



IN THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not Reportable
CASE No: J2098/18

In the matter between:

CITY OF TSHWANE METROPOLITAN MUNICIPALITY

Applicant

and

E MAREE N.O

First Respondent

SEKGALA AND OTHERS [2003 GROUP] AND MACHETE

AND OTHERS [2012 GROUP]

Second Respondent

SHERIFF OF THE HIGH COURT FOR THE DISTRICT

OF PRETORIA (FREDDY BATT N.O)

Third Respondent

Heard: 28 June 2018

Delivered: 29 June 2018

Summary: Urgent application-section 145(7) and (8) of the LRA-

JUDGMENT

MABASO, AJ

- [1] The applicant approached this Court, on an urgent basis, seeking an order, *inter alia*, that: the writ of execution/enforcement of award dated 8 May 2018 issued in favour of the second respondents (the employees) be declared to have been unlawfully and irregularly issued and therefore be set aside, that it has no force and effect; that it be exempted from furnishing security¹ in terms of the Labour Relations Act² and/or alternatively be ordered to pay an amount of security (if any) that is sufficient in the Court's discretion.³ This application is opposed by the employees.

The parties

- [2] The applicant is the City of Tshwane Metropolitan Municipality (the municipality), the first respondent is Commissioner Maree NO (the commissioner), the Second Respondents are the employees of the applicant. The fourth respondent is the Sheriff of the High Court. The Fourth Respondent is the South African Local Government Bargaining Council (the Council).
- [3] Some of the points that have been raised in this case are the following,
- 3.1 The employees assert that, as the founding affidavit is commissioned by an administrative clerk in the office of the Director of Public Prosecutions, “*dispute that an admin clerk has delegation of authority to commission and deny that an admin clerk has a Commissioner of Oath authority in terms of the Regulations...*”.
- 3.2 The employees further contend that the review application has no merit as it has lapsed and during argument they submitted that since the arbitration award has been certified, it cannot be reviewed as it is now “an order of court” in terms of section 143 of the LRA.

¹ Section 145(7) and (8) of the LRA.

² Act 66 of 1995 (the LRA)

³ Notice of motion.

- 3.3 That the provisions of section 145(7) and (8) do not apply to review applications which are not about an arbitration award that orders neither reinstatement nor compensation .

Brief Background

[4] I deem it necessary to sketch out the history of this matter, before dealing with the preliminary points as raised by the parties, as I do so below.

[5] The employees are employed by the applicant in its Emergency Services Department which comprises of two groups. The employees declared a dispute, to the Council, relating to the interpretation and application of the collective agreement. The Commissioner was appointed to arbitrate the dispute, whereafter, on 20 August 2017 she issued the arbitration award wherein she concluded that:

“...[The applicant], must comply with the collective agreement namely ‘the implementation of an interim uniform salary grading scheme for emergency medical care and ambulance services employees in the health and social development department’ signed on 9 June 2010.

“[The applicant] is therefore ordered to retrospectively upgrade the applicants as listed on pages 17 and 104 and 105 from the date of the apartments retrospectively on 1 January 2003 and 1 January 2012 and implement the salary adjustments from these dates.

It is further ordered that the interest is paid on the outstanding amounts from the date of this award in terms of section 2 of the Prescribed Rate of Interest Act 55 of 1975.”

[6] Following the issuing of the award, the applicant proceeded to bring a rescission application. However, the rescission application was unsuccessful, the rescission ruling was issued on or about 17 September 2017. This unfavourable outcome necessitated the applicant to lodge the pending review application in this Court on or about 9 March 2017 under case number JR 2107/17. The Commissioner and the Council failed to deliver the records as required by Rule 7A of the Rules of the Labour Court. The applicant

proceeded to bring an application to compel them to deliver the records and the latter application was granted on 20 February 2018.

