# IN THE HIGH COURT OF ESWATINI

**HELD AT MBABANE** **CASE NO: 2355/2022**

In the matter between:

**HO'S ENTERPRISE (PTY) LTD** **APPLICANT**

**AND**

**SIMO MNGOMEZULU** **FIRST RESPONDENT**

**NOBUHLE SIMELANE & 19 OTHERS** **SECOND RESPONDENT**

**CONCILIATION MEDIATION &**

**ARBITRATION COMMISSION** **THIRD RESPONDENT**

Neutral citation : *Ho's Enterprise (Pty) Ltd v Simo Mngomezulu & Others [2355/2022] [2025] SZHC 27 (27 February 2025)*

| | |
|---|---|
| **CORAM:** | **B.S DLAMINI J** |
| **DATE HEARD:** | 14 February 2025 |
| **DATE DELIVERED** | 27 February 2025 |
| ***Summary:*** | *Application for review of an arbitrator's award-Respondent's taking a point of law that application is time barred in terms of the relevant legislation-Applicant conceding that application is out of time but arguing that Court has power to condone non-compliance on 'good cause' shown-Consideration of whether Court has power to condone non-compliance to a statutory prescriptive provision on good cause shown.* |
| ***Held;*** | *Court has no power to override the intention, purpose and objectives of Parliament in prescribing time frames for the performance of certain acts-Point of law upheld with costs.* |

---

**JUDGMENT**

---

## INTRODUCTION

[1] Serving before Court is an employer's application for the review and setting aside of an arbitrator's award issued under the auspices of the Conciliation Mediation and Arbitration Commission ("CMAC"). The arbitration award which is attached to Applicant's papers is dated 9th September 2024.

[2] It is common cause that second Respondents (a group of 20 employees), were employees of the Applicant and had been dismissed by Applicant for allegedly taking part in an unlawful strike action on or around the 5th April 2022. According to Applicant, the strike action was unlawful because it *inter alia* violated the provisions of the Industrial Relations Act, 2000 (as amended) and, in particular, failed to follow the dictates of Part VIII of the said Act.

[3] Applicant states in its Founding Affidavit that it had obtained a Court Order declaring the said strike action to be illegal and yet the employees or Respondents failed to heed to Applicant's call to return to work immediately. According to Applicant, when it issued the various ultimatums placed in different forums, 330 employees

returned to work and this was about 60% of the total work force. It is Applicant's averment that;

**"[18] On or about the 25th April 2022, a notice was placed at the gate [company gate] by the Applicant's finance department which invited all employees to come to work the following day to sign for their pay-slips. On the following day, all employees came to work to sign for their pay-slips. In the course of doing so, those who had failed to report for duty the previous week were given letters of termination. They were about 220 in number."**

[4] The 220 employees who had been dismissed were allowed to appeal the decision to terminate their services and most were successful in their appeals. The 20 employees who are part of the present proceedings declined to note appeals and their termination was not reversed. The 20 employees subsequently reported a dispute and, after conciliation, the dispute was certified as unresolved by CMAC. The parties thereafter agreed to refer the matter to arbitration under the auspices of CMAC. At the conclusion of the arbitration process, an award was made by the commission or CMAC in favour of the

employees ("Respondents"). In total, a sum of E 573,964.97 was ordered to be paid to the 20 employees in terms of the arbitration award issued by CMAC.

[5] It is against the award issued by CMAC that Applicant has approached this Court seeking to reverse the award issued against it through the present review application.

**ISSUES FOR DETERMINATION**

[6] Upon receipt of the application for review, Respondents raised a preliminary point of law as follows;

**"[1.1]In terms of the Industrial Relations (Amendment) Act 2010, a review application in which an Applicant seeks to have an Arbitrator's decision reviewed and corrected and set aside must be filed within twenty-one (21) days from the making of the arbitrator's determination.**

**[1.2] ...the application for review has been filed outside of the twenty one (21) statutory days' period..."**

[7] The Applicant concedes that the application for review was filed out of time. This is because in its application for review, Applicant's first prayer is for "*condoning the failure to comply with the time frame for filing of the review application.*" In justifying the prayer for condonation, the Applicant deposed as follows in its affidavit;

