

THE LABOUR APPEAL COURT OF SOUTH AFRICA, JOHANNESBURG

Reportable

Case No: JA74/2023

In the matter between:

ITALSAFARIS CC T/A VIVA SAFARIS

Appellant

and

NUFBWSAW obo MEMBERS

First Respondent

THOMAS MURIMISI MAHASHA N.O

Second Respondent

**THE COMMISSION FOR CONCILIATION,
MEDIATION AND ARBITRATION**

Third Respondent

Heard: 3 May 2024

Delivered: 31 May 2024

Coram: Molahlehi AJP, Van Niekerk JA and Nkutha-Nkontwana JA

Summary: Interpretation of subsections 145 (3), (7) and (8) of the LRA – disjunctive interpretation offends the contextual and purposive interpretational instruments – there is one application in terms of section 145(3) application in terms of which the court may exercise its discretion to reduce or absolve the applicant from furnishing security as contemplated in section 145(8) – if there is no evidence to justify exercise of discretion in terms of section 145(3) to absolve the furnishing of security, a default position in terms of section 145(7) shall prevail.

JUDGMENT

NKUTHA-NKONTWANA, JA

Introduction

[1] This is an appeal against the judgment and order made by the court *a quo* granting a conditional stay of execution of the arbitration award rendered by the Commission for Conciliation, Mediation, and Arbitration (CCMA) pending the outcome of the review application under case number JR654/22. The rider was that the appellant had to provide security in terms of sections 145 (7) and (8) of the Labour Relations Act¹ (LRA) within 14 days of the order; failing which, the order would lapse automatically.

[2] This appeal turns fundamentally on an interpretation of section 145(3), read with subsections (7) and (8). Alternative or adjunct thereto is the determination of the amount of security the appellant had to pay; and whether the Registrar of the Labour Court (Registrar) has discretion to determine the amount of security.

Background

[3] The genesis of this matter is the default award rendered by the second respondent on 1 March 2022 under case number L8404/21 against the appellant and the dismissal of the appellant's rescission application on 16 March 2022.

[4] On 29 September 2022, the appellant launched a review application and also sought a stay of execution of the award. Notwithstanding the review application, the first respondent went ahead and certified the award. As a result, the appellant approached the court *a quo* by way of urgency seeking an order, *inter alia*, that:

1. ...
2. The enforcement of the arbitration award issued by the Commission for Conciliation Mediation and Arbitration (CCMA) under CCMA case number: LP8404/21 as varied by an undated ruling, be stayed pending the outcome of the review application before court under case number JR654/22;
3. That the applicant be exempted from furnishing security in terms of section 145(7) and (8) of the LRA...

¹ Act 66 of 1995, as amended.

[5] It was the appellant's contention that it was not in a position to furnish security as contemplated in section 145(8) as its business was still recovering from the financial impact that was caused by the COVID-19 pandemic and the consequent strict government restrictions. As such, if ordered to furnish the exorbitant amount of about three million rands in security, it would lead to business closure and would jeopardise the job security of its other employees. Alternatively, the appellant argued that it did not have to furnish any security since it launched the application in terms of section 145(3) which grants the court the discretion to stay the execution of the award without invoking section 145(7) and (8).

[6] The court *a quo*, as alluded to above, granted a stay of the execution of the award conditional on the appellant furnishing security per section 145(8) of the LRA. In essence, the court *a quo* refused to absolve the appellant from furnishing security. That is so because, according to the court *a quo*, the appellant failed to place cogent facts to show that it could not afford to pay security; alternatively, it had adequate assets to satisfy the award in the event the review application is unsuccessful.

Legal principles and application

[7] The crisp issue for determination is whether section 145(3), which provides for a stay of enforcement of the award, operates independently of the security provisions under sections 145(7) and (8). Subsections (3), (7) and (8) of section 145 provide:

'(3) The Labour Court may stay the enforcement of the award pending its decision.

....

(7) The institution of review proceedings does not suspend the operation of an arbitration award, unless the applicant furnishes security to the satisfaction of the Court in accordance with subsection (8).

