THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Reportable

Case no: J396/21

In the matter between:

EMALAHLENI LOCAL MUNICIPALITY **Applicant**

and

MOLOKO EPHRAIM PHOOKO N. O **First Respondent**

SOUTH AFRICAN LOCAL GOVERNMENT BARGAINING COUNCIL **Second Respondent**

SAMWU obo N RAPOLAEIDEON LESUDI **Third Respondent**

Heard: **4 May 2021**

Delivered: **5 May 2021**

Summary: Urgent application to stay in of section 145 (3) of the Labour Relations Act[1]. The Labour Court retains a discretion to stay the enforcement of the award pending its decision. This is a self-standing discretionary power and once exercised its effect is that the enforcement of an arbitration award is stayed pending a decision. Section 145 (7) provides for the suspension of an arbitration award unless the applicant for review furnishes security to the satisfaction of the Court. This is also a self-standing provision which automatically suspends the operation of an

[1] Act 66 of 1995.

award. Where a party obtains an order to stay the enforcement, such a party does not require the automatic suspension which is actuated by the furnishing of security. Thus there is no connection between the furnishing of security and the stay of enforcement. Since the Labour Court is bound by the LAC decision in *City of Johannesburg v Samwu obo Monareng and another*[2], the default position is that the applicant must furnish security. This Court is satisfied that the applicant has made out a case for the exemption from furnishing security within the contemplation of section 145 (7) of the LRA. Held: (1) The application is heard as one of urgency. Held (2): The enforcement of the arbitration award is stayed pending the outcome of a review application. Held: (3) The applicant is exempted from furnishing security within the contemplation of section 145 (7) of the LRA. Held (4): There is no order as to costs.

JUDGMENT

MOSHOANA, J

Introduction

[1] Before me is an urgent application primarily seeking an order to stay an enforcement of an arbitration award within the contemplation of section 145 (3) of the LRA as well as an exemption to furnish security within the contemplation of section 145 (7) of the LRA. The third respondent does not oppose urgency, as such this matter was heard as one of urgency.

Background facts

[2] Briefly the facts underscoring the present application are that on 17 July 2013, Mr Rapolae (Rapolae) was appointed as head of traffic and

[2] Case JA 120/ delivered on 20 March 2019.

security department of the applicant municipality. In May 2016, Rapolae was transferred to a new position. He was aggrieved by the transfer and he lodged a formal grievance. Following the conclusion of the grievance process, Rapolae refused to report to his new position. Such refusal culminated in his suspension. Following a disciplinary hearing, Rapolae was dismissed around October 2019. Aggrieved by his dismissal, the applicant referred a dispute to the bargaining council alleging unfair dismissal. On 18 December 2019, an award was issued ordering the applicant to reinstate Rapolae and to pay him some money. During January 2021, the applicant launched a review alleging a defect in the arbitration award. Such an application is still in the balance in this Court. During March 2021, Rapolae commenced a process seeking to certify the award to enable him to take executionery steps. Ultimately at the beginning of April 2021, the award was certified and Rapolae and his trade union intimated that executionery steps shall be taken.

[3] Owing to a potential harm to the assets of the applicant, on or about 13 April 2021, the applicant launched the present application to be heard urgently by this Court on 4 May 2021.

Evaluation

[4] Three important issues merit consideration in this matter. Firstly, is it a condition for the grant of the stay of enforcement that security must be furnished? Secondly whether granting a stay without an order for payment of security and or exemption therefrom secures or not secures the stay of enforcement in terms of section 145 (3) of the LRA? Thirdly whether a case has been made by the applicant for the stay and an exemption from furnishing security?

Is there a connection between section 145 (3) powers and section 145 (7) provisions?

[5] There is a view that in order to grant a stay, this Court must be satisfied that security has been furnished and if not furnished order an exemption if a case for that has been made. With respect, I with considerable regret differ with that view. In order to expatiate on my difference, I state the following in this judgment.

