IN THE LABOUR COURT OF SOUTH AFRICA

CASE NO: D 735/21

In the matter between:

THE MEC, DEPARTMENT OF ECONOMIC DEVELOPMENT AND TOURISM **APPLICANT**

AND

LG NAIDU **FIRST RESPONDENT**

GENERAL PUBLIC SERVICE SECTOR BARGAINING COUNCIL **SECOND RESPONDENT**

P JAIRAJH **THIRD RESPONDENT**

Heard: **3 December 2021**

Delivered: **This judgment was handed down electronically by circulation to the parties' legal representatives by email, publication on the Labour Court's website and released to SAFLII. The date and time of the hand-down is deemed to be on 10 December 2021 at 10h00.**

JUDGMENT

Hiralall AJ

Introduction

[1] This is an application brought as one of urgency in which the applicant seeks an order staying the enforcement of the award issued by the third respondent under case number GPBC 674/2016 in the General Public Service Sector Bargaining Council (the "GPSSBC"), as well as an order absolving it from furnishing security as contemplated in section 145(7) and (8) of the Labour Relations Act, pending the finalization of a review application launched in this court under case number D735/21. The application is opposed by the first respondent.

Background

[2] The background facts to this application are briefly as follows:

2.1 The first respondent, who had been in the applicant's employ for 34 years, was dismissed from employment on allegations of misconduct. He referred an unfair dismissal dispute to the second respondent. Upon finalization of a protracted arbitration hearing, the dismissal of the first respondent was declared to be substantively and procedurally unfair, and he was awarded retrospective reinstatement without any loss of benefits to his previous position as HR Manager at the Department of Economic Development and Tourism. The applicant was also ordered to pay to the third respondent back pay in the sum of R4 320 630.09 plus interest prescribed at the legal rate from 1 August 2021 to date of payment.

2.2 It is common cause that the applicant did not comply with the arbitration award.

2.3 It launched a review application in this court on 24 August 2021. The first respondent's attorneys filed a notice of opposition on 2 September 2021.

2.4 In the meantime, the first respondent had applied to have the award certified and it was so certified on 7 September 2021.

2.5 On 25 October 2021, the second respondent issued an enforcement of the award and on 9 November 2021 the Sheriff of the High Court served the award on the applicant.

2.6 The first respondent refused to stay the enforcement of the award pending the finalisation of the review application and called for a bond of security to be furnished for the enforcement of the award to be stayed.

Evaluation

[3] I set out below briefly the legal position relating to the stay of enforcement of arbitration awards and the furnishing of security in terms of s145(3), and s145(7) and (8), respectively where public sector employers are concerned.

[4] The Labour Appeal Court in *City of Johannesburg v SAMWU obo Monareng and another*[1], has settled the question whether public sector employers that are regulated by the PFMA or the MFMA are automatically absolved from providing security on the

[1] (JA120/2017) [2019] ZALAC 54; (2019) 40 ILJ 1753 (LAC) (20 March 2019)

stay of enforcement of arbitration awards pending the outcome of a review application. The court stated as follows at paragraph 17 of the judgment:

'[17] … [E]mployers in the public sector that are regulated by the PFMA or the MFMA are not automatically absolved from providing security on the stay of the enforcement of an arbitration award pending the decision of the Labour Court on review. The general rule is that an employer is obliged to provide security in accordance with section 145(8) of the LRA unless the Labour Court orders otherwise. Section 145(8) confers upon the Labour Court a discretion that it may exercise in favour of, either dispensing altogether with the payment of security or, reducing the amount of security required. *However, before the Labour Court exercises its discretion under section 145(8), the employer seeking to dispense with the requirement to provide security for the suspension of the enforcement of the arbitration award, must show cause for why it should not do so.*' (my emphasis)

[5] The court also stated that the import of s 145(3) read with section 145(7) and (8) is that where an applicant in a review application furnishes security to the Labour Court in accordance with section 145(8) of the LRA, it need not make an application in terms of section 145(3) of the LRA to stay the enforcement of the arbitration award as the operation of the arbitration award is automatically suspended pending the decision in the review application. However, where the employer seeks to be absolved from providing security in terms of the Act, it must make an application to the court to stay the enforcement of the award and make out a proper case for the stay as well for dispensing with the provision of security[2].

