IN THE SUPREME COURT OF ESWATINI

JUDGMENT

HELD AT MBABANE **CIVIL CASE NO: 22/2019**

In the matter between:

FLETCHER ELECTRICAL (PTY) LTD **APPELLANT**

And

ELIAS MABUZA **1st RESPONDENT**

NONTSIKELELO DLAMINI N.O **2nd RESPONDENT**

THE CONCILIATION, MEDIATION **3rd RESPONDENT**

AND ARBITRATION COMMISSION (CMAC)

Neutral Citation: *Fletcher Electrical (PTY) Ltd vs Elias Mabuza and another (22/ 19) [2020] SZSC 13 (25 May 2020)*

CORAM: **DR. B.J. ODOKI JA**

S.P. DLAMINI JA

J.P. ANNANDALE

JA DATE HEARD: 12 May 2020

DATE DELIVERD: 25 May 2020

SUMMARY: *Civil procedure - referral of the matter to Arbitration by the Industrial Court - review of Arbitration award by the High Court judgments as the correct interpretation of Section 85 (4) (b) of the Industrial Relations Act - Held that literal interpretation of Section 85 (4) (b) followed in some of the judgments of the* High *Court is incorrect - Held that the intention of the legislature was to grant a party who wishes to challenge an award 21 days to do* so *and therefore a purposive interpretation is the correct one -Held that the appeal must succeed and the judgment of the High Court is set aside - Held that no order as to costs is made.*

INTRODUCTION

[lJ This is an appeal against the judgment of the High Court per Her Ladyship M. Langwenya J. delivered on 04 July 2019.

[2] The matter involves a labour dispute between the Appellant who was the Applicant *a quo* and the 1st Respondent who was also the 1st Respondent *a quo*.

(3] The matter was initially conciliated upon before the Conciliation, Mediation and Arbitration Commission (CMAC) and the parties could not agree. It was then taken up by the 1st Respondent to the Industrial Court.

(4] The President of the Industrial Court in the exercise of his powers in terms of the Industrial Relations Act (IRA) referred the matter for arbitration on 14 December 2016.

ARBITRATION

[5J The 2nd Respondent was appointed as an arbitrator. A hearing was conducted before the arbitrator who made a written award dated 25 October 2018.

[6] The contents of the award are not important for the purpose of this appeal save to state that Appellant was unhappy with it.

PROCEEDINGS BEFORE THE HIGH COURT

[7] In view of the fact that Appellant was dissatisfied with the award made by- the 2nd Respondent, Appellant launched proceedings before the High Court. It sought to have the award by the 2nd Respondent to be "reviewed and corrected or set aside" per Notice of Motion dated 05 December 2018.

[8] Appellant, for the relief sought, relied on the Founding Affidavit attested to by Howard Middleton who was employed as the Appellant's Operations Manager.

[9] Mr. Middleton in his Affidavit gave a background to the matter, the details of the 1st Respondent's claim and the grounds for the relief sought in the Notice of Motion.

[10] The Notice of Motion was opposed by the 1st Respondent. 1st Respondent in his opposition to the Notice of Motion filed a Notice to Raise Points of Law *in limine* only and did not file an Answering Affidavit.

[1 lJ I find it necessary to reproduce verbatim the points of law that were raised by Appellant;

> *"BE PLEASED* TO *TAKE NOTICE THAT the respondent herein gives notice of intention* to *raise points of law in limine in this matter and such points are* to *be argued before hearing of the merits of the review application and are as follows:*
>
> *1.*
>
> *REVIEW APPLICATION FILED OUT OF TIME*
>
> *10.1 The review application in casu has been filed out of the time limits prescribed by Section 5 of the Industrial Relations {Amendment) Act 2010 which fixes the period within which a review of the decision of a CMAC Commissioner I Arbitrator to twenty one (21) days from the date of delivery of the CMAC decision.*
>
> *10.2 In casu, the CMAC decision was issued on the 25th October 2018 as it more fully app ars on record.*
>
> *10.3 The review application was filed on the 5th December 2018 while the statutory and m,andatory twenty one (21) days period lapsed on the 22nd November 2018.*
>
> *10.4 The first respondent therefore humbly argues that the review application is bad in law ought* to *be dismissed for non compliance with the mandatory provision of Section 5 of the Industrial Relations (Amendment) Act 2010.*

WHEREFORE, first respondent humbly prays that the review application be dismissed with costs."