- [7] At the beginning of this month the applicant was served with “enforcement of award” (confirming that the arbitration award has been certified in terms of section 143(3) of the LRA). The provisions of ss 143 (1)and(3) of the LRA provide that once an arbitration award has been certified it is final and binding and may be enforced as if it were an order of the Labour Court, in respect of which a writ has been issued. Following the certification of the award, the sheriff was directed to attach and take into execution the movable goods of the applicant and realised by public auction, the sum of R12 524 642.00.
- [8] The deponent to the founding affidavit, Mr Sithole, following the visit by the sheriff proceeded to inquire with the sheriff, as according to the applicant, *“the arbitration award was not quantified and no computation was provided as to the calculation of R12 524 642.00. On 13 June 2018, the sheriff returned to the applicant’s offices and provided [Mr Sithole] with a copy of certain calculations that had been made by [the employees]”*.
- [9] Upon receipt of the “enforcement of the award” from the sheriff, the applicant proceeded to communicate with the employees’ attorneys advising them that according to it, the award had not been quantified, that they were not a party to any computation of the calculations therefore it was of the view that the section 143(3) process was irregular and/or incorrect and/or fatally flawed, and that it therefore cannot be relied upon.
- [10] The applicant then asked for an undertaking from the employees' attorneys to hold in abeyance any further executions steps, however this request received no response from the attorneys, and the sheriff had indicated that the only way of not proceeding with the enforcement is when an urgent application is brought, hence this application is before this Court.

Is the affidavit defective?

- [11] In the answering affidavit, the employees through their attorney who is a deponent thereto, contend that the application is defective as it was

commissioned by an admin clerk allegedly in the office of the Director of Public Prosecutions. They dispute that an admin clerk has the delegation of authority to commission and they further deny that the admin clerk has commission of authority in terms of regulations.⁴ Taking into account what the employees have stated, the answer to this question is situated in section 6 of the Justices of Peace and Commissioners of Oaths Act⁵ read with Designation of the Commissioners of Oath, which among other things provides in its schedule that a public servant is classified as a commissioner of oaths. The public servant is defined as:

- “(a) Officers in the Administrative, Professional, Clerical, Technical or General A and General B Divisions of the Public Service occupying a post with a salary scale the minimum notch of which is equivalent to or higher than the minimum notch of salary level 2 applicable in the Public Service.
- (b) Employees held against posts in the Administrative, Professional, Clerical, Technical or General A and General B Divisions of the Public Service if the minimum notch of the salary scale applicable to such posts is equivalent to or higher than the minimum notch of salary level 2 applicable in the Public Service.”

Based on the above, the submissions that the application is defective cannot succeed.

Lapsed review

[12] The employees assert that the review application, which the applicant has brought, asking this Court to stay the enforcement of the award pending its finalisation, has lapsed. The employees' submission is two-fold, namely: (a) that it is more than 8 months since the review was delivered and the applicant has failed to deliver the records of the arbitration, and that there is no application for extension of the period in which to serve and file the records.

⁴

⁵ Act 16 of 1963.

- [13] The review application was delivered in October 2017, the Commissioner and the Council failed to deliver the records of the arbitration which led to the applicant approaching this Court and on 20 February 2018 this Court issued a court order directing the Commissioner and the Council to deliver the arbitration records within 30 days. Clearly this process happened within seven months from the date of the lodging of the review application. I therefore conclude that there is no substance to the employees' argument in respect of this point.⁶
- [14] The other point to be dealt with is point (b) wherein the employees have pleaded in paragraphs 9.4, 9.5 and 9.6 of their answering affidavit, that once an arbitration award has been certified it is final and binding and may be enforced as if it was an order of this court, which is the current position of law. However, during argument the employees counsel argued that once an arbitration award has been certified in terms of the provisions of section 143 the review process is no longer possible because such an award is now "an order of court" and he said the authority for this is *Department of education v Souders*⁷ and *Department of Home Affairs v Public Service Co-ordinating Bargaining Council and Others*.⁸
- [15] I disagree with this submission. The *Home Affairs* judgment, in paragraph 3 the court summarised the judgment that had been issued in the matter before it, where a certified arbitration award was further made an order of court before contempt application could be instituted, and nowhere in that judgment has Van Niekerk J expressly or impliedly made a statement that once an arbitration award has been certified it becomes a court order and the review becomes moot because of the certification of such an award.
- [16] It is further explained in the *Home Affairs* judgment that once an arbitration award has been made an order of the court, in terms of section 158(1)(c) it is no longer reviewable but can be appealable, and any pending review application against such an award becomes "moot", however, if an arbitration

⁶ See paras 11.2.1 to 11.2.5, and 11.2.7 practice Manual.

⁷ [2015] 12 BLLR 1187 (LAC) at para 32

⁸ (2018) 39 ILJ 823 (LC) at para 3

award has been certified that does not make a pending review “moot” and such an award will still be reviewable if the review thereof has not been disposed of.

- [17] If a party armed with a certified award decides to bring an application in terms of section 158(1)(c) ,to make the same certified award an order of court and the Labour Court grants such application, then its status would change to be a court order which will automatically affect any pending review against that award and before the review could be proceeded with, before this court, such section 158(1)(c) court order may either be rescinded and/or appealed against. Based on the above, the submission that the arbitration award has lapsed fails, because *in casu* there is no evidence that the certified award has been made an order of court.

