IN THE HIGH COURT OF ESWATINI

JUDGMENT

Case No. 1450/2014

In the matter between:

Inn Staff Swaziland (Pty) Ltd **Applicant**

And

Bongani S. Dlamini N.O. **1st Respondent**

Ntokozo Charlie Bhembe **2nd Respondent**

Conciliation, Mediation And

Arbitration Commission **3rd Respondent**

Neutral citation: *Inn Staff Swaziland (Pty) Ltd vs Bongani S. Dlamini N.O. and 2 Others (1450//2014) [2018] SZHC 193 (24 August 2018)*

Coram : T. L. Dlamini J

Delivered : 24 August 2018

Review – Arbitration award – Review of award to be launched within 21 days.

Summary: *Applicant contends that the arbitrator made an award in favour of the 2nd respondent based on constructive dismissal when the 2nd respondent's claim was based on automatic unfair dismissal – Applicant also contends that the evidence of its witness Nandi Sukati was ignored and that section 152 of the Employment Act was invoked instead of Regulation 19 of the Wages Act – It was accordingly submitted that the arbitrator acted irregularly.*

Held: *That in terms of section 85(4)(b) of Industrial Relations (Amendment) of 2010, a review of an arbitrator's award is to be filed within 21 days – The present application was filed after nine (9) months from the date of the award – Review is accordingly time barred – Application dismissed.*

JUDGMENT

[1] The applicant, Inn Staff Swaziland (Pty) Ltd, filed an application in which it seeks an order in the following terms.

> **1. Reviewing and/or correcting and/or setting aside the ARBITRATION AWARD made by the 1st Respondent on the 10th January 2014 under CMAC Case No. 169/13;**

2. **Cost of this application in the event the respondents oppose the granting of the application;**

3. **Further and / or alternative relief.**

[2] The applicant is a company that is registered in terms of the company laws of the Kingdom of Eswatini and acts as a labour broker for the hotels at the Ezulwini area. An arbitration award was granted against this company in favour of the 2nd respondent on the 10th January 2014.

[3] The 1st respondent, Bongani S. Dlamini, was, at the time of the award, a part time commissioner for the Conciliation, Mediation and Arbitration Commission (CMAC). He was the arbitrator of the present matter and it is his award that is sought to be reviewed, corrected and set aside.

[4] The 2nd respondent, Ntokozo Charlie Bhembe, is the person in whose favour the arbitration award was granted. The 3rd respondent (CMAC) is a statutory body established by the Industrial Relations Act, 2000, under whose auspices the arbitration was held.

[5] On the papers filed before court, the 2nd Respondent reported a labour dispute to CMAC in May 2013. The labour dispute was based on automatic unfair dismissal from work. The dismissal took place in June 2012.

[6] The dismissal claim was opposed and the dispute was eventually referred to arbitration for determination. The 1st respondent was appointed as the arbitrator for the matter in November 2013.

[7] As already pointed out in paragraph [5] above, the 2nd respondent's case was founded on automatic unfair dismissal. The applicant's opposition to the claim was that there was no unfairness in the dismissal.

[8] After hearing evidence, the 1st respondent found and held that the 2nd respondent was constructively dismissed from work by the applicant. He accordingly awarded in his favour the total sum of **E16 406.80** (Sixteen Thousand Four Hundred and Six Emalangeni and Eighty Cents) made up of Notice pay, Additional Notice pay, Severance pay and 8 months' salary compensation. These issues are common cause between the parties.

[9] *In casu,* the applicant's case is that it was irregular for the arbitrator to find that the 2nd respondent was constructively dismissed and issue an award in his favour when as a matter of fact the 2nd respondent categorized his claim as that of automatic unfair dismissal.

[10] It is also the applicant's case that the arbitrator ignored the evidence of its witness Nandi Sukati who testified that there was an agreement or arrangement with the employees concerning the issue of transport to and

from work. In terms of the agreement or arrangement, the employees were delivered in town and could not be transported further than that as envisaged by Regulation 19 of the Wages Act. It was submitted that the arbitrator ignored this evidence and instead invoked section 152 of the Employment Act of 1980 in place of Regulation 19 of the Wages Act.

[11] It was further submitted that the arbitrator ignored Nandi Sukati's evidence which was that the 2nd respondent was to lease or rent a house closer to his place of work.

[12] I must point out that a transcribed record of the proceedings of the arbitration hearing was filed by the Executive Director of CMAC, Nathi Gumedze, who also deposed to an affidavit and stated that the 3rd respondent (CMAC) does not oppose the application for review but will abide by the decision of this court.

[13] The application is opposed by the 2nd respondent. He raised three (3) points of law, *viz.*, first, that the manner of service is not one that is permissible in law or one provided for under Rule 4 of the Rules of this court; second, that the application does not comply with Rule 53 because the Record of Proceedings of the arbitration hearing has not been furnished yet it is necessary; and, third, that the award was to be complied with by 15 February 2014 but was not and the applicant filed this review application in October

2014. It was submitted that by the long delay, the applicant waived his right to review the arbitration award.

[14] The application is also opposed on its merits. It was submitted on behalf of the 2nd respondent that the arbitrator fully applied his mind to the issues and gave legally correct reasons for basing his award on constructive dismissal than automatic unfair dismissal. It was further submitted that the arbitrator gave a legally correct reason for his departure from Regulation 19 of the Wages Act and invoking section 152 of the Employment Act instead.