[6] Section 145 (7) of the LRA was inserted by section 22 of Act 6 of 2014 and took effect on 1 January 2015. Before the insertion of the section, a party could stay an enforcement of an award by bringing an application to this Court in terms of section 145 (3) of the LRA. Despite the insertion of subsection (7), subsection (3) was left unchanged. In the scheme of the LRA, if the legislature intends to connect a section to another, the legislature would employ phrases like "*subject to section"* (in this regard reference is made to section 158 (1) (g) of the LRA). In *Awumey and Another v Fox Cox Agricultural College and others*[3], the phrase was defined to mean conditional upon[4]. Accordingly, I take a view that if the legislature intended a connection between subsection (3) and (7), subsection (3) would have been amended to read:

> "[3] Subject to subsection [7] the Labour Court may stay the enforcement of the award pending its decision."

[7] An important observation to be made is that in subsection (3) the legislature refers to "stay of the enforcement" whereas in subsection (7) reference is made to "suspend the operation of an arbitration award". Enforcement literally means the process of compelling observance of a law, regulation etc. Where the Labour Court stays an enforcement of the award, such means that the award is not to be observed for a certain period. An award that is not to be observed also translates to an award's operation being suspended. The mischief that subsection (7) seeks to

[3] 2003 (8) BCLR 861 (Ck)

[4] See also *Skinner and others v Nampak Products Ltd and Others* (JS197/16) [2019] ZALCJHB 189 (20 June 2019) at para 25-26.

curb only arises once a review application is launched. It must be remembered that a subsection (3) application may be launched even before a review application is launched. As an example, a party may launch a stay of an award because a non-party to an award has to be added. In such an instance, a party may approach this Court to add a party to an award. The interest of justice may demand that the observance of the award must be stayed pending the decision of the Labour Court on adding a party. Of importance, the subsection does not state that the stay pends a decision on a review application. It may be a decision on any form of an application, a review included.

[8] To buttress this point, the *Memorandum of objects, Labour Relations Amendment Bill, 2012* states the following as the object of subsection (7):

> "This section is amended by introducing certain measures to reduce the number of review applications that are brought to frustrate or delay compliance with arbitration awards, and to speed up the finalisation of applications brought to the Labour Court to review arbitration awards.
>
> At present, a review application does not suspend the operation of an arbitration award. This often results in separate or interlocutory applications to stay enforcement of awards pending review proceedings. It is proposed that the operation of an arbitration award would be suspended if security is provided by the applicant in an amount specified in the provisions, or any lesser amount permitted by the Labour Court."

[9] The prevailing and accepted position achieved by the Labour Court at the time of the amendment was that launching a review application does not suspend the operation of an arbitration award. In and around that time Rule 49 (11) of the Uniform Rules provided that the following suspended an operation and execution of an order; namely; (a) noting of an appeal or application for leave to appeal; (b) rescission application; and (c) review. The rule was codifying the common law rule. In light of

the common law rule, it was necessary to clarify the position with regard to arbitration awards in relation to suspension. The Labour Court held that bringing a review application does not suspend the operation of an arbitration award. This position ultimately found itself in the LRA and obtained codification under subsection (7). In my view this position existed alongside subsection (3) for a while though not codified. For the above reasons, in my respectful view, it is fundamentally wrong to conclude that in the absence of furnishing of security, this Court is not empowered to exercise its discretion fully within the contemplation of subsection (3).

[10] The origin of this position seem to be the decision of the Labour Court in *Rustenburg Local Municipality v SALGBC*[5]. The Acting Justice of this Court Snyman reached the following conclusions:

> "[29] …That being said, the Court should always bear in mind the security requirements… when exercising its discretion…
> [32] …In simple terms, the **default position** must be that the Labour Court will require security to be provided as prescribed…as a condition for any stay or suspension order being granted by the Court, unless the applicant can show good and proper cause in the application why this should not be the case."

[11] In coming to the above conclusion, the Acting Judge suggested that he is fortified by the decision of this Court per Van Niekerk J in *National Department of Health v Pardesi and Another*[6]. The default position of Snyman AJ seems to differ with that of Van Niekerk J. The one for Snyman AJ is that security will be required to be provided unless a proper case is shown as a condition for any stay order. The one for Van

[5] [2017] 38 ILJ 2596 (LC).

[6] [2016] ZALCJHB 492 (September 2016) at para 6.

