



IN THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

JUDGMENT

Not Reportable
Case No: J2560/16

In the matter between:
EMELDA R MOGWALE
and

Applicant

**EKURHULENI ARTISANS AND SKILLS TRAINING
CENTRE (PTY) LTD**

Respondent

Heard: 11 July 2017

Delivered: 4 August 2017

JUDGMENT

BARRABLE AJ

Introduction

- [1] The applicant seeks an order in terms of Section 158 (1) (c) of the Labour Relations Act¹ (LRA) for the arbitration award dated 29 September 2016 issued by the Commission for Conciliation, Mediation and Arbitration (CCMA) under case number GAEK6260-16 to be made an order of Court.
- [2] The respondent has opposed this application and at the same time has brought a counter application in which the respondent seeks the following orders:
- 2.1 Staying the enforcement of the arbitration award pending the outcome of a review application launched by the respondent under case number: JR2198-16,
- 2.2 Directing that the respondent be absolved from making payment of security as required in terms of Section 145 (8) of the Act as amended or alternatively fixing a reasonable amount of security in line of the principles of justice and equality.
- [3] The applicant opposes the respondent's counter application.

Background facts

- [4] The applicant was employed by the respondent as a call centre agent. Following her dismissal on 26 February 2016 the applicant referred an unfair dismissal dispute to the CCMA. The CCMA issued

¹ Act 66 of 1996.

an award in her favour on 29 September 2016. In the award, her dismissal was found to be substantively unfair and the commissioner ordered that the applicant be reinstated and paid seven months' salary in the amount of R71 400.00 (R10 200.00 x 7). It was further ordered that the applicant report for work at the respondent's premises on 17 October 2016.

- [5] On 14 October 2016, the respondent filed an application to review and set aside the award under case number JR 2198-16.
- [6] On 1 November 2016, the respondent submitted payment to transcribers for the preparation of the CCMA record.
- [7] On 2 November 2016, the applicant lodged this application to make the arbitration award an order of Court in terms of Section 158 (1)(c) of the LRA. The respondent immediately opposed the application and brought a counter application seeking the relief as set out above.

Analysis

- [8] When exercising its power to make an arbitration award an order of Court in terms of Section 158 (1)(c) of the LRA, the Court has a discretion which it must exercise judicially taking into account all the relevant facts and circumstances².
- [9] The applicant contends that the respondent's review application is not properly before this Court as the respondent has failed to furnish security as required by the LRA. Section 145 (7) of the LRA states:

² *Greef v Consol Glass (Pty) Ltd* (2013) 34 ILJ 2835 (LAC).

"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 sub section (8)".

- [10] It is clear from the wording of this subsection that the validity of a review application does not depend upon the furnishing of security, however the enforcement of an arbitration award is not suspended unless security has been furnished.
- [11] The respondent took steps to bring its review application well within the time frames allowed under the LRA. It appears that the respondent has taken steps to transcribe the record of the CCMA proceedings although the record has as yet not been delivered.
- [12] There is no evidence that the respondent was using the review application process to deliberately delay the applicant from receiving payment in terms of the arbitration award.
- [13] In the circumstances, I do not consider that it would be in the interests of justice and fairness to grant the applicant's application as the respondent would be denied the opportunity to have its review application ventilated.

Counter application

- [14] Section 145 (8) of the LRA provides: "*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".

- [15] In terms of this subsection the Court is empowered to reduce the quantum of security. In considering the question whether the requirement of security could be waived, in *Free State Gambling and Liquor Authority v CCMA and Others*³, Rabkin Naicker J concluded that the Court has the discretion to order that security be reduced or dispensed with⁴. In that case the Court found that it was unnecessary for the organ of state, who was regulated by the Public Finance Management Act⁵ and Treasury Regulations, to put up security. The Court also held that regarding the circumstances under which the quantum of security may be reduced, this should be determined on a “case to case basis”⁶.
- [16] In *MBS Transport CC v CCMA and Others, Bheka Management Services (Pty) Ltd v Kekana and Others*⁷, in considering whether an employer party should be absolved from furnishing security the Court took into account the financial position of the employer from submissions made in its application. The Court was also of the view that in exercising its discretion it should balance the competing interests of the parties⁸. Further, the Court referred to several decisions of the courts that labour disputes must be resolved and finalised expeditiously⁹.
- [17] As a general principle, in motion proceedings an applicant must