[15] At the hearing of the matter, the 2nd respondent's attorney informed the court that the first two points of law, *viz.*, manner of service and non – compliance with Rule 53 are being abandoned and were accordingly not argued. They are therefore no longer for determination by this court.

[16] The first and only remaining point of law to be determined is the alleged waiver of the right to review the award. The 2nd respondent's attorney correctly submitted that the arbitration award was handed down on the 10th January 2014 and was to be complied with by 15th February 2014 at the latest. Instead of complying as directed, the applicant did not but waited for nine (9) months, whereafter it decided to launch the review application in the middle of October 2014.

[17] It was argued that the non-compliance period is unreasonably long and amounts to a waiver of the right to seek the` review. It was also argued that such non-compliance amounts to a refusal to comply with the arbitration award.

[18] Furthermore, it was submitted on the 2nd respondent's behalf that in terms of section 85 of the Industrial Relations (Amendment) of 2010, a review of an arbitration award is to be launched within 21 days of the issuance of the award. It was accordingly argued that the 2nd respondent has been frustrated, without a good and lawful reason, for the long period of non-compliance by the applicant

[19] In *contra* argument, the applicant's attorney denied that section 85 of the Industrial Relations Act of 2000, as amended, requires that reviews should be sought within 21 days. He referred to the submission as not only wrongful but misleading as well. In its Supplementary Heads of Argument filed three (3) days after the date of arguments, the applicant states as quoted below:

1.

"***AD WAIVER OF RIGHT TO REVIEW***

During argument of the matter on the 9th December 2016 the 2nd Respondent's attorney submitted from the bar that SECTION 85 of the INDUSTRIAL RELATIONS ACT 2000 (as amended) provides that a party seeking to review an arbitration award from CMAC should do so within twenty one (21) days from the date of receipt of the award.

1.1

I humbly submit on behalf of the Applicant that such assertion by the 2nd Respondent's attorney is not only wrongful but it is misleading. There is no such provision in the Industrial Relations Act 2000 (as amended). SECTION 85 of the Act does not address such an issue. It is outright dishonest of the 2nd Respondent's attorney to purposefully mislead the court in this manner.

1.2

The 2nd respondent's attorney never even submitted the relevant Section of the Act to the court. He never even addressed the issue of the waiver in his Heads of Argument. His act of raising the issue of Section 85 for the first time from the bar is tantamount to giving evidence from the bar. Wrong evidence for that matter. It would be grossly irregular for the Court to be persuaded by the argument of the 2nd Respondent which has no legal basis.

1.3

Copies of section 85 from the principal Act as well as the amended Act is annexed hereto for ease of reference and marked "INN 1"."

[20] I point out that the annexure "INN 1" furnished by the applicant's attorney is a copy of the Industrial Relations (Amendment) of 2005. The 2nd respondent's attorney referred this court to section 85 of the Industrial Relations (Amendment) of 2010 and not 2005.

[21] The Amendment of 2010 deleted paragraph (b) of section 85 (4) and replaced it with a new paragraph (b). The newly enacted amendment of section 85(4) of the Industrial Relations (Amendment) Act of 2010, provides as quoted below:

"85(4) If the matter is referred to arbitration –

(a) the arbitrator shall determine the dispute within twenty-one 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 a period of twenty-one days after the making of such determination, to the High Court for a review."

[22] The 2nd respondent's attorney is absolutely correct that a review of an arbitrator's award is to be sought within 21 days. The award is signed and dated 10 January 2014 whilst compliance was to be on or before 15 February 2014. Twenty-one days (working days) from the 10th January 2014 lapsed on the 10th February 2014. The compliance date of 15th February 2014, took, in my view, into account the applicant's time and right to seek a review of the arbitration award, if it so wished. Instead, the applicant did not, until it was time barred to do so.

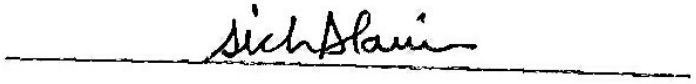
[23] I accordingly uphold the point of law that a review of the arbitrator's award ought to have been sought within 21 days after it was delivered. However, it was sought by the applicant on the 13th October 2014, eight (8) months after the expected time of compliance as contemplated by section 85(4)(b) of the Industrial Relations (Amendment) of 2010. For this reason alone, the application for review fails and is accordingly dismissed.

[24] The point of law determines the fate of the entire application. I will therefore not proceed to determine the question of whether or not the arbitrator correctly based his award on constructive dismissal instead of automatic unfair dismissal, and whether or not he correctly invoked the provision of section 152 of the Employment Act or ought to have applied Regulation 19 of the Wages Act Regulations. For purposes of this case, doing so would be for academic reasons only.

[25] I wish to point out that submissions about a provision of a statute do not constitute the submission of evidence from the bar as argued by the applicant's attorney. Such submissions are not introducing evidence that witnesses are required or expected to give. They only address legal issues that are commonly referred to as points of law.

[26] It is trite law that a point of law may be raised at any stage of the proceedings. The argument by the applicant's attorney that the submission regarding section 85(4)(b) of the Industrial Relations (Amendment) of 2010 constitutes giving evidence from the bar is accordingly rejected.

[27] For the aforegoing, the application is dismissed with costs.



T.L. DLAMINI J

JUDGE OF THE HIGH COURT

For Applicant: Mr C. Bhembe
For 2nd Respondent: Mr S. M. Dlamini