Exemption from furnishing security?

- [18] The applicant argued that it should be exempted from furnishing security , as it is of the view that it is not required to provide such. The applicant’s binary point is that (a) its budget and financial management is governed by PFMA and Treasury regulations, (b) alternatively that security for costs only relates to instances of reinstatement or compensation orders which *in casu* it submits that it is not the case. In respect of the first component of this point, the applicant relies on the authority of *Free State Gambling Board v CCMA and others*⁹. The applicant also acknowledged, in argument, that this Court in the matter of *Rustenburg local municipality v South African local government bargaining council and others*¹⁰ differ with the *Free State gambling board* matter.
- [19] I have taken into account the provisions of section 210 of the LRA, which reads thus,

‘210. Application of Act when in conflict with other laws.-If any conflict, relating to the matters dealt with in this Act, arises between this Act and the provisions of

⁹ (2015) 36 ILJ 2867 (LC), at paras 5 and 6.

¹⁰ [2017] 11 BLLR 1161 (LC).

any other law save the Constitution or any Act expressly amending this Act, the provisions of this Act will prevail.’¹¹

[20] I, therefore, share the same views as expressed in the *Rustenburg* matter in that municipalities are not exempted from furnishing security. Under these circumstances, the submission that the applicant as an organ of state is exempted from providing security because it is governed by the PFMA fails.

[21] In respect of the second component of this point (the section 145 (8) point), the applicant asserts that the arbitration award relates to salary grading not reinstatement or compensation. In dealing with this point, one has to take into account the following factors.

[22] Section 145 reads as follows

‘(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’

[23] The phrase arbitration award is not defined in the LRA. It is common cause between the parties that an arbitration award was issued and was issued in terms of the provisions of the LRA.

[24] In order to decide whether or not the provisions of subsection 145(8)(a)/(b) of the LRA are applicable, one has to be guided by what Wallis J rehearsed in *Natal Joint Municipal Pension Fund v Endumeni Municipality*¹² where he said,

¹¹ See also *City Power (Pty) Ltd v Grinpal Energy Management Services (Pty) Ltd and Others* (CCT133/14) [2015] ZACC 8; 2015 (6) BCLR 660 (CC).

‘An interpretation will not be given that leads to impractical, unbusinesslike or oppressive consequences or that will stultify the broader operation of the legislation”

and

‘The present state of the law can be expressed as follows: interpretation is the process of attributing meaning to the words used in a document, be it legislation, some other statutory instrument, or contract, **having regard to the context provided by reading the particular provision or provisions in the light of the document as a whole and the circumstances attendant upon its coming into existence.** Whatever the nature of the document, consideration must be given to the language used in the light of the ordinary rules of grammar and syntax; the context in which the provision appears; the apparent purpose to which it is directed and the material known to those responsible for its production. Where more than one meaning is possible each possibility must be weighed in the light of all these factors. The process is objective, not subjective. A sensible meaning is to be preferred to one that leads to insensible or unbusinesslike results or undermines the apparent purpose of the document.... 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....’

- [25] As the LRA is legislation based on the constitution, therefore, its provisions should provide for the speedy resolution of disputes in the workplace.¹³ It is always important to look at the explanatory memorandum of the LRA to understand why certain provisions had to be introduced therein. For example the memorandum of object in respect of the amendment of section 145 of the LRA provides that:

“this section is amended by introducing certain measures intended to reduce the number of review applications that are brought to frustrate or delay

¹² 2012 (4) SA 593 (SCA), paras 26 and 32.

¹³

compliance with the arbitration awards, and to speed up the finalisation of applications brought to the Labour Court to review arbitration awards".¹⁴

[26] Taking into account what I have mentioned above, it is now essential to look at the provisions of section 145(8) of the LRA in that nowhere in that section is it stated that the only arbitration award which can be stayed by security for costs and/ or by an application in terms of section 145(3) of the LRA is one where reinstatement or re-employment or compensation has been ordered. In line with *Endumeni's* matter and the explanatory memorandum cited above, I am of the view that it was not the intention of the legislature to limit the security for costs to arbitration award which called for reinstatement or re-employment or compensation (which relates to dismissals only), but where an award which is a subject of the review in terms of the provisions of section 145 relates to salary grading and a commissioner directed an employer to adjust salary, which I opine that can be classified as compensation the provisions of subsection 145(7), (8) apply.

