IN THE HIGH COURT OF SWAZILAND

JUDGMENT

Case No: 773/11

In the matter between:

O.K. BAZAARS SWAZILAND (PTY) LTD

T/A SHOPRITE **APPLICANT**

and

HAPPINESS DLUDLU N.O. **1ST RESPONDENT**
MAKHOSAZANA TAYLOR **2ND RESPONDENT**
CONCILIATION MEDIATION AND ARBITRATION COMMISSION (CMAC) **3RD RESPONDENT**

Neutral citation	:	O.K. Bazaars Swaziland (Pty) Ltd t/a Shoprite and Happiness Dludlu N.O. and 2 Others (773/11) [2012] SZHC 222 (28 SEPTEMBER 2012) 2012)
Coram	:	MABUZA J
Heard	:	16 JANUARY 2012; 25 JANUARY 2012.
Delivered	:	28 SEPTEMBER 2012
Summary	:	Labour Law – Review of decision of Arbitrator – Review permissible by section 19 (5) of Industrial Relations Act No. 1/2000 (as amended) review not be confused with appeal – Rule 53 revisited – Decision of arbitrator upheld.

[1] The Applicant herein seeks the following prayers:

(a) Reviewing and setting aside the decision of the 1st Respondent in the Conciliation, Mediation and Arbitration Commission (CMAC) arbitration proceedings in case SCOMB 490/09 dated 25th January 2011.

(b) Directing that the decision therein be substituted by a decision dismissing the application proceedings brought by the 2nd Respondent in the said arbitration proceedings.

(c) Costs: and

(d) Further or alternative relief.

[2] The background hereto is that the 2nd Respondent was employed by the Applicant on the 1st February 1984 and remained in the Applicant's employ until her alleged constructive dismissal on the 29th September 2009. She resigned her employment citing unfair treatment, harassment in the form of unlawful and unfair disciplinary action, ill-treatment and a creation of an environment by her employer wherein she could no longer be expected to continue in employment. After she had resigned the 2nd Respondent reported a dispute with CMAC. Conciliation was unsuccessful and the matter was

referred by consent to arbitration. The arbitrator (1st Respondent) found in the 2nd Respondent's favour and awarded the total amount of E169,893.43 (One hundred and sixty nine thousand eight hundred and ninety three Emalangeni forty three cents) constituting notice pay, additional notice, severance allowance and compensation for unfair dismissal.

[3] It is against this decision that the Applicant seeks a review and setting aside of the 1st Respondent's decision. The 2nd Respondent opposes the relief sought.

[4] Has the Applicant properly invoked this Court's jurisdiction or is this an appeal disguised as a review? It is trite that review jurisdiction is concerned with the questioning of the method of adjudication and not its result or in other words, the validity of the adjudication process and not the correctness of the decision of the adjudicator per: Herbstein and Van Winsen: Civil Practice of the Supreme Court of South Africa 4th ed, 932.

[5] A review to this court is sanctioned by section 19 (5) (a) of the Industrial Relations Act No. 1/2000 which provides that:

> "A decision or order of the Court or arbitrator shall at the request of any interested party be subject to review by the High Court on grounds permissible at common law".

[6] In **Takhona Dlamini v President of the Industrial Court and Another** Case No. 23/1997 the Court set out some common law grounds for review thus:

> "Broadly, in order to establish review grounds it must be shown that the President failed to apply his mind to the relevant issues in accordance with the "behests of the statute or the tenets of natural justice". Such failure may be shown by proof, inter alia, that the decision was arrived at arbitrarily or capriciously or mala fide or as a result of unwarranted adherence to a fixed principle or in order to further an ulterior or improper purpose; or that the President misconceived the nature of the discretion conferred upon him and took into account irrelevant considerations or ignored relevant ones, or that the decision of the President was so grossly unreasonable as to warrant the inference that he had failed to apply his mind to the matter in the manner aforestated. Some of these grounds tend to overlap".

[7] Once an Applicant has decided to go on review he or she must set out each ground review clearly; Rule 53 (2) of the Rules of the High Court sets out the procedure to be followed upon review and provides as follows:

> "The notice of motion shall set out the decision or proceedings sought to be reviewed and shall be supported by affidavit setting out the grounds and the facts and circumstances upon which applicant relies to have the decision or proceedings set aside or corrected".

Does the Applicant's affidavit(s) meet these requirements? Has the Applicant set out the necessary jurisdictional facts to move this Court to review the decision of the 1st Respondent?

[8] The 2nd Respondents has raised certain crucial preliminary points of law which unfortunately this Court cannot uphold or dismiss without discussing the merits of the matter.

