THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not Reportable

Case No: JR1785/22

In the matter between:

VUSELELA TVET COLLEGE **Applicant**

And

GENERAL PUBLIC SERVICE SECTORAL BARGAINING COUNCIL (GPSSBC) **First Respondent**

JOYLEAF BOASE N.O. **Second Respondent**

NEHAWU o.b.o. LERATO THIBILE **Third Respondent**

Heard: **31 January 2024**

Delivered: **2 February 2024**

JUDGMENT

MAKHURA, J

[1] The applicant applied to review and set aside the arbitration award issued by the second respondent and this application is pending before this court. In addition, the applicant launched these proceedings seeking an order to be exempted from the provisions of section 145(7) and (8) of the Labour Relations Act (LRA)[1] and to stay the

[1] Act 66 of 1995, as amended.

operation of the award pending the outcome of its review application. The current application is unopposed.

[2] The basis of the applicant's case for the stay of the award is that it has legitimate grounds for the review of the award. It argues that it did not dismiss the employee and is therefore pursuing a legitimate application. Further, that if the execution of the award is not stayed, this would result in real and substantial injustice and that it would suffer irreparable harm.

[3] Regarding its application for exemption, the applicant argues that the employee's salary was paid from the National Skills Fund (NSF) project. The argument goes further that as a publicly funded college, the applicant:

'… cannot ring fence the amount ordered by Second Respondent out of its own funds as these are public funds and it no longer has access to the funds from the NSF Project. The Applicant furthermore realised a deficit for the 2021 financial year. Its cash flow needs to support salaries of its employees as well as support approximately 8000 (eight thousand) learners.

The Applicant furthermore need to have an amount available in its budget for unforeseen expenses. Providing the security will cause irreparable harm…'

[4] In terms of section 145(7) of the LRA, the institution of a review application does not suspend the operation of the award unless the applicant furnishes security to the satisfaction of the court in accordance with subsection 8. Subsection 8 provides that unless this court directs otherwise, the applicant must provide security equivalent to 24 months remuneration in the case of an award of reinstatement or an amount equivalent to the amount of compensation awarded in the case of an award for compensation.

[5] The default position is that an employer challenging an arbitration award issued in favour of an employee must furnish security in accordance with subsection 8. The provision of security in accordance with subsection 8 will automatically stay the operation and execution of the award. If the employer elects not to furnish security, the

employee is entitled to enforce the award, despite the pending review application. However, the employer may apply to this court for an order directing otherwise – for full or partial exemption from furnishing security.

[6] In *casu*, the applicant sought an order for full exemption from section 145(7) and (8) of the LRA. An applicant for exemption must satisfy this court as to why it should be exonerated from furnishing security. This court has discretion under subsection 8 to grant or refuse the application. The employer who seeks to be exempted from section 145(7) and (8) must show good cause why these provisions should not prevail in its specific case.[2]

[7] The applicant submits that the employee's salary was paid from an NSF project, that it no longer has access to the funds from the NSF project and that it cannot 'ring fence' the amount ordered by the commissioner out of its own funds because these are public funds. Further, the applicant submits that it realised a deficit for the 2021 financial year and that its cash flow needs to support the salaries of its employees as well as support approximately 8000 learners. Finally, the applicant argues that it needs to have money in its budget for unforeseen expenses.

[8] The question is, if the applicant does not have access to the funds in the NSF project which were used to pay the employee's salary and is not prepared to commit funds at this stage as security from its budget or other projects, how is it going to comply with the award in the event that its review application fails.

[9] In my view, the applicant's submission in this regard makes it more compelling for security to be furnished. This is particularly so because the applicant has not made any averment in its affidavit on how it would comply with the award should it be unsuccessful in its review application.

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[2] See *City of Johannesburg v SA Municipal Workers Union on behalf of Monareng and another* [2019] ZALAC 54; (2019) 40 ILJ 1753 (LAC) at paras 16 and 17.

[10] The applicant's submission, that it realised a deficit in its 2021 financial year, does not take the issue any further. Ms Tye, appearing for the applicant, argued that the financial statements show that the applicant has sufficient assets to realise its obligation in the event that its review application fails. However, there is no such case pleaded in the founding affidavit nor is there any case pleaded where it would source the funds in the event of an unsuccessful review application. That the applicant realised a budget deficit in 2021 also makes it more compelling that security is provided to safeguard the interests of the employee. In my view, the applicant's pleaded case demonstrates that there is a risk of non-compliance with the award in the event that its review application is dismissed.

[11] Ms Tye also submitted that the applicant has reasonable prospects of success. Whilst I understand that this court has discretion to grant or refuse an application for exemption, the prospects of success should not play a determinative role in this enquiry. In any event, the applicant has not addressed the prospects of success in its application. It has only raised that the award falls to be reviewed because the commissioner exceeded his powers, committed misconduct and issued an unreasonable award without substantiating these allegations. It has not requested that the contents of the review application be incorporated into its current application.

[12] The applicant alleged that it needs to have an amount available in its budget for unforeseen expenses and that providing security would cause it irreparable harm. The applicant has not pleaded how providing security would make it impossible for it to meet its daily, weekly or monthly obligations. Having considered the application, I am not satisfied that the applicant has made out a case to be exempted from the requirement of section 145(7) and (8) of the LRA. Consequently, its application for exemption must fail.

[13] The applicant's case for a stay of the award was solely dependent on a successful exemption. No other facts were pleaded as to why the execution of the award should be stayed pending the review application. Having found that the applicant

has failed to make out a case for exemption, it follows that the application for stay of the award must fail.

[14] In the premises, the following order is made:

Order

1. The application is dismissed.
2. There is no order as to costs.

M. Makhura

Judge of the Labour Court of South Africa

Appearances:

For the Applicant: Adv. M Tye

Instructed by: Pearson Attorneys