Urgency

[27] The determining factor here is that the arbitration award has been certified in terms of section 143(1) of the LRA and the sheriff has already been instructed and has taken steps to enforce the certified award and he advised the applicant that the only way to stop the process would be by approaching this Court. I have also taken into account the amount of money that is involved in this matter and what the applicant has said from paragraph 5.2.2.1 to 5.2.2.3 of the founding affidavit under the circumstances I conclude that the requirements of the urgency have been met.

Whether the enforcement award is unlawful and irregular issued?

[28] The applicant asserts *inter alia*, that the execution /certification of the award is irregular and/or flawed in that the arbitration award has not been quantified and the individual employees are not permitted to quantify same unilaterally

¹⁴ For further discussion in this, see *Chillibush Communications (Pty) Ltd v Gericke and others* [2010] JOL 24799 (LC).

and proceed to commence with steps of issuing the writ of execution. The applicant further submits that the calculations are incorrect.

[29] Mr Christoffel Johannes Geldenhuys, an attorney for the employees is the deponent to their answering affidavit, and asserts that: *“having dealt with the matter from the onset when the referral to the South African local government bargaining council was made”*, the contents of the answering affidavit are within his personal knowledge and are both true and correct. The arbitration was set down for 3 August 2017, he represented the employees, he introduced a bundle of documents which was subsequently supplemented by the applicant which had been represented by Advocate Martin Steyn, and it was accepted as common cause and the evidence on which the commissioner was called to interpret and apply the collective agreement.

[30] Mr Geldenhuys disputes that the quantification was unilaterally done by the applicant. The calculations were done by the applicant's executive director legal counsel, in the group legal services department, these calculations were accepted by the employees and included in the bundle of documents used before the Commissioner. It is further asserted by Mr Geldenhuys that based on the same calculations the applicant has already paid

“ Tsomo and 10 others an amount of R1 1 99 780.00. Furthermore, paid the Makgatholela group and others ...based on the same calculations, although in instrument...”

[31] The applicant in its replying affidavit, responding to what is stated above regarding the evidence of Mr Geldenhuys says *“ the contents of the disputed and I reiterate what is stated in the founding affidavit in this regard”*. It has to be noted that the deponent to the replying affidavit is Mr Sithole and no confirmatory affidavit by Advocate Steyn whom it is asserted that he was involved and was involved in the submittal of the calculations documents, was filed with the Court. Under the circumstances, the *Plascon-Evans* principle¹⁵ applies, in this regard, I accept the evidence of Mr Geldenhuys.

¹⁵ *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd* 1984 (3) SA 623 (A), 634H-I.

[32] The fact that the arbitration award does not state the amount of R12 524 642.00 does not mean that such amount is incorrect taking into account that it was part of the bundle of documents that were common cause between the parties during the arbitration. Looking at the LRA form 7.18A under part 4(b) it refers to “B” “C” and “D” which such documents deal with calculations, under those circumstances it is the view of this Court that the proper quantification was submitted to the Council. I therefore conclude that prayer 3 of the notice of motion cannot succeed.

[33] the applicant in its founding affidavit has submitted that the grant of the attachment and subsequent sale of its assets will result in it being unable to carry out its municipal duties and that service delivery would be adversely affected. I am of the view that an amount of more than R12 million would be too excessive as there is a review application pending. Under those circumstances, I conclude that on a balance of interests of both parties, an amount equivalent to 25% of R12 524 642.00 should be furnished as security.

[34] I, therefore, conclude that the following order will be proper:

Order:

1. The provisions of the Rules, relating to time and manner of service referred to therein are dispensed with, and the matter is heard as one of urgency in terms of Rule 8 of the Rules of this Court.
2. The Applicant to pay R3.131 160.50 into the trust account of the Second Respondents' attorneys, within 20 days of the date of this order.
3. An application to declare the certified arbitration award unlawful and issued irregularly and to have no force and effect is dismissed.
4. The certified arbitration award issued by the second respondent is stayed pending the finalisation of the review application, however,

should the applicant fail to pay the amount as specified in (2) above, the certified arbitration award may be executed.

5. No order as to costs.

S Mabaso
Acting Judge of the Labour Court of South Africa

Appearances

For the Applicant: Advocate X Mofokeng
Instructed by: Gildenhuys Malatji Inc.

For the Second Respondents: Advocate GL Van Der Westhuizen
Instructed by : Geldenhuys CJ@ Law Inc.