[12] Regarding the *dies* to file a review on the one hand Appellant submitted before the High Court that the Application was out of time hence bad in law and ought to be dismissed with costs. For this contention Appellant relied on the case of **General Engineering Works (pty) Ltd vs Thulani Theron Sifundza and others High Court case no: 124/2018** (per Her Ladyship D. Tshabalala J.).

[13] On the other hand, it was contended on behalf of the Respondent, that the twenty one (21) days is counted from the date when the party wishing to exercise the right of review becomes aware of the award. For this contention 1st Respondent relied on the case of **VIP Protection Services vs Nkosinathi Dlamini Industrial Court case 202 / 2007.**

[14] Langwenya J. considered the relevant section of the IRA and the cited authorities and came to the following findings; firstly, the **VIP Protection Service** case (supra) was dealing with Section 81 (9) oflRA which is worded differently from Section 85 (4) (b) hence distinguishable; and secondly, the twenty one (21) days of "the making of the determination."

[15] Her Ladyship Langwenya J., in view of her findings, concluded at paragraphs 18 and 19 of the judgment that;

"[18/ The arbitrati n award against the applicant and in favour of the first respondent was made on 25 October 2018 and the review application was made on 5 December 2018. Twenty one working days expired on 29 November 2018. The applicant failed to exercise the right of review within the prescribed period nor did it apply for condonation for the late fl.ling of the review application.

[19} The first respondent contends that section 5 of the IR Amendment Act 2010 does not provide for condonation and as such an applicant who fails to meet the twenty-one days period is out of time and cannot by law fl.le a review application thereunder. I am of the view that in as much as the 20 l O Act does not provide for condonation in the same vein it does riot *preclude it."*

[16] Langwenya J. cited with approval and followed the *dictum* in the case of **General Engineering Works** case *(supra)* per Tshabalala J.

PROCEEDINGS BEFORE THIS COURT

[17] Appellant was dissatisfie<;:l with the judgment of the High Court and launched the present appeal.

[18] Appellant in the Notice *qf* Appeal dated 20 March 2019 lists two (2) grounds of appeal namely that;

"a) The Honourable Court a quo erred in law and in fact in holding that the date of delivery of the decision of the

Arbitrator, the second Respondent herein, was the date of the signature .t he re on (on the award} as opposed to the date on which same was actually delivered to the Appellant/ (Applicant a quo).

b} The Court a quo erred in law and in fact when holding that the time/days of filling of the review application then before it, were to be computed as effective from the 25t h day

of October 20118 as opposed to the 14 t h day of November 2018 on which date same was delivered to the Appellant/ (Applicant a quo}."

[19] A couple of issues had been raised before the High Court. Apart from the issue of the correct interpretation of Section 85 (4) (b), the other issues fell by the wayside both before the High Court and this Court.

(20] Therefore, the only issue falling for consideration by this Court is the correct interpretation of section 85 (4) (b) particularly in view of the conflicting judgments coming out of the High Court on this issue. Section 85 (4) (b) states that;

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

[21] On the one hand, if this Court finds that Section 85 (4) (b) must be interpreted to mean that the *dies* is calculated from the date when an award is made then the appeal stands to be dismissed.

[22] On the other hand, if this Court finds that Section 85 (4) (b) must be interpreted to mean that the dies starts to run when the affected party becomes aware of the award then the appeal stands to succeed and the matter must then be referred back to the High Court to be heard on the merits.

ARGUMENTS OF THE PARTIES BEFORE THIS COURT

[23] The parties in their heads maintained the same submissions as in the High Court with amplification here and there and added authorities in support of their respective arguments. I thank both counsel for being of assistance to this Court.

THE LAW AND ITS APPLICATION

[24] By way of introduction, legislative interpretation is termed Judicial understanding of legislation and it is about making sense of the full legislative scheme relevant to the issue falling for consideration.

[25] In the British case **Corocraft Ltd v Pan-American Airways (1968] 3 WLR 714** at page 732 per His Lordship Donaldson J. the Court has this to say regarding interpretation of legislation;

> ***"In the performance of this duty the judges do not act as computers into which are fed the statutes and the rules for the construction of statutes and from which issue forth the mathematically correct answer. The interpretation of statutes is a craft as much as a science and the judges, as craftsmen, select***

and apply the appr,opriate rules as the tools of their trade. They are not legislators, but finishers, refiners and polishers of legislation which comes* to *them in a state requiring varying degrees of further processing."

[26] In the South African case of **Johannesburg Municipality vs Cohen's Trustees 1909 TS811 a page 823** per Solomon J. the Court has this to say;

"It is sound rule to construct a statute in conformity with the common law rather than against* it*, except where and so far as the statute is plainly intended to alter the cause of the* common *law."