**"[48] The application [Applicant] herein applies for condonation for the four (4) day delay in the lodging of the current review application. The 1st Respondent issued out his arbitration award on or about the 9th September 2024. It was served on the Applicant on or about the 10th September 2024 in terms of the 3rd Respondent's rules. Our attorneys were engaged for advice on the relief to be sought on or about the 12th September 2024. They were furnished with all the documents that were used at the disciplinary hearing a few days later to enable them to determine if there were any grounds to seek the appropriate relief.**

**[49] Unfortunately, we are advised that the attorney who was initially assigned to attend to out matter, Mr. Philani Khumalo, subsequently left the employ of our attorneys on**

**very short notice of a few days, at the end of September 2024, without having started working on the review application. His principal Mr. Thwala could not immediately start working on the review application because of the inevitable doubled case load that he experienced due to the immediate departure of Mr. Khumalo."**

[8] When the matter came up on the roll for hearing or argument, it became clear that the first issue requiring determination by the Court is whether or not the Court has power to condone failure to comply with a statutory prescriptive provision, namely section 85 (4) (b) of the Industrial Relations (Amendment) Act, 2010, stipulating that an arbitrator's award ought to be challenged within 21 days of the day of issue.

[9] Applicant's argument was that the High Court is seized with power to condone late filing of a review application in terms of the relevant piece of legislation. In Applicant's argument;

"[4] **It is not disputed that the application was filed after the lapse of the stipulated 21 days per section 85 (4) (b) of the Industrial Relations (amended) Act 2010. However, it is applicant's humble submission that the above honourable Court take into consideration the unique circumstances that resulted in the late filing of the application."**

[10] The Respondents on the other hand strongly opposed the granting of condonation and argued that the Court has no such power to grant condonation in the face of a directory provision of a statute. The Court was thus required to make a determination on the two opposing views held by Learned Counsels.

## ANALYSIS AND FINDINGS

[11] The relevant statutory provision states that;

**"If a matter is referred to arbitration-**

**(a) The arbitrator shall determine the dispute within thirty (30) of the end of 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."**

[12] In the High Court case of **Kobe Ramokgadi Advanced Learning Academy v The Presiding Commissioner at CMAC Mbabane & Others (1483/18) [2018] SZHC 33 (14 December 2018)**, this Court was faced with a similar task of determining whether or not the High Court has power to condone the late filing of a review application under this legislation,

[13] In dealing with the issue at hand, the Court held as follows;

**"[7] The Applicant further submitted that this Court has authority to condone its non-compliance with the provisions of the law. I must say that I reject the contention straight away. For this Court to extend time limits prescribed by the Legislature would be totally fully [folly]. The Court would be creating its own law and ignoring that which was promulgated by the law giver. This would make nonsense of the whole exercise of prescribing any periods by Parliament for the performance of any act.**

**[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 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."**

[14] When the *Kobe Raamokgadi judgment* was brought to the attention of Applicant's attorney, his response was that this Court ought to depart from the *ratio decidendi* pronounced by the Court in that case as same was not in line with good legal authority especially in circumstances where 'good cause' can be shown for the delay.

[15] This Court had to dig deeper and, in so doing, came up with a detailed and well-reasoned judgment of the Labour Court of Namibia in **Puma Chemicals v Labour Commissioner and Another (90 of 2012) [2014] NALMCD 9 (10 February 2014).** This was also an application for review of an arbitrator's award brought in terms of section 89 (4) of the Labour Act, 2007. In terms of the Namibian legislation, an application for review of an arbitrator's award in terms of section 89 (4) has to be made within 30 days of the arbitrator's decision being brought to the attention of the aggrieved party.

[16] Just like the facts of the present matter, the Applicant in the *Puma Chemicals* matter (above), brought the application for review of the arbitrator's award outside of the stipulated 30 day period and conceded in argument that the application was indeed out of time. The Applicant however argued that the Court may, on 'good cause' shown, condone the late filing of the review application.

