THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not reportable

Case no: J1779/17

In the matter between:

TWILIGHT CLOTHING MANUFACTURING (PTY) LTD AND 26 OTHERS	**Applicants**
and	
SHERIFF OF THE HIGHER AND LOWER COURTS FOR QWA FREE STATE	**First Respondent**
CCMA	**Second Respondent**
NATIONAL BARGAINING COUNCIL FOR THE CLOTHING MANUFACTURING INDUSTRY NORTHERN CHAMBERS	**Third Respondent**

Heard: 24 August 2017

Delivered: 28 August 2017

Summary: Urgent application to stay writs of execution pending outcome of review application – relief refused

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JUDGMENT

MYBURGH, AJ

Introduction

[1] This is an urgent application to stay the enforcement of writs of execution pending the outcome of an application to review an arbitration award.

[2] The essential background is this.

a) The 27 applicants are employers within the clothing manufacturing sector in Qwa Qwa. They fall within the jurisdiction of the third respondent (the bargaining council), and are members of the Maluti Clothing Manufacturers' Association.

b) During 2016, and further to what appears to have been a single arbitration, separate (compliance) arbitration awards were issued against each of the applicants in terms of which they were found to be in breach of a clause in a collective agreement concluded in the bargaining council relating to the payment of an annual bonus, and ordered to make the relevant payments. The awards vary from between R10 000 and R470 000 per applicant, with 17 of them being for less than R50 000.

c) In November 2016, separate review applications were launched in respect of 24 of the applicants under the same case number – JR2513/16. A review application was not launched in respect of the 25th, 26th and 27th applicants. Only the review application relating to the first applicant is part of the application papers, although it is assumed that the papers in respect of the balance of the relevant applicants are the same. It is claimed that the applicants have "excellent" prospects of success on review. But on the face of it, the prospects of success are not good, as the main complaint appears to be no more than that the applicants could not afford to pay the bonuses, which seems irrelevant to the review. Furthermore, the review application was brought late (although not by long).

d) To date, the record of the arbitration proceedings under review has also not been filed. Further to the exchange of correspondence between the parties after the hearing on 11 August 2017 (see below), the bargaining council has given the applicants until early September 2017 to identify the exact contents of the record that should be filed.

e) Apparently, all the awards were certified by the CCMA and writs of execution thereupon issued.

f) On 21 July 2017, the first respondent (the sheriff) sought to serve and execute the writ at the first applicant, with it thereupon coming to light that he is apparently in possession of similar writs in relation to each of the other applicants.

g) It was in these circumstances that, on 1 August 2017, an urgent application to stay the execution of the writs was launched, with the matter being enrolled for hearing on 11 August 2017. The founding affidavit is deposed to by a director of the first applicant, with supporting affidavits having been filed in respect of 20 of the 26 other applicants – no supporting affidavits have been delivered by the 8th, 13th, 14th, 15th, 20th and 23rd applicants. The founding affidavit says only this about the issue of security in terms of section 145(7) of the LRA: “The applicants are not in a position to file any security or pay these amounts as listed in the arbitration awards as they simply cannot afford to pay them.”

h) On 11 August 2017, I postponed the matter to 24 August 2017, so as to enable the bargaining council to file an answering affidavit and the applicants a replying affidavit.

i) In its answering affidavit, the bargaining council stressed that the applicants have not furnished security. In their replying affidavits, the applicants contend that section 145(7) does not apply in the circumstances of this case, and that, insofar as it does, security should be waived by this court because the furnishing of security "will financially ruin the applicants". There are replying affidavits from the first applicant (who owes R138 000), the seventh applicant (who owes R315 000) and the Maluti Clothing Manufacturers' Association.

Relevant legal principles

[3] In terms of section 145(3) of the LRA, this court may stay the enforcement of an award pending a review. This court's powers under section 145(3) extend to any kind of enforcement of awards, and includes writs issued by this court and writs of enforcement issued by the CCMA and sent to the sheriff for execution.[1]

[4] It is trite law that that this court exercises a discretion as to whether to grant a stay or suspension of execution or enforcement of the award, which discretion must be exercised judicially on the basis that real or substantial justice requires such a stay or suspension, or put differently that an injustice will otherwise be done.[2]

[5] Amongst the factors to be considered in the exercise of this discretion are whether the review application has *prima facie* prospects of success, and whether it has been timeously prosecuted.[3]

[6] Another key factor in the exercise of this discretion are the security requirements of sections 145(7) and (8).[4] As this court put it in *Rustenburg Local Municipality*:[5]

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[1] *Rustenburg Local Municipality v South African Local Government Bargaining Council and Others* (J779/2017) [2017] ZALCJHB 261 (30 June 2017) at para 27.

[2] *Ibid* at para 28.

[3] *Ibid* at para 30.