[9] The Applicant's first complaint in respect of the way the 1st Respondent handled the hearing was with regard to the failure by the 2nd Respondent to respond to some e-mails that were sent to her by the Regional Manager of the Applicant's stores in Swaziland. The Applicant's complaint is that the 1st Respondent did not apply her mind in making a finding that the 2nd Respondent was not given an opportunity to respond nor that the Applicant

did not investigate why the 2nd Respondent did not respond to e-mails sent by Pamela Dlamini despite evidence given by the latter.

[10] It is my considered opinion that the above criticisms are leveled at findings of fact based on the evidence that was before the 1st Respondent. There is nothing in the complaint above that shows that there was anything irregular in the 1st Respondent's reasoning in arriving at the conclusion that she did.

[11] The second complaint is that the finding that the Regional Manager erred to summon the 2nd Respondent to explain her default because any appeal would be adjudicated by Miss Dlamini whose impartiality would be questionable. This finding by the 1st Respondent is a factual one based on the evidence that was before her. Whether it is right or wrong is immaterial for review purposes. There is no evidence that she arrived at that decision in an irregular manner.

[12] The third complaint is that the Applicant has also raised a complaint that the 1st Respondent took into account irrelevant considerations and ignored relevant ones. There are no allegations set out in the Applicant's affidavit setting these out.

[13] A fourth complaint raised by the Applicant is in regard to the failure by the Applicant to furnish the 2nd Respondent with a verdict of a disciplinary hearing that was conducted against her. The Applicant says that there was no malice on its part in not giving her a verdict and this failure was not so prejudicial as to ground a case for constructive dismissal because there was a plausible explanation for the said failure. The Applicant's gripe with the 1st Respondent is that she did not decide which explanation she preferred between the two parties and failed to provide reasons for such preference.

[14] Here too with regard to the verdict the Applicant has not set out what was irregular about the 1st Respondent's action(s) in her dealing with and reaching her conclusion in regard to the said issue. The 1st Respondent correctly found that disciplinary hearing must end with a sanction and the fact that the 2nd Respondent was found guilty does not make the hearing fair if there was no sanction. The Applicant's conduct could not be condoned as this was unfair labour practice. This conclusion by the 1st Respondent is unassailable and I can find no fault with it.

[15] The fifth complaint raised by the Applicant is with regard to the warning issued to the 2nd Respondent on 10th September 2009 for failure to control her store expenses. The Applicant's complaint is that the adverse finding by the 1st Respondent against the Applicant was unreasonable. The adverse finding by the 1st Respondent was in my view reasonable. The warning of the 10th September 2009 was part of a series of warnings which followed one another closely and the frequency of which constituted harassment as they did not give the 2nd Respondent time to improve. The 1st Respondent was in my view correct in finding that the frequency of the warnings were calculated to harass the 2nd Respondent and as such formed the basis for constructive dismissal.

[16] A sixth complaint raised is with regard to the 1st Respondent finding fault with the warning of 21 September 2009 issued by the Branch Manager, Moses Mkhonto. A perusal of the 1st Respondents award reveals that the 2nd Respondent's complaint was that the warnings that were issued on the 19th and 21st September 2009 were issued for identical charges by two different managers and that it was improper to issue the same type of warning twice without any explanation. The 1st Respondent's response was that she agreed with the 2nd Respondent that the two offences she had been accused of were

similar and that there was no need for the Applicant to issue her with another warning more so within a space of two days. The Applicant did not give her an opportunity to correct her behavior. The Applicant has not set out any facts with regard to this complaint that show that any irregular conduct on the part of the 1st Respondent in order to ground a review thereto.

[17] A seventh complaint is that the 1st Respondent's irregularly allowed inadmissible evidence which had not been pleaded in the 2nd Respondent's statement of claim i.e. the evidence that the 2nd Respondent was instructed to vacate her office in order to make room for a liquor storeroom and she was not given an alternative place to work in or to perform her duties. She was forced to work at one of the till points. Here too the challenge is with regard to admissibility of evidence which is a ground of appeal and not review. In my view the evidence complained of was correctly admitted because it showed that the conduct of the Applicant created intolerable working conditions for the 2nd Respondent. Furthermore the issue of being deprived of an office or sustainable working space was as relevant issue which the 1st Respondent correctly considered. The issue that the office was eventually not turned into a storeroom is irrelevant for purposes of the 2nd Respondent's cause of action.

[18] An eighth complaint is in respect of the warnings. The Applicant's gripe herewith is that there was no evidence to suggest that these constituted harassment of the 2nd Respondent as they were issued on different dates punctuated by intervals and for different offences; and that the Applicant presented uncontroverted evidence that verbal and written warnings were routinely issued without an elaborate disciplinary enquiry where minutes were taken and that a list of managers in the position of the 2nd Respondents were given these warnings. Once again this complaint does not constitute a reviewable ground. The 2nd Respondent was served with a warning on the 1st June 2009 for not responding to e-mails and while that warning was still pending (the warning was valid for six months) another warning was issued on the 10th September 2009 for not controlling stores expenses; while that warning was pending another warning was issued on the 19th September 2009 for failure to make a follow up on payment of invoices for VIP security from January to June 2009. Another warning was issued on the 21st September 2009 for failure to control and monitor expenses and to ensure that all expense invoices were paid.