(8) Unless the Labour Court directs otherwise, the security furnished as contemplated in subsection (7) must –

(a) in the case of an order of reinstatement or re-employment, be equivalent to 24 months' remuneration; or

(b) in the case of an order of compensation, be equivalent to the amount of compensation awarded.'

[8] In *City of Johannesburg v SA Municipal Workers Union on behalf of Monareng and another*², this Court, similarly confronted with an appeal against an order which stayed the enforcement of an arbitration award pending a review application conditional on the appellant, a municipality, furnished security as required in terms of section 145(8). In a judgment penned by Kathree-Setiloane AJA, this Court observed that:

'[7] The Labour Court has a discretionary power under section 145(3) of the LRA to stay the enforcement of an arbitration award pending its decision in the review application. It may stay the enforcement of an arbitration award pending 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 that where an applicant in a review application furnishes security to the Labour Court in accordance with section 145(8) of the LRA, 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 pending the finalisation of the review application.

[8] However, should the employer wish to be absolved from providing security or to provide security in an amount less than the threshold in subsection (8)(a) and (b), then it is required to make an application to the Labour Court, in terms of section 145(3), for the stay of the enforcement of the arbitration award pending its decision in the review application. The employer must make out a proper case for the stay as well as for the provision of security in accordance with section 145(8) to be dispensed with or reduced.

[9] The words "unless the Labour Court directs otherwise" in section 145(8) of the LRA must be construed broadly to mean that the Labour Court is afforded a discretion to either: (a) exempt the employer from paying security

² [2019] ZALAC 54; (2019) 40 ILJ 1753 (LAC) (*City of Johannesburg*).

on the stay of the enforcement of an arbitration award pending its decision on review or (b) reduce the quantum of security to be furnished by the employer to an amount below the threshold in sections 145(8)(a) and (b) of the LRA.³

[Own emphasis]

[9] It follows from the above authority that, as a general rule, an employer is obliged to provide security in accordance with section 145(8) of the LRA unless the Labour Court orders differently.

[10] Yet the appellant persists with the contention that there are no legal prerequisites for the relief sought in terms of section 145(3) as the Labour Court has discretion to grant a stay of execution of the award without invoking subsections (7) and (8). To bolster this contention, reliance is placed on the two decisions of the Labour Court in *Emalahleni Local Municipality v Phooko NO and Others*⁴ which was recently sanctioned in *Marquis Finance v Quinn and Another*⁵ by the same learned Judge.

[11] In *Marquis* the Labour Court found that an application in terms of section 145(3) of the LRA is not dependent on the furnishing of security as the Labour Court is afforded “*a wide untrammelled discretion to order a stay*”⁶. For this notion, the Labour Court followed its own decision in *Emalahleni* where it found that section 145(3) has nothing to do with the security contemplated in section 145(7) as a section 145(3) application is a discrete and distinct application. That is so, it was further reasoned, since “*if payment of security on its own is sufficient to suspend the operation of the arbitration award, mutatis mutandis, if the requirements of a stay application are met, the stay order on its own must halt the operation of the award*”⁷.

[12] In addition, the Labour Court opined that section 145(7) ought to operate once a review application is launched whereas a stay is not dependent on the launch of

³ Id.

⁴ [2021] ZALCJHB 61; (2021) 42 ILJ 2196 (LC) (*Emalahleni*).

⁵ [2023] JOL 60127 (LC) (*Quinn*).

⁶ Id at para 6.

⁷ Id at para 8.

review proceedings⁸; in view of the fact that a section 145(3) application is “*primarily for a stay and not necessarily to give review proceedings the impetus to suspend the operation of an arbitration award impugned and that a stay application may be granted if the court is satisfied that the requirements for a stay have been met*”⁹.

[13] Accordingly, the appellant contends that the court *a quo*’s construction of section 145(3) to mean that there must be provision of security in terms of section 145(7) read with section 145(8) in order to stay enforcement of the award is incorrect and must be rejected. To the extent that the court *a quo* followed the dictum in *City of Johannesburg*¹⁰, that decision was equally incorrect and should be revisited; alternatively, the construction of section 145(3) was just *obiter* hence not followed in *Emalahleni*.