[2] *City of Johannesburg*, paragraph 7 and 8

[6] In *Emalahleni Local Municipality v Moloko Ephraim Phooko and Others*[3], referring to the judgment in *Gois v Van Zyl*[4], the Labour Court reiterated the general principles for the granting of an application to stay:

> '1. A Court will grant a stay of execution where real and substantial justice requires it or where injustice would otherwise result.
>
> 2. Since the Court will be guided by factors applicable to interim interdicts, the Court must be satisfied that:
>
> (a) The applicant has a well-grounded apprehension that execution is taking place at the instance of the respondent;
>
> (b) Irreparable harm will result if the execution is not stayed and the applicant ultimately succeeds in establishing a clear right;
>
> (c) Irreparable harm will invariably result if there is a possibility that the underlying causa (arbitration award) may ultimately be removed, i.e. where the underlying *causa* is the subject-matter of an ongoing dispute between the parties;
>
> (d) The court is not concerned with the merits of the underlying dispute – *the sole enquiry is simply whether the causa is in dispute.'*

[7] It appears that a court considering whether an applicant should be absolved from providing security as in the present case must, following a consideration of the above general principles, consider the following further factors as enunciated in *City of Johannesburg* [5]:

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[3] (396 of 2021) [2021] ZALCJHB 61 (05 May 2021)
[4] *Tony Gois t/a Shakespeare's Pub v Van Zyl*, [2003] JOL 11875 (LC) at [37]
[5] *City of Johannesburg,* paragraphs 18-20

- the particular circumstances of the case as well as considerations of equity and fairness to both the applicant and the employee;
- whether the applicant has assets of a sufficient value to meet its obligations should the arbitration award be upheld by the Labour Court on review, the principal concern being that the employee should not be left unprotected if the Labour Court decides the review application in his or her favour;
- prejudice to be suffered by the applicant.

[8] I proceed to consider the application in line with the above.

Urgency

[9] It is common cause that following the issue of the award in the first respondent's favour, the applicant launched a review application in this court on 24 August 2021. It is not in dispute that the first respondent has in the meantime had the award certified by the second respondent on 7th September 2021 and that the sheriff of the High Court served the writ on the applicant on 9 November 2021. The court accepts that in terms of imminent execution the matter is urgent.

Stay of enforcement of the award

[10] It is not in dispute that the first respondent has set in motion the process of execution which it was entitled to do.

[11] There is also, however, a pending review application before this court to which the applicant has an automatic right.

[12] The award is for retrospective reinstatement and back pay quantified in the amount of R4 320 630.09, plus interest.

[13] According to the applicant, if the arbitration award is finally set aside on review but the applicant is forced in the interim to make monetary payment to the first respondent, irreparable harm will result if the current relief sought is not granted.

[14] I cannot fault this averment.

[15] The first respondent denies the above averment. He contends that there are concerns regarding the applicant's financial affairs as pointed out by the Auditor General, that the department continues to litigate incurring expenses where there are no prospects of success, and it would appear that this matter is being dragged unnecessarily to his prejudice seeing that almost five years have gone past since he was dismissed. Furthermore, he was charged with allegations that were at least two years old notwithstanding that he had 34 year's service with the department and the arbitrator found him not guilty of the allegations.

[16] For a stay, the applicant is required to show that 'irreparable harm will result if the execution is not stayed and the applicant ultimately succeeds in establishing a clear right', and that 'irreparable harm will invariably result if there is a possibility that the underlying causa, being the arbitration award, may be ultimately removed, i.e. where the underlying *causa* is the subject-matter of an ongoing dispute between the parties'. In other words, if the stay is not granted and the first respondent executes on the writ, the applicant has no protection if it is later successful in the review application and the first respondent is unable to repay the amount.

[17] Further, at this point of the enquiry, the 'court is not concerned with the merits of the underlying dispute – *the sole enquiry is simply whether the causa is in dispute.'* The review application was filed timeously and as matters stand, despite the first respondent's contention that the record was only applied for on 17 November 2021, the applicant has until at least 24 December to file the record. If the applicant does not file the record timeously, the review application will be deemed to be withdrawn, which according to *Emalahleni*[6] will entitle the first respondent to execute without any further ado.

[6] *Emalahleni* para 19

[18] Having regard to the facts presented, I am satisfied that not staying the enforcement of the award will result in irreparable harm should the applicant later be successful in the review application. I find that the applicant has made out a case for a stay of the enforcement of the award.

Furnishing of security

[19] A stay of enforcement of an award does not mean that an applicant will automatically not be required to furnish security.

[20] The applicant has to show cause for an order in its favour.

[21] In considering the particular circumstances of the case as well as considerations of equity and fairness to both the applicant and the employee, as the court is enjoined to do, the following factors are taken into account:

21.1 the first respondent was dismissed some five years ago;

21.2 the award of the bargaining council was issued during July 2021;

21.3 there is a review application pending;

21.4 the review application is opposed;

21.5 the applicant has an automatic right to apply for a review of the award;

21.6 the review application is being prosecuted within the time frames.

21. The further consideration is whether the applicant has assets of a sufficient value to meet its obligations should the arbitration award be upheld by the Labour Court on

review, the principal concern being that the employee should not be left unprotected if the Labour Court decides the review application in his or her favour.

