IN THE HIGH COURT OF ESWATINI

HELD AT MBABANE **CASE NO: 4013/2021**

In the matter between:

THE PRINCIPAL SECRETARY MINISTRY

OF PUBLIC SERVICE **APPLICANT**

And

CONCILIATION MEDIATION &

ARBITRATION COMMISSION **FIRST RESPONDENT**

NATIONAL PUBLIC SERVICE &

ALLIED WORKERS UNION **SECOND RESPONDENT**

Neutral citation : *The Principal Secretary, Ministry of Public Service v Conciliation Mediation and Arbitration Commission & Another 4013/21 SZHC 06 [2021] 01/02/2024.*

CORAM:	**B.S DLAMINI J**
DATE HEARD:	08 December 2023
DATE DELIVERED	01 February 2024

Summary:	*Application for review of an Arbitrator's award- Point of law raised that application was filed out of time- Section 85 (4) (a) of the Industrial Relations Amendment Act 2010 examined .*
Held;	*Court needs to adopt purposive approach to interpretation of statute-Application was filed within the prescribed period of 21 days. The period of 21 days is calculated from the time of receipt of the award by the aggrieved party.*

JUDGMENT

INTRODUCTION

[1] On or about the 1st December 2021, the Applicant instituted a review application against the First Respondent's decision and/or arbitration award issued by its duly appointed Arbitrator. In the review application, Applicant sought to be granted the following orders;

"1. **Directing the 1st Respondent to dispatch to the Registrar of the High Court, the record of proceedings under CMAC arbitration proceedings file number SWMZ 295/2018, within fourteen days of this order;**

2. **Reviewing and/or correcting and/or setting aside the 1st Respondent's decision/arbitration award of the 29th of October 2021 in file SWMZ 295/2018;**

3. **Granting Applicant leave to amplify his grounds for the review, by way of a supplementary affidavit within fourteen days of receiving the record in (1) above, if he shall so desire;**

4. **Further and/or alternative relief."**

[2] In its Answering Affidavit, the Second Respondent, namely the National Public Service and Allied Workers Union ("NAPSAWU"),

raised a preliminary legal objection to Applicant's application as follows;

"2.2 **The application for review was filed beyond the stipulated period of twenty-one (21) days contrary to the provisions of Section 85 of the Industrial Relations Act. The application is time barred and ought to be dismissed."**

[3] After the exchange of all papers, heads of argument were prepared and duly filed by the parties. The matter was set down for arguments on the preliminary legal objection raised on behalf of the Second Respondent and this was on the 8th December 2023.

SECOND RESPONDENT'S SUBMISSIONS

[4] In motivating the preliminary legal objection, it was argued on behalf of the Second Respondent that the arbitration award was delivered on the 29th October 2021. The application for review, according to Second Respondent, was instituted on the 1st December 2021 and was thus outside the stipulated 21 days.

[5] Citing the relevant legislation, Second Respondent's counsel argued that;

> "4.1 **I submit that the Applicant has failed to adhere to the stipulated time frame of 21 days, it took the Applicant more than the stipulated time period after delivery of the arbitration award to lodge review proceedings. On this basis the review proceedings ought to fail."**

[6] Having carefully perused the 2021 calendar, this Court noted that the application for review ought to have been filed on the 30th November 2021 but instead it was filed on the 1st December 2021. The application was therefore One (1) day late in order for same to fall within the required 21 days as stipulated in the relevant legislation.

[7] It is common cause that inasmuch as the arbitration award was delivered on the 29th October 2021 by the Arbitrator, same was however received by Applicant on the 2nd November 2021. A calculation of the 21 day period reckoned from the 2nd November 2021 would mean Applicant instituted the application for review timeously as required by the Act.

[8] Applicant's argument was that if the legislature stipulated 21 days as the period within which to launch a review application against an Arbitrator's award, it did not matter as to when the aggrieved party actually received the award. The review application, according to Applicant's counsel, ought to have been instituted within 21 days from the date of delivery by the Arbitrator. This, according to Applicant's counsel, is in line with the judgment of the High Court in **Kobe Ramokgadi Advanced Learning Academy v The Presiding Commissioner at CMAC Mbabane and Others (1433of 2018) [2018] SZHC 333 (14 December 2018)** in which the Court held that;

"If the matter is referred to arbitration-

(a) The arbitrator shall determine the dispute within 30 days of the end of the hearing and;

(b) A party who is aggrieved by a determination made by an Arbitrator in terms of paragraph (a) may apply within 21 days after the making of such determination to the High Court for review..."

[9] The Applicant did not say much in rebuttal of Respondent's point of law except to argue that 'the review proceedings were instituted on the 1st December 2021, which was the 21st day after it received the award on the 2nd November 2021.' According to Applicant, the review application was filed timeously in accordance with CMAC Rules.

ANALYSIS AND FINDINGS

[10] The reliance by Second Respondent's counsel on the **Kobe Ramokgadi judgment** (supra) is misdirected. In this case, the Applicant did not only seek to review and set aside an Arbitrator's award but it (Applicant) also sought to be granted '**condonation for failure to institute the review application within 21 days.**' In addressing the prayer for condonation, the Court correctly held as follows;

> "[8] **Having said that I am of course mindful that there are instances where Parliament in making a law provides for condonation by the courts of non-compliance therewith. However unless Parliament has specifically granted such authority to the courts to condone non-compliance with**

certain provisions of a legislative enactment, the courts have no authority to grant such condonation.