Niekerk J is related to the failure to provide reasons not to furnish security[7]. In exact terms Van Niekerk J stated the following:

> "[6] …There are no facts before me that enable me to exercise a discretion to order that security should not be furnished. The **default position must therefore apply**. That being so, the provisions of s145 (7) prevail, i.e. the institution of review proceedings does not suspend the operation of the arbitration award. The application to set aside or suspend the operation of the writ accordingly stands to be dismissed.

[12] In *Pardesi*, Van Niekerk J was faced with an application to set aside a writ on the basis that there is no order. Notably, the applicant therein did not necessarily apply to have the enforcement of the arbitration award stayed. In dealing with prayer 3 of the notice of motion seeking to have a writ issued to be stayed, Van Niekerk J made reference to section 145 (7) and that led him to the conclusion he reached as set out above. It is clear to me that the default position that Van Niekerk J refers to is the opening provisions of the subsection, which as indicated earlier is the codification of what the Labour Court held prior to the amendment. My colleague Tlhotlhalemaje J in *PRASA SOC Ltd v Sheriff District of Goodwood*[8] concluded that:

> "[16] …I accept that in determining whether there is an underlying *causa* which is sought to be attacked in seeking a stay, a fundamental consideration in light of the provision in question is whether security has been furnished."

[13] It is apparent that Tlhotlhalemaje J holds a view that in the absence of consideration of the question whether security has been furnished, a stay may not be determined. With considerable regret I disagree. Recently, the LAC in *City of Johannesburg v Samwu obo Monareng and another*[9] reached the following conclusions:

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[7] This seem to be the understanding achieved by the LAC in *City of Johannesburg* para 16 of the judgment.

[8] Case [C1230/2018] dated 27 December 2018.

[9] *Ibid* footnote 2.

> "[7] The Labour Court has discretionary power under section 145 (3) of the LRA to stay enforcement of an arbitration award pending its decision in the review application. It may stay the enforcement of an arbitration award pending the finalisation of a review application against the award with or without conditions. It may in terms of section 145 (8) of the LRA dispense with the requirement of furnishing security. Properly construed, section 145 (3) read with section 145 (7) and (8) should be interpreted to mean where an applicant in a review application furnishes security to the Labour Court …, the operation of the arbitration award is automatically suspended pending its decision in the review application. In other words, the employer need not make an application in terms of section 145 (3) of the LRA to stay the enforcement of the arbitration award…."

[14] I read this part of the judgment to mean that as a corollary, an applicant may apply for a stay which may be granted with or without conditions. A stay would effectively suspend the operation of an arbitration award. Proper reading of the judgment suggests that there are two distinct applications that a party may bring. Those are, for a stay or for being absolved from furnishing security. The following paragraph makes the point:

> "[8] However, should the employer wish to be absolved from providing security…then it is required to make an application to the Labour Court … for the stay of the enforcement of the arbitration award…The employer must make a proper case for the stay ***as well as*** for the provision of security in accordance with section…

[15] Reading of this part of the judgment suggests that it finds application to employers who wish to be absolved from providing security. Where an employer does not wish to be absolved but wish to have the enforcement stayed, it cannot be expected of such an employer to still make a case for the provision of security. Logic dictates that where security is provided, automatically the enforcement is suspended. Therefore, the same logic must apply *mutatis mutandis* in a suspension by a court

order. It cannot be correct to interpret the section to mean that the only instance where an enforcement of an arbitration award may be achieved is by furnishing security or seek to be absolved. I do not read subsection (7) to mean that if no security is furnished or an order is sought to be absolved an award may not be stayed pending a review application.