22. According to the applicant, its financial affairs are strictly regulated by the provisions of the PFMA and the National Treasury regulations, the provision of public funds for the purpose of security is not an expenditure contemplated in that legislation or in the administrative processes of the applicant, and it would be unnecessarily onerous to require the applicant to furnish security. The purpose of putting up security is to ensure that review proceedings are not instituted as a delaying tactic or a potential means by which a party can manipulate its affairs to avoid payment of amounts owing. It was submitted that this does not apply to a government department such as the applicant and there was no question that any monies legally due to the first respondent would be paid to him in the event that the review application was ultimately unsuccessful.

23. The first respondent denies the above averments. He contends that there are concerns regarding the applicant's financial affairs as pointed out by the Auditor General, that the department continues to litigate incurring expenses where there are no prospects of success, and it would appear that this matter is being dragged unnecessarily to his prejudice seeing that almost five years have gone past since he was dismissed. Furthermore, he was charged with allegations that were at least two years old notwithstanding that he had 34 year's service with the department and the arbitrator found him not guilty of the allegations.

24. The first respondent referred to a news report stating that the EDTEA received an unqualified AG report with findings and concerns raised regarding fruitless, wasteful and irregular expenditure within the department in some of the entities under its control. The EDTEA incurred R55.8 million in irregular expenditure up from R13 million in 2018/ 2019 which was related to expenditure occurred in the prior years due to proper procurement processes not being followed. Fruitless and wasteful expenditure to the amount of R839 000.00 was also reported.

25. The applicant's response was that the first respondent's contention was disingenuous. As a former senior executive of the department, he was well aware of the extent of its budget and that the figures disclosed in the newspaper article relating to expenditure not in terms of proper procurement processes were negligible in relation to the departmental budget. The department has a total budget for the 2021/ 2022 financial year in the sum of R 3 341 676 billion and an allocation to 12 public entities in the amount of R2 184 573 000. These amounts appeared in, and are freely available on, the departmental website.

26. it was submitted by Mr Schumann that the amount reflected as irregular expenditure in the article, was infinitesimally small compared to the applicant's total budget, and that the applicant had the funds to satisfy the award.

27. On this issue of whether the applicant should be absolved from providing security, the court in *Emalahleni*[7] stated as follows:

' [21] … I am satisfied that the applicant has made a case for being absolved from furnishing security. *City of Johannesburg* tells us that the onus lies with an applicant who must show that it has assets of a sufficient value to meet its obligations should the arbitration award be upheld by the Labour Court on review. The LAC did not consider prejudice to an employer as being decisive. It considers it to be one factor but it is not decisive. It does seem that the LAC considers the sufficiency of assets as a crucial consideration. It held –

"[25] …In particular, because the facts more than adequately demonstrate that the appellant is in possession of sufficient assets to meet an order of the review court upholding the arbitration award in the dismissed employee's favour."

[7] Paragraphs 21 and 22

[22] This sufficiency of assets was seen by the LAC as a crucial shield for an employee should the review application be decided in his or her favour. Before me there exists evidence that the applicant has non-core assets; capital donations from the mines and private companies; equitable share from the National government; valuable current assets and new assets class. Accordingly, the applicant must be absolved from providing security.'

28. In the present case, the applicant has put up an annexure, albeit under reply, showing the budget allocation for the department.

29. I am satisfied that the applicant is possessed of a budget that can meet an order of the review court if the arbitration award is upheld. The irregular expenditure of R55.8 million, although not an insignificant amount, is not comparable to the budget that is available to the applicant.

30. Considerations of equity and fairness dictate that the applicant must be absolved from providing security. Inasmuch as the first respondent was dismissed about 5 years ago and was found not guilty by the third respondent, the first respondent has a right to apply for a review of the award. As already stated, it appears that the review application is at the point where the record should be filed soon and a hearing date sought in terms of the rules.

31. There is prejudice to be suffered by the applicant if the application to be absolved from furnishing security is refused and it is unable to furnish security timeously because, as pointed out, the process involved in terms of the PFMA is onerous.

32. The balance of convenience favours the applicant at this point. The review application is being prosecuted in terms of the prescribed time periods, and if the applicant fails in this regard, the first respondent has prescribed remedies in terms of the Practice Manual.

33. I find that the applicant must be absolved from providing security.

34. I make the following order:

Order:

1. The application is heard as one of urgency.

2. The enforcement of the award issued by the third respondent under case GPBC number 674/2016 dated 15 June 2021 is stayed pending the finalization of a review application launched under case number D735/2021.

3. The applicant is absolved from furnishing security as contemplated in section 145(7) and (8) of the LRA.

4. There is no order as to costs.

HIRALALL AJ

APPEARANCES

For the Appellant: ADV. SCHUMAN
Instructed by: PKX ATTORNEYS

For the Respondent: MR JONES
Instructed by: MACGREGOR ERASMUS ATTORNEYS INC