[14] Interpreting the dictum in *City of Johannesburg*, the Labour Court in *Emalahleni* stated that:

‘[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. A 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 (para 8) makes the point: ‘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 s 145(8) ...’ (Emphasis added.)

[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 wishes 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,

⁸ Id at para 9.

⁹ Id at para 11.

¹⁰ *Supra* fn 2.

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 enforcement of an arbitration award may be achieved is by furnishing security or seeking to be absolved. I do not read subsection (7) to mean that if no security is furnished or no order is sought to be absolved an award may not be stayed pending a review application.’¹¹

[15] I need to explore whether the above exposition correctly reflects the construction of provisions at stake in *City of Johannesburg*. Expediently, I propose to first remind us of the fundamental tenets of statutory interpretation which are pretty trite. The pendulum has acceptedly swung towards contextual and purposive methods of construction, consistent with the Constitution.¹² This interpretational instrument was sanguinely espoused in *Natal Joint Municipal Pension Fund v Endumeni Municipality*¹³ that “the ‘inevitable point of departure is the language of the provision itself’, read in context and having regard to the purpose of the provision and the background to the preparation and production of the document’¹⁴.

[16] In this instance, the intents of section 145(7) and (8) are plainly articulated in the the memorandum¹⁵ to the Labour Relations Amendment Act¹⁶ as follows:

‘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

¹¹ *Emalahleni Supra* fn 4.

¹² See: *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Tourism and others* [2004] ZACC 15; 2004 (4) SA 490 (CC) at para 90; *Cool Ideas 1186 CC v Hubbard and another* [2014] ZACC 16; 2014 (4) SA 474 (CC) at para 28.

¹³ [2012] ZASCA 13; 2012 (4) SA 593 (SCA) (*Endumeni*) at para 18; see also *Bothma-Batho Transport (Edms) Bpk v S Bothma & Seun Transport (Edms) Bpk* [2013] ZASCA 176; 2014 (2) SA 494 SCA at paras 11 - 12.

¹⁴ *Id.*

¹⁵ Memorandum of Objects, Labour Relations Amendment Bill, 2012.

¹⁶ Act 6 of 2014.

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.’

[17] The provisions obviously serve two important objectives: firstly, to dissuade employers from launching unmeritorious review applications aimed at hindering or delaying compliance with arbitration awards; and secondly, to engender prompt prosecution of review applications.¹⁷ In essence, the exigent statutory prerequisites effectively require the employer applicants to pledge money to the review application in advance hopefully to constrain them to carefully consider whether it is prudent to proceed, especially if there are no prospects of success but the review application is pursued frivolously in order to frustrate the respondent employees.¹⁸

[18] Notably, the requirements for a stay of enforcement of an award have evolved as a result of the amendment to the LRA. Section 145, cannot, as suggested in *Emalahleni*, be read disjunctively as it deals with the review of arbitration awards. Thus, only one application is conceivable in terms of sections 145(3), (7) and (8) where a single enquiry is conducted. There is no stand-alone application to which section 145(3) applies, even if there is no review application yet instituted. As pointed out in *City of Johannesburg*¹⁹, in the event the employer requests to be absolved from providing security or to provide security in an amount less than the threshold in subsections (8)(a) and (b), section 145(3) must be triggered and an application be made to the Labour Court for the stay of the enforcement of the arbitration award pending its decision in the review application.²⁰ Significantly, it was emphasised that the employer is enjoined “*to make out a proper case for the stay as well as for the provision of security in accordance with section 145(8) to be dispensed with or reduced*”²¹.

¹⁷ See: *Rustenburg Local Municipality v SA Local Government Bargaining Council & others* [2017] ZALCJHB 261; (2017) 38 ILJ 2596 (LC) (*Rustenburg*) at para 38 referred to with approval in *City of Johannesburg* at para 21.

¹⁸ *Id.*

¹⁹ *City of Johannesburg* supra fn 2 at paras 7 - 9.