[17] When analyzing the issues, the Namibian Court observed that a recent trend of judgments showed a 'flexibility' in such matters by seeking to

draw a distinction between 'peremptory' and 'directory' prescriptive statutory provisions. In circumstances where the legislature had used peremptory language in spelling out the time frame for the performance of a certain act, it would not be possible for a Court to allow or condone non-compliance to the legislation in question. However, where the legislature had used directory words in spelling out time limits for the performance of certain acts, Courts could, in such circumstances, allow flexibility and condone non-compliance on good cause shown. In most instances, this distinction is to be found on the legislature's use of the words 'may' or 'shall' in statutory enactments.

[18] In dealing with the issues, the Court in the *Puma Chemicals judgment* held as follows;

> "[6] **It should be mentioned that this application for review also contains an application for condonation, to condone the late filing thereof, in which application it is contended that 'good cause' thereof can be shown, particularly as the applicant submits that it strong prospects of success of overturning**

**the award due to certain irregularities perpetrated by the arbitrator during the arbitration.**

**[7] It should also be mentioned that this review was unopposed.**

**[8] Ms Visser who appeared on behalf of the applicant submitted that the court does have the power to condone the late filing of her client's review and to hear the matter outside the stipulated 30 day period. She recognized that this Court would-in the ordinary course-have to follow the decision in the Lungameni matter and that she therefore had to persuade this court not to follow that judgment, as that judgment was wrongly decided.**

**[9] More particularly, her argument [Applicant's argument] in this regard was based on a recent trend to adopt a more flexible approach in the interpretation of statutory time limits, as also recognized by the Supreme Court in *Rally for Democracy & Progress v Electoral Commission of Namibia & Others* where the Supreme Court stated;**

**'[32] It is common cause that the application was not filed outside the 30-day period allowed in s 110 (1) of the Act. It is therefore not necessary for purposes of this appeal to consider whether the subsection's provisions may conveniently be labelled as 'peremptory' or 'directory'..."**

**[10] Ms Visser then went on to quote extensively in her heads of argument from the applicable authorities that she relies on and which are those set out by Van Niekerk J in *Kanguatjivi and Others v Shovoro Business and Estate Consultancy and Others* were [where] the learned Judge went on to state;**

**"[23] In considering the question raised it is not helpful to focus merely on whether the requirements of s35 are peremptory or directory. Although these are useful labels to use as part of the discussion *(Nkisimane and Others v Santam Insurance Co. Ltd 1978 (2) SA 430 (A) at 433 (H),* the true enquiry is whether**

**the legislature intended the distribution of any assets in terms of the liquidation and distribution account to be valid or invalid where the period for inspection is shorter than 21 days. (*Cf Ex parte Oosthuysen 1995 (2) SA 694 (T) at 695*). It should be remembered that-**

**'It is well established that the Legislature's intention in this regard is to be ascertained from the language, scope and purpose of the enactment as a whole and the statutory requirement in particular (Nkisimane (supra at 434 A); Maharaj and Others v Rampersad 1964 (4) SA 638 (A); Oosthuysen supra at 696 A).**

**[24] The principle was expanded in *Swart v Smuts 1971 (1) SA 819 (A)*, when Corbett AJA (as he then was) said the following at 829E-F;**

**'In general an act which is performed contrary to a statutory provision is regarded as a nullity, but this is not a fixed or inflexible rule.**

**Thorough consideration of the wording of the statute and of its purpose and meaning can lead to the conclusion that the Legislature had no intention of nullity.'**

**[25] In *JEM Motors Ltd v Boutle and Another 1961 (2) SA 320 (N) J at 328A-B* the Court expressed the issue in this helpful way;**

**'...what must first be ascertained are the objects of the relative provisions. Imperative provisions, merely because they are imperative will not, by implication, be held to require exact compliance with them where substantial compliance with them will achieve all the objects aimed at.'"**

[19] In a nutshell, what the legal authorities state is that it is not helpful to examine or focus on the question whether the Legislature used 'peremptory' or 'directory' words in spelling out time limits in the performance of certain acts. What Courts should focus on is whether

the Legislature intended that there could be flexibility in the interpretation of the prescriptive words contained in the enactment.