³ (2015) 36 ILJ 2867 (LC) at para 4.4

⁴ Approved in *MBS Transport CC v CCMA and Others, Bheka Management Services (Pty) Ltd v Kekana and Others* (2016) 37 ILJ 684 (LC)

⁵ Act 1 of 1999 (PFMA)

⁶ *Ibid* at para 4.5

⁷ (2016) 37 ILJ 684 (LC)

⁸ *Ibid* at para 24

⁹ *National Education Health and Allied Union v University of Cape Town and others* 2003 (3) SA 1 (CC); (2003) 24 ILJ 95 (CC) para 31, *National Union of Metalworkers of SA and Others v Fry's Metals (Pty) Ltd* 2005 (5) SA 433 (SCA); (2005) 26 ILJ 689 (SCA) para 36

make its case out in its founding affidavit¹⁰. In support of its counter application the respondent contends that the security amount of R244 800.00 which is the equivalent of 24 months' remuneration is unreasonable and not in the interests of justice. The deponent to the respondent's affidavit however does not support this contention with any facts or evidence which would assist me in making a determination on this issue.

[18] The respondent's representative submitted at the hearing of this application that the deponent is the sole director of the respondent which is not a substantial company. Further, that the payment of the statutory security amount would have a detrimental effect on the respondent and would cause debt to the business. The respondent was willing to tender two months' salary in the amount of R 20 000.00 as security. The applicant's representative disputed the submissions made by the respondent's representative stating that the respondent was a large training school in Ekurhuleni and had many assets. The applicant rejected the respondent's tender on the basis that it had only now been made known for the first time at this hearing and was hopelessly inadequate.

[19] Unfortunately, none of the submissions made by the respondent's representative were mentioned in the respondent's founding papers.

[20] The amount of compensation as set out in the arbitration award earns interest from the date of the award at the rate prescribed from time to time in respect of a judgement debt in terms of Section 2 of the Prescribed Rate of Interest Act¹¹. This militates against any prejudice which an employee/applicant may suffer should the

¹⁰ *National Council of Society for the prevention of cruelty to animals v Openshaw* 2008 (5) SA339 (SCA) para 26

¹¹ Act 55 of 1975

respondent delay in finalising the review. Nothing has been placed before me suggesting that should the respondent be unsuccessful in its application to review and set aside the award of the CCMA it would be unable to satisfy the award.

[21] I have already noted that it does not appear that the respondent is using delay tactics in prosecuting the review application.

[22] In these circumstances, in my view the respondent has not made out a case for the security as prescribed by the S 145 (8)(a) of the LRA to be dispensed with or reduced.

Costs

[23] Whether costs should be granted in this Court involves a consideration of law and fairness. I note that in its review application¹², the respondent included a prayer for an order for the respondent to be absolved from making payment of security alternatively fixing a reasonable amount of security. I agree with the submissions of the applicant's representative that this prayer is not appropriate in a review application, as it would have circumvented the very purpose of the requirement of security as set out in Section 145 (7). It appears that the respondent's counter application was only brought as a reaction to the Section 158 (1)(c) application launched by the applicant. The respondent did not proactively approach this Court by way of a separate application for a determination on the issue of security. Also, the respondent's founding affidavit is not substantial and does not set out sufficient facts to support the relief that it seeks.

¹² Annexure "MJVR2" page 25-29 of the bundle

[24] Despite receiving notification from the Registrar on 23 February 2017 and again on 7 June 2017, to file heads of argument, the respondent did not file heads of argument.

[25] Taking into account all these factors I see no reason why the respondent should not be liable for the costs of its counter application.

Order

[26] I make the following order:

26.1 The applicant's application in terms of S 158 (1)(c) is dismissed with no order as to costs.

26.2 With regard to the respondent's counter application the following order is made:

26.2.1 The respondent is ordered to pay security in the amount of R244 800.00 within 10 days of the date of this order.

26.2.2 The enforcement of the arbitration award issued by the CCMA under case number GAEK626-16 on 29 September 2016 is stayed pending the outcome of the review application launched under case number: JR2198-16.

26.2.3 The respondent is ordered to pay the costs of the counter application

G Barrable
Acting Judge of the Labour Court

Appearances:

For the Applicant: Advocate Matome Sehunane
Instructed by: Sehunane Attorneys
For the Respondents: Mr Calie Smit of Smit Attorneys