[9] **The piece of legislation referred to in *casu* makes no provision for condonation by the courts of failure to comply with it. This court accordingly has no authority to condone failure to comply with the statutory period of 21 days in lodging an application for review of an arbitral award."**

[11] In the case of **Fletcher Electrical (Pty) Ltd v Elias Mabuza and Another (22/2019) [2020] SZSC 13 (25 May 2020),** the Supreme Court of Eswatini has settled the debate on when the *dies* on such matters ought to start running. The Court stated the law as follows;

"**[27] When it comes to the running of the *dies* the common law requires service in any of the lawful forms of service. Therefore, some form of awareness of a legal step is required in our law to place a party in *mora* as it were.**

[28] It is not in dispute that in this matter the Appellant was only served with the award some twenty (20) days after the

award was made. This left the Appellant with virtually only hours to consider the award, find an attorney and have review papers filed for the review to not fall foul of the law according to the impugned judgment of Langwenya J.

[29] It is a trite principle of interpretation of statutes that if a literal interpretation leads to an absurdity it must not be followed. If what is depicted above is not an absurdity, I wonder what if anything would be an absurdity at all.

[30] Furthermore, Mr. S. Simelane for the Appellant drew the attention of the Court to the provisions of Section 85 (9) which provides that;

> "(9) Where the matter has been referred to mediation or arbitration, the mediator or arbitrator shall make available their report to the parties and to the Commissioner of Labour within two (2) days after the mediation or arbitration."

[31] It has to be noted that this provision [sec 85 (9)] is couched in peremptory terms in that it provides that the reports

shall be made available to the mentioned parties within two (2) days.

[32] It is common knowledge that the report was not delivered to the Applicant in two (2) days after the award was made, it was delivered twenty (20) days after the award was made. There was no explanation for this before the High Court. As a matter of fact Mr. Simelane for the Respondent [in the Court a quo] had no response to this point when it was argued before the Court. The High Court did not deal with the implications and consequences of this omission at all.

[33] In my view, the purpose of this section is to expedite resolution of labour disputes by placing time frames to take certain actions in the claim of finalizing them. This is also true for Section 85 (4) (b). In my view a proper reading of Section 85 (4) (b) as read together with Section 85 (9) is that the *dies* can only legitimately run after a party has been made aware of the award by its delivery as envisaged in Section 85 (9).

[34] If the interpretation of Section 85 (4) (b) by Langwenya J is correct, it would result in many absurdities for example as shown above where a party is faced with an impossible mission to review an award because of no fault of her or his was made aware of it in the 11th hour, 59th minute or 59th second to the run out of dies. Also, if there are more parties to a matter they may be treated differently whereby others become aware of the award ahead of some of the parties. Plain logic and common sense cannot countenance such."

[12] In another case of **Unifoods (Pty) Limited v Mark Dlamini and six (6) Others (982/2018) [2018] SZHC (26th July 2018),** this Court held as follows;

"**[21] It is an old maxim of our law that he who alleges must prove or in latin- '*necessitas probandi incumbit el qui agit.*' The Respondents assert that the arbitration award was made on the 23rd January 2018. However they would be hard put to maintain such a stance given that the publication of arbitrator's award, casting aside that the text of the award bears the date in question, it is not in question that it was**

not handed to both parties on that date and on the facts, it can scarcely be said to have been delivered to them on that date. The parties appeared before the arbitration tribunal during the hearing of the matter but were never summoned for the delivery of the award. There is no evidence as to when they were eventually put on notice as to the existence of the award or when or how exactly the award was made available to them. This is a basic right of the parties and it also makes for proper and definitive efficacy of the provisions of Section 85 (4) (b) in determining the time for a review of the award if any. It is for the Respondents who are raising the point to show that the application for review is out of time and in the absence of evidence as to the assertion that the award was delivered on the alleged date for purposes of the point they have taken, the point of law must fail."

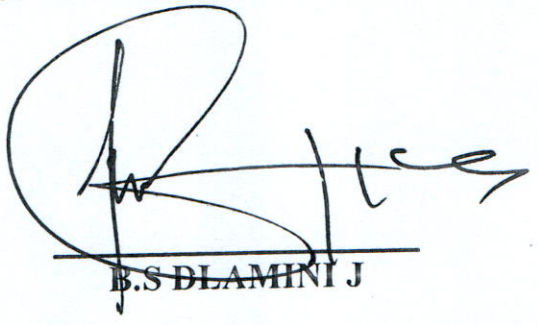
[13] The judgments of the Supreme Court and High Court as referred to herein above have settled the approach and the law to be applied in such matters. The *dies* or time of launching an application for review

starts running on the day of service of the arbitration award upon the parties concerned. It is the date of service of the arbitration award upon the affected parties that it can be said each one of them had knowledge of the award. This approach not only aligns with our fundamental rules of natural justice but it also is the most practical and reasonable approach, for how else can one challenge a decision that he or she is not aware of?

[14] In conclusion, the Court hereby issues the following orders;

(a) The Second Respondent's point *in limine* is dismissed.

(b) Costs to be costs in the main matter.



B.S DLAMINI J

THE HIGH COURT OF ESWATINI

For Applicant: *Attorney Mr. G. Dlamini*

(Attorney General's Chambers)

For 2nd Respondent: *Attorney Mr. MLK Ndlangamandla*

(MLK Ndlangamandla Attorneys)