[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 forms 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 vir;tually only hours to consider the award, find an attorney and have review papers filed for the review to not to 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 the arbitrator shall make available their report to the parties and to the Com.missioner of Labour within two (2) days after the mediation or arbitration."*** (My own underlining.)

[31] It has to be noted that this provision 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 Appellant 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 had no response to this point when it was argued before this 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 awar d ·because of no fault of her or his was made aware of it in the 1 1th hour, 59th minute or 59th second to the run out of *dies.* Also, if there are more parties to a matter they m y be treated different whereby others become aware of the award much ahead of some of the parties. Plain logic and common sense cannot countenance such.

[35] As such, an interpretation would not only be offending against the letter and spirit of the IRA bui also Constitutionalism as anchored in the Eswatini Constitution Act No.1 of 2005 particularly with regard to the principles of natural justiye and fairness.

[36] In the **VIP Protection Services** case (supra) Dunseith J. interpreted section 81 (9) of IRA as fo'uows;

> "·····.***in the view of the Court, a party can only have knowledge of the decision of the arbitrator as contemplated by section 89 (9) of the IRA 2000 when the written award, signed by the arbitrator has been brought to his attention."***

[37) Langwenya J. in the impugned judgment addressed this point and sought to make distinction between the two cases namely; the wording in section 81 (9) stipulates that the *dies* runs from the date on which the aggrieved party had knowledge of the decision whereas in section 85 (4) (b) the *dies* runs from the date of the making of the determination."

[38) It is true that the sectio s are drafted as captured by Langwenya J. However, the enquiry in my view does not end there. The matter gives rise to a question of interpretation and the principles relating to interpretation of statutes come into play. For example it has to be asked, was it the intention of the legislature to have parties falling under section 81 (9) treated differently from parties falling under Section 85 (4) (b) and to what end?

[39) There is no useful purpose served by the distinction between the aforesaid two sections. I can only attribute it to a drafting problem than a conscious intention on the part of the legislature to give with one hand and take with the other.

[40) Maphanga J. in the case of **Unifoods (pty) Limited v Mark Dlamini and six (6) others (982/ 18) (2018] SZHC 171 [2 6 th July 2018]** was confronted with the sam issue. In interpreting Section 85 (4) (b) Maphanga J. rejected that a presumption of knowledge existed merely on the basis of the award being made. The Learned Judge proceeded to state the following at paragraph 19;

"In my mind there is no reason why the common law principle that in making and award an arbitrator must summon the parties and deliver the award 'in the presence of the parties.'

[41] With respect, I disagree with the conclusions of Langwenya J and agree with Maphanga J. on the question of the correct interpretation of Section 85 (4) (b). Therefore, the appeal must succeed.

COSTS

[42] Before I venture into the issues of costs, I wish to record that the exercise by the President of the Industrial Court of his authority to refer the matter back to CMAC with a view to reach a conclusion of the matter lauded as it is in some instances is counter- productive to the very object as shown by this matter. The matter started at CMAC, went to the Industrial Court and back to CMAC then it was taken to the High Court and now it is before this Court. As it will appear in the order below, it is again going back to the High Court.

[43] The dispute is still not resolved yet the costs have skyrocketed to the detriment of the litigant. A permanent solution here is clearly necessary and I believe the Honourable Chief Justice is available to assist the Judge President to get additional appointments of Industrial Court judges or at least acting Industrial Court judges if the posts cannot be established.

[44] Regarding costs, it is trite principle of our law that costs should follow the course unless there are good grounds to depart from this principle.

This matter emanated from the labour jurisdiction which is based on equity and in many instances costs are not awarded. Respondent's opposition to the appeal before this Court is not a spurious one particularly in view of the conflicting judgments of the High Court and this has offered the opportunity to address the conflict.

[45] I am inclined to depart from the principle that costs must follow the cause. Instead, the Court makes no order as to costs.

COURT ORDER

[46] Accordingly, the Court makes the following order;

1. That the appeal is upheld and judgment of the High Court is set aside.

2. That the matter is referred back to the High Court to be heard on its merits before a different judge.

3. That no order as to costs is made.

S.P. DLAMINI JA

I agree

DR. B.J. ODOKI JA

I agree _____

J.P. ANNANDALE JA

FOR THE APPELANT: MR. S.C. SIMELANE

(N.E. GININDZA ATTORNEYS)

FOR THE FIRST RESPONDENT: **MR. S.M.** SIMELANE

(SIMELANE MTSHALI ATTORNEYS)