[20] After embarking on a detailed analysis of all the legal authorities presented to it, the Court in the *Puma Chemicals* matter observed that the legislature had opted to use the word 'may' in stipulating the time frame within which to institute a review application in terms of section 89 (4) of the Labour Act of Namibia. This is the same position in the case of Eswatini. The Legislature has used the word 'may' for a litigant to institute a review application against an arbitrator's award in Section 85 (4) (b) of the Act. Accordingly, the prescription would ordinarily be considered as 'directory' as opposed to being 'peremptory'.

[21] His Lordship Geier J, in the *Puma Chemicals judgment*, nonetheless stated the position of the law as follows;

**"[28] In this regard it is to be noted that it may not always be helpful to focus merely on whether the requirements set by statute are 'peremptory' or 'directory' but that the true**

**enquiry is what the intention of the legislature actually is, as properly construed...**

**[34] There thus seems to have been a deliberate intention to limit- by statute-the common law period within which labour reviews are to be brought.**

**[35] This conclusion then also reveals that counsel's submissions- that the failure to extend to the court the power to hear labour reviews, out of time, was an omission or oversight – cannot be upheld."**

[22] In this jurisdiction, the purpose, object and intention of the Legislature in enacting section 85 (4) (b) of the Industrial Relations (Amendment Act) was dealt with by the Supreme Court in **Fletcher Electrical (Pty) Ltd v Elias Mabuza and Another (22/19) [2020] SZSC 13 (25 May 2020)** as follows;

**"[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)..."**

[23] By placing specific time-frames within which to file a review application against an arbitrator's award, the intention and purpose of Parliament is clear. It is to bring an early resolution of labour disputes, especially in circumstances where the parties themselves freely and voluntarily chose to resolve their dispute through the less formal process of arbitration. Our Courts would be over-stepping their authority if they were to alter the time-frame stipulated by the Legislature. In the end, and, in affirming the binding judgment of His Lordship Magagula J in the *Kobe Ramokgadi* matter, this Court finds that it has no power to condone the late filing of a review application in terms of Section 85 (4) (b) of the Amendment Act.

[24] Interestingly, the Court in the Namibian case found, as a matter of principle, that the application for review against the arbitrator's award had good prospects of success on the merits. However, because of the prescriptive clause in the legislation, the Court's hands were tied and the Court could not come to Applicant's rescue on the merits. This

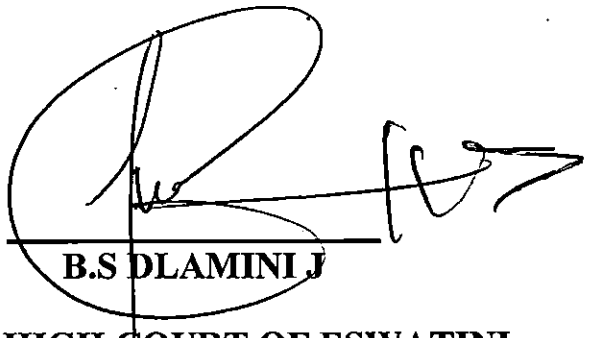
Court doubts that the same can be said of Applicant's case on the merits of the present matter.

[25] The issuance of an ultimatum to striking employees or the fact that an order was obtained from Court to declare the strike action by the employees as being unlawful does not, on its own, waive the fundamental right to be heard before an adverse decision is taken against a person. This right, in the context of Eswatini, does not merely exist as a fundamental natural right but now forms part of the constitutional dispensation of the land. This Court is finding it hard to fathom how Applicant believes it will be able to juggle itself out of this legal problem, that is, if it were to be allowed to deal with the merits of the matter.

[26] The Court thus confirms the *ex tempore* ruling issued on the 14th February 2025 as follows;

**(a) The point of law raised on behalf of Second Respondents is upheld and the Applicant's application is dismissed.**

**(b) Applicant is ordered to pay costs of the application at the ordinary scale.**



**B.S DLAMINI J**

**THE HIGH COURT OF ESWATINI**

***For 2nd Respondents:*** ***Attorney Mr. S.M. Simelane***

***(S.M Simelane & Company)***

***For Applicant:*** ***Attorney Mr. Thwala***

***(Thwala & Associates)***