[16] Also I do not read the LAC judgment to suggest that the amendment brought about a regime that renders the judgment of *Gois v Van Zyl*[10] obsolete. It is worth mentioning that the position advanced by the opening paragraph of subsection (7) has always been there even at the time of *Gois*. To my mind, provision of security is specifically required to discount the position that launching a review on its own, without an application to stay, suspends the operation of an arbitration award. This to my mind is what Van Niekerk J refers to as the default position. The general principles for the granting of a stay remains the following:

1. A Court will grant a stay of execution where real and substantial justice requires it or where injustice would otherwise result.
2. Since the Court will be guided by factors applicable to interim interdicts, the Court must be satisfied that:
   (a) The applicant has a well-grounded apprehension that execution is taking place at the instance of the respondent;
   (b) Irreparable harm will result if the execution is not stayed and the applicant ultimately succeeds in establishing a clear right;
   (c) Irreparable harm will invariably result if there is a possibility that the underlying causa (arbitration award) may ultimately be removed, i.e. where the underlying *causa* is the subject-matter of an ongoing dispute between the parties;
   (d) The court is not concerned with the merits of the underlying dispute – the sole enquiry is simply whether the *causa* is in dispute.

[10] 2011 (1) SA 148.

[17] For very obvious reasons, there is no requirement to furnish security or to be absolved before a stay may be granted. The judgment accepts and appreciates an existence of an underlying dispute, which in my view is a review application. However, of importance is its existence and not the merits or demerits of the underlying dispute before a stay may be granted. Having traversed the authorities, I take a view that once a party satisfies the requirements spelled out above a stay must happen irrespective of whether a party has symbiotically sought to be absolved from the furnishing of security.

[18] The position extrapolated above answers the first and the second issues mentioned above.

[19] I now briefly turn to the third issue which has two parts. Starting with whether the applicant has made a case for the stay. Without a shadow of a doubt, the requirements of justice dictates that this Court must grant a stay. In terms of section 145 of the LRA, a party has an automatic right of review of an arbitration award. The review was launched in time and is progressing within the confines of the Rules and the Practice Manual. Where an applicant for review does not comply with the rules and the practice manual, a review shall be deemed withdrawn or shall lapse and considered dismissed, in which event, it is as good as being dismissed. All of that will entitle Rapolae to execute without any further ado. I am satisfied that should the applicant succeed the arbitration award will be removed and not staying the award would result in an irreparable harm. Contrary to the submission by Rapolae's counsel, the harm will not be prevented by ordering the applicant to pay security.

[20] Where a party is unable to furnish security, in my view, the only way to prevent an imminent irreparable harm is to obtain a stay, which is an equivalent of an interim interdict. It is undisputed that the award has already been certified and capable of being executed as if it is an order of this Court. That is the harm and it is indeed irreparable should the

assets of the municipality be sold in execution on the basis of an award that may ultimately be removed. There is no doubt in my mind that should the applicant fail in its review, the rights of Rapolae emanating from the award remain intact for another solid 30 years.

[21] In the event I am wrong in my conclusions that a section 145 (3) application is not separate and distinct from a requirement to furnish security, I am satisfied that the applicant has made a case for being absolved from furnishing security. *City of Johannesburg* tells us that the onus lies with an applicant who must show that it has assets of a sufficient value to meet its obligations should the arbitration award be upheld by the Labour Court on review. The LAC did not consider prejudice to an employer as being decisive. It considers it to be one factor but it is not decisive. It does seem that the LAC considers the sufficiency of assets as a crucial consideration. It held –

> "[25] …In particular, because the facts more than adequately demonstrate that the appellant is in possession of sufficient assets to meet an order of the review court upholding the arbitration award in the dismissed employee's favour."

[22] This sufficiency of assets was seen by the LAC as a crucial shield for an employee should the review application be decided in his or her favour. Before me there exists evidence that the applicant has non-core assets; capital donations from the mines and private companies; equitable share from the National government; valuable current assets and new assets class. Accordingly, the applicant must be absolved from providing security.

[23] In the results I make the following order:

Order

1. The application is heard as one of urgency.

2. The enforcement of the award issued by Commissioner Moloko Ephraim Phooko under case number MPD 101908 dated 17 December 2020 is stayed pending the finalization of a review application launched under case number JR47/21.

3. The applicant is absolved from furnishing security as contemplated in section 145(7) and (8) of the LRA.

4. There is no order as to costs.

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GN Moshoana

Judge of the Labour Court of South Africa

Appearances:

For the Applicant: Mr E V Van Graan SC
Instructed by: De Swart Myambo Attorneys, Pretoria

For the Respondents: Mr M R Mokwala
Instructed by: Morudu Attorneys, Middelburg