²⁰ *Id.*

²¹ *Id.*

[19] In addition, contrary to the suggestion in *Emalahleni*, in *City of Johannesburg*²² this Court endorsed the Labour Court's decision per Van Niekerk J (as he then was) in *National Department of Health v Pardesi and another*²³, in the context of a public entity as an employer, that:

'...the public sector employer must establish on the facts why it should be exempt from furnishing security. The Labour Court concluded in *Pardesi* that there were no facts before it that would enable it to exercise its discretion against ordering that security should not be furnished. It accordingly held that the default position must apply and the provision of section 145(7) must prevail.'²⁴

[20] It follows that the construction of section 145(3) adopted by the Labour Court in *Emalahleni* and followed in *Quinn* is patently erroneous as it negates the context and the purpose or the mischief the provisions were intended to cure. Resultantly, it deviated from the sound and binding construction of section 145(3) read with section 145(7) and (8) by this Court in *City of Johannesburg*. Instructively, the Constitutional Court has told us on numerous occasions that all laws must be viewed through the radiant constitutional prism.²⁵ To fulfil the constitutional imperative for expeditious resolution of labour disputes, the common law requirements for a stay of execution of the arbitration award should, in my view, yield to section 145(7) and (8).

[21] That being the case, the court *a quo*'s construction of these provisions, which is in line with this Court's pronouncement in the *City of Johannesburg*, cannot be faulted. As correctly submitted by the first respondent, the appellant had to show cause why it should be absolved from furnishing security, failing which, the default position in section 145(7) was applicable and the stay accordingly refused. The appellant's contention that the construction of section 145(3) in the *City of Johannesburg* is parenthetical is untenable. Moreover, there is nothing novel that warrants that *City of Johannesburg* be revisited as contended by the appellant.

²² *City of Johannesburg* supra fn 2 at para 16.

²³ [2016] ZALCJHB 492 at para 6.

²⁴ *Id.*

²⁵ See: *My Vote Counts NPC v Speaker of the National Assembly and Others* [2015] ZACC 31; 2016 (1) SA 132 (CC) at para 51; *Jordaan and others v City of Tshwane Metropolitan Municipality and others* 2017 (6) SA 287 (CC) at para 8.

[22] The last issue for determination is the appellant's alternative or adjunct contention that the court *a quo* failed to exercise its discretion to determine the amount of security to be furnished, a discretion it delegated to the Registrar. Likewise, this contention is untenable. It is clear from the order of the court *a quo* that the appellant was directed to furnish security as contemplated in section 145(8); failing which, the award remained executable by default in terms of section 145(7). It follows that no discretion was delegated to the Registrar to decide the amount of security.

[23] Notwithstanding, the court *a quo* found that there was no cogent evidence to show that the appellant could not afford to furnish security in line with section 145(8) or that it has a sufficient asset and income base to demonstrate that it is financially stable. Yet, it does not appear that the court *a quo* properly considered the uncontested evidence that the appellant, as a travelling agency, was severely affected by the COVID-19 pandemic shutdown and stringent regulations which impacted its financial viability.

[24] The amount of security at stake is not insignificant; it is almost three million rands. However, the appellant is apparently in a position to furnish some form of security but not as directed by the court *a quo*. To that extent, this matter stands to be remitted back to the court *a quo* solely for a prompt determination of the amount of security to be furnished by the appellant on supplemented papers by the parties, if they so wish.

Conclusion

[25] In all the circumstances, the court *a quo*'s interpretation of section 145(3) is beyond reproach and the appeal in this regard must fail. Still, the amount of security to be furnished ought to be reconsidered.

Costs

[26] Since the appeal is partly successful, each party must bear its own costs.

[27] In the circumstances, the following order is made:

Order

1. The appeal is upheld in part.
2. The matter is remitted back to the Labour Court on the same or supplemented papers for a prompt determination of the amount of security to be furnished by the appellant.
3. There is no order as to costs.

Nkutha-Nkontwana JA

Molahlehi AJP et Van Niekerk JA concur.

Appearances:

For the appellant:

Moja Sibiyi Attorneys Inc

For the third respondent:

Voyi Incorporated Attorneys