> "[32] … a proper case must always be made out by the applicant, in seeking to dispense with the requirement of providing security, which would form the basis upon which such a discretion might be exercised. In simple terms, the default position must be that the Labour Court will require security to be provided as prescribed by section 145(7) and (8) 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.
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> [33] Good cause in the context of motivating a departure from the security provisions prescribed in section 145(7) and (8) would involve a proper explanation why this request should be entertained, with particular emphasis on any material prejudice the applicant may suffer if it is not granted this relief. I will illustrate the point by way of an example. A small manufacturing business with 20 employees dismisses 10 employees for group misconduct. A CCMA commissioner then reinstates all these employees. The required security would be 24 months' salary for each of these 10 employees, which would in effect wipe out the entire operating cash flow of the undertaking for several months. This is the kind of prejudice I am referring to. Simply described, the explanation cannot be that it will be hard to set security, but the explanation must be that it would unduly onerous and harmful to be required to set the prescribed security."

Evaluation and analysis

[7] As a point of departure, the application must fail in relation to: (i) the 8th, 13th, 14th, 15th, 20th, and 23rd applicants, who have failed to deliver affidavits in support of the application; and (ii) the 25th, 26th and 27th applicants who have failed to deliver a review application.

[8] In relation to the balance of the applicants, the method followed by the applicants (other than the first applicant) of filing what are *pro forma* affidavits – which lack any real substantive content – in support of the first applicant's founding affidavit, renders it more than questionable whether each applicant

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[4] *Ibid* at para 29.

[5] Fn 1 *supra*.

has made out anything of a case for relief. This is particularly so given that the relief sought in the notice of motion appears to properly relate only to the first applicant – certainly the date of the writ of execution set out in the notice of motion relates only to it. Furthermore, and this relates to all the aforesaid applicants as well as the first applicant, I do not believe that *prima facie* prospects of success on review have been established. It is not enough to baldly allege, as the applicants do, that they have "excellent" prospects of success, without in any way substantiating the allegation. There is then also the issue that the review was brought late (albeit not unduly) and that the record has not been delivered to date – this eight months after the review was launched (albeit that there seems to be some issue between the parties as to the composition of the record). For these reasons alone, I am disinclined to grant the application.

[9] Over and above this, the absence of security is an issue. To my mind, section 145(8) does not stand to be interpreted as meaning that security only needs to be furnished in dismissal cases. The word "compensation" in section 145(8)(b) clearly does not relate only to compensation for an unfair dismissal, as contended for on behalf of the applicants in argument. Read together with section 145(7), which generally provides for the furnishing of security, the term "compensation" should, in my view, be given a wide interpretation so as to include any monetary award; otherwise the purpose of sections 145(7) and (8) will be defeated. Significantly, the arbitration in this matter was conducted in terms of section 33A of the LRA, which regulates the enforcement of collective agreements by bargaining councils. Sub-section (12) thereof provides that the launching of a review by an employer automatically suspends the obligation to pay any fine imposed on it under sub-section (8), but nothing similar is said in relation to monetary compliance awards.

[10] To my mind, security must thus be furnished in this case in order to secure the suspension of the operation of the award – subject to the court exercising its discretion to forego the requirement on good cause shown. As appears from the passages from *Rustenburg Local Municipality* quoted above, in the absence of an applicant having furnished security in terms of sections 147(7)

and (8), or otherwise having convinced this court that there is good cause to waive the requirement, this court will typically be disinclined to stay a writ of execution.

[11] Turning to the affidavits filed of record, to my mind, the bald – and completely unsubstantiated – allegation in the first applicant's founding affidavit (repeated in the replying affidavits) that security is unaffordable in respect of all the applicants is insufficient to secure the waiver of security by this court. No financial statements – which the replying affidavits recorded would be handed up to court in respect of all the applicants – were produced at the hearing. Furthermore, many of the amounts are not particularly substantial (17 being below R50 000). In short, a proper case to forego security has not been made out, with this being an additional basis not to grant a stay of the writs of execution in relation to all the applicants.

[12] The position in relation to the seventh applicant is different. Although a proper case was not made out on its behalf in the founding papers, it delivered a replying affidavit, in which it seeks to substantiate why it cannot afford to put up security, and attaches financial statements in an attempt to support this contention. However, on first principle, it is impermissible to make out a case in reply. In any event, the fact that the seventh respondent suffered a loss of R125 000 as at the end of the 2017 financial year (28 February 2017) does not, in itself, establish that it cannot now afford to put up the required security.

[13] At the hearing of the matter, I invited Mr Ramdaw (who appeared for the applicants) to reconsider whether the applicants are prepared to furnish security – this on the basis that it might well be a material consideration in my determination of the application. In response, he stood by the pleaded position.

[14] In the premises, the application is dismissed with costs, which shall include the cost of 11 August 2017.

Myburgh, AJ

Acting Judge of the Labour Court of South Africa

Appearances

For the applicants: A Ramdaw of Roy Ramdaw & Associates Inc

For the third respondent: J Apfel of Joshua Apfel Attorneys