



IN THE LABOUR COURT OF SOUTH AFRICA

(HELD IN DURBAN)

Case no: D 24/25

Not Reportable

In the matter between:

THE MEMBER OF THE EXECUTIVE COUNCIL

DEPARTMENT OF EDUCATION, KZN

First Applicant

THE HEAD OF THE DEPARTMENT

DEPARTMENT OF EDUCATION, KZN

Second Applicant

and

MAVIS NOMATHEMBA ZWANE

First Respondent

THE EDUCATION LABOUR RELATIONS COUNCIL

Second Respondent

ARBITRATOR/COMMISSIONER PROTAS CELE

Third Respondent

Heard: 28 January 2025

Judgment delivered: 31 January 2025

JUDGMENT

WHITCHER J

- [1] The applicants applied to this court on an urgent basis for an order in the following terms:
- (i) The enforcement of the arbitration award issued in the [second respondent] in Case number ELR171-23/24KZN on 1 September 2024, be stayed pending the finalisation of the review application.
 - (ii) That the applicants be absolved from furnishing security pending the finalisation of the review.
- [2] Counsel for the applicants contended that an application for a stay of enforcement of an arbitration award¹ operates independently of the security provisions under section 145(7) and (8). In other words, the Labour Court has the discretion to grant the stay without invoking section 145(7) and (8).
- [3] In support of these contentions, reliance was placed on the judgment in *Emalahleni Local Municipality v Phooko NO and Others*², which was followed by the same judge in *Marquis Finance v Quinn and Another*.³
- [4] The Labour Appeal Court in *Italsafaris CC t/a Viva Safaris v NUFBWSAWU and Others*,⁴ roundly rejected the above construction of the law.
- [5] The LAC held as follows:

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...As pointed out in *City of Johannesburg*⁵, 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. Significantly, it was

¹ Which ordered reinstatement.

² (2021) 42 ILJ 2196 (LC).

³ [2023] JOL 60127 (LC).

⁴ (2024) 45 ILJ 2004 (LAC).

⁵ *City of Johannesburg v SA Municipal Workers Union on behalf of Monareng and another* (2019) 40 ILJ 1753 (LAC).

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.”

- [6] The LAC further held that the construction of the law in *Emalahleni* and followed in *Quinn* also negates the purpose or the mischief the provisions of section 145(7) and (8) were intended to cure. The court noted that:

In this instance, the intents of section 145(7) and (8) are plainly articulated in the the memorandum⁶ to the Labour Relations Amendment Act⁷ 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 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.’

- [7] And that:

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.⁸ 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.

⁶ Memorandum of Objects, Labour Relations Amendment Bill, 2012.

⁷ Act 6 of 2014.

⁸ 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.

- [8] Accordingly, to stay enforcement of an award⁹ under a pending review brought under section 145, the applicants 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. There is only one application – a 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 the exercise of discretion to absolve the furnishing of security or reduce it, the default position in terms of section 145(7) shall prevail.
- [9] The issue before me is thus whether the applicants have made 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.
- [10] In my view they have not.
- [11] The Department avers that it will suffer severe prejudice if the implementation of the award is not stayed, and it is required to furnish security. However, there is no explanation whatsoever as to how and why such severe prejudice would be suffered. This omission, as submitted by counsel for the first respondent, is fatal to this application.
- [12] The Department further avers that, “like any other government department, [it] has no budget for security. Moreover, the “courts have held that where the budget and financial management of a party is governed by the Public Finance Management Act, 1999, the object of providing security is satisfied since the government will have sufficient funds to pay the employees(s) in the event of being successful in the review application.”
- [13] I was not provided with such authority which particularly held that.
- [14] Regarding this very issue, the LAC in *Italsafaris* endorsed the Labour Court’s decision in *National Department of Health v Pardesi and another*¹⁰ that government departments to whom Public Finance Management Act, 1999 is applicable, are not automatically exempted from furnishing security. Like all

⁹ Which ordered reinstatement, re-employment or compensation.

¹⁰ [2016] ZALCJHB 492.

employers, they must show good cause as to why they should be absolved from furnishing security.

[15] In *Pardesi* the Court stated:

The applicant's counsel submitted that the applicant was not required to furnish security and relied on *Free State Gambling & Liquor Authority v Commission for Conciliation, Mediation and Arbitration & others; Free State Liquor & Gambling Authority v Motake* (2015) 36 I LJ 2867 (LC) to contend that it was unnecessary for the applicant to provide security for costs.

It is not necessary for me to express a view on the correctness or otherwise of the decision in *Free State Gambling*. What the court made clear is that where an applicant's budget and financial management are governed by the PFMA and Treasury regulations and that the object of providing security is satisfied thereby, it remains necessary to make what the court referred to as 'duly authorised' averments to this effect. In the present instance, the applicant makes no averments regarding any exemption that it might enjoy from the obligation to provide security. The applicant in the *Free State Gambling* case sought exemption from furnishing security on the basis that sections 145(7) and (8) were in conflict with s 66 of the PFMA. The *Free State Gambling* judgement is not authority for the proposition that all departments of state or other entities subject to the PFMA do not have to furnish security.

[16] In my view, other than a general reliance on the applicability of the PFMA and outdated case law, the applicants have not made out a case as to why they should be exempted from furnishing security.

[17] Finally, bearing in mind the purpose of section 145(7) and (8) (*supra*), nothing was put forward to show the applicants are serious about their review application – that it is being prosecuted with the urgency and time periods emphasised in the Rules. Such information in my view was important given that the review was filed out of time and a condonation application for same was filed two months later.

[18] Ultimately, there are no facts before this court that enable it to exercise its discretion against ordering that security should not be furnished. Accordingly, the default position must apply and the provision of section 145(7) must prevail.

[19] Regarding costs, the court has a broad discretion in terms of s 162 to make orders for costs according to the requirements of the law and fairness. The first

respondent has sought costs on a punitive scale. I wish to make some observations in this regard.

- [20] Stickly speaking, this urgent application fell to be struck from the roll for self-created urgency, as submitted by the first respondent.¹¹
- [21] The application, set down for 29 January 2025, was served on the first respondent on Thursday, 23 January at 2.45 with a directive that if she wished to oppose it she had to file her answering affidavit by 2pm, Monday, 27 January.
- [22] These time periods were set in circumstances where there is evidence that as early September 2024, the first respondent indicated a clear intention to enforce the award.
- [23] The evidence further demonstrates that as early as 20 September 2024, the first respondent's attorney via written communication pertinently reminded the Department of the need to furnish security. Read with due consideration, it also indirectly warned the Department that if they did not intend to file security, an application to absolve it from furnishing security was needed. No such application was filed with the review application.
- [24] On 9 January 2025, the Department was once again reminded of the need to furnish security or (impliedly) file the necessary application, but still no application was filed until 23 January 2025, and when it was filed no reason whatsoever for the delay was offered in the founding affidavit.
- [25] In the circumstances, there is no reason why the first respondent who is unemployed should be denied her costs.

Order

1. The application is dismissed with costs.



Benita Whitcher

Judge of the Labour Court of South Africa

¹¹ But, preferred the matter to be decided on the merits.

APPEARANCES:

For the Applicants: Adv. M Mpahlwa, instructed by State Attorney, KwaZulu-Natal

For the First Respondent: Mr B Mgaga, from Garlicke & Bousfield Inc

Labour Court