[19] The 1st Respondent in my view applied her mind to these issues when she came to the conclusion that the warnings amounted to harassment and that the warnings ended up by not serving their lawful intended purpose that is to give an employee a chance to correct her mistakes. See pages 28 – 29 of her award where the warnings are discussed in detail. See the case of **Fikile Nkambule v Transworld Radio** Industrial Court Case No. 128/1997, Nduma JP stated:

> "The purpose of a written warning should be to provide the employee with an opportunity to improve and should also indicate the consequences of future non-compliance".

See also **Fana Matsenjwa v Steelman Engineering Works** Industrial Court Case No.32/1997.

[19] A final complaint raised by the Applicant as grossly irregular is the failure of the 1st Respondent to deliver her decision within the time stipulated by the Industrial Relations Act No. 1/2000 (as amended). It is alleged that the Applicant took over a year to complete her assignment and this fact is common cause between the parties.

[20] Section 17(5) of the Industrial Relations Act (as amended) provides that:

> "Unless a referral to arbitration provides otherwise the arbitrator shall issue an award with concise reasons by the arbitrator within 30 days after the conclusion of the arbitrator proceedings".

Section 85 (4) (as amended) confirms the above provision and states:

> "If the matter is referred to arbitration;
>
> (a) the arbitrator shall determine the dispute within 30 days of the end of the hearing".

[21] In the case of **Standard Bank of SA Ltd v Fabb and Others** 2003 (2) SA 6921C (following Free State Buying Association Ltd t/a **Alfa Farm v SACCAWU & Another** (1998) 19 ILJ 1481 (LC) the Court stated (with reference to a section in the Labour Relations Act similar to our section 17 (5) as follows:

> "The time limits in this context are a guideline and not peremptory. I say so, first, because peremptory treatment can lead to absurdity. Secondly, it is not in the interests of litigants to rehear arbitrations for no reason but the fact that the award is issued outside the time limit.

Thirdly, it would conflict with the object of the LRA to resolve labour disputes effectively. In the nature of arbitration, awards are issued late. If they are nullity and no effect can be given to them, then the referral for a fresh arbitration would not be an effective, expeditious solution".

[22] The above dictum was followed by the Industrial Court in the case of **Thembekile Dlamini & 7 Others v Principal Secretary in the Ministry of Public Service and Information** Industrial Court Case No. 347/2008. Therein the Industrial Court was required to determine whether or not an award made eight (8) months after the date of completion of the hearing was valid. The Court considered the law and came to the conclusion that the award was valid. Following is what the Court concluded at paragraph 18 of its judgment:

"Having regard to these objects and purposes it is most unlikely that the legislature intended section 17 (5) be peremptory with the result that award could not be issued after 30 days or, if so issued, would be null and void. Such a construction would mean that the default of the arbitrator, even for good reason, would necessitate that completed arbitration proceedings would have to commence de novo. Not only would this obstruct and delay the final resolution of the dispute and frustrate the process of justice, but if would visit great inconvenience

and added expense on the parties, not to mention CMAC under whose auspices the arbitration is conducted".

[23] The complaint raised by the Applicant with regard to the delay in issuing the award must indeed fail as it does.

[24] The cumulative evidence outlined before the 1st Respondent clearly shows that the conduct of the Applicant towards the 2nd Respondent created an intolerable situation thus justifying her to leave the Applicants employ. I am further satisfied that the Applicant's conduct towards the 2nd Respondent falls squarely within the ambit of section 37 of the Employment Act No. 5/1980 which provides:

> "When the conduct of an employer towards an employee is proved by that employee to have been such that the employee can no longer reasonably be expected to continue in his employment and accordingly leaves his employment, whether with or without notice, then the services of the employee shall be deemed to have been unfairly terminated by his employer.

[25] I am satisfied that the 1st Respondent in arriving in her decision that the 2nd Respondent was constructively dismissed applied her mind to the relevant considerations, reached a reasoned conclusion, considered the arguments from both sides, acted rationally and her decision was reasonable in all the circumstances. As the evidence before the arbitrator shows she did not arrive at her decision arbitrarily or capriciously or mala fides or as a result of an unwarranted adherence to a fixed principle or in order to further an ulterior or improper purpose: in short none of the grounds listed in the Takhona case.

[26] In the circumstances I find that the decision of the 1st Respondent unassailable and hereby confirm her decision and dismiss the application for review with costs.

Q.M. MABUZA
JUDGE OF THE HIGH COURT

For the Applicant : Mr. S. Dlamini

For the Respondents : Mr. Mr. Z. Jele