

SOUTH AFRICA / JUDGMENT

Africabin Building Systems (Pty) Ltd v Mogaladi and Others (J822/24) [2024] ZALCJHB 345; (2024) 45 ILJ 2727 (LC) (6 September 2024)

[2024] ZALCJHB 345

COURT

Labour Court Johannesburg

BEFORE

M Makhura

CASE / FILE NUMBER

J822/24

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FLYNOTES:

LABOUR – Review – Security
from employer –
Failure
to furnish in terms of award – Award orders employer to
reinstate employee – Employer decides to challenge
award by
way of review proceedings – Employer must comply with
provisions by furnishing security – Employee is
entitled to
execute award absent security – Company failed to prove that
it would suffer any prejudice if ordered to
furnish security –
Security ordered to be furnished – Labour Relations Act 66
of 1995, ss 145(7) and (8).
THE
LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG
Not
Reportable
Case
No: J822/24

In the matter between: AFRICABIN
BUILDING SYSTEMS (PTY) LTD
Applicant
and
PETUNIA
LETSOBANA MOGALADI
First
Respondent
LONDEKA
SOSIBO N.O.
Second
Respondent
COMMISSION
FOR CONCILIATION,
MEDIATION
AND ARBITRATION
Third
Respondent

Heard: 8 August 2024

Order: 8 August 2024

Reasons: These reasons for the order are handed down electronically by
circulation to the parties' legal representatives by
email. The
date of hand-down is deemed to be 6 September 2024.

JUDGMENT

MAKHURA, J

[1] On 8 August 2024, this Court issued an order in the following terms:

'1. The forms and services provided for in the rules of this court are dispensed with and the matter is heard as one of urgency.

2. The enforcement of the arbitration award under case number GAVL2049-22 is stayed pending the finalization of the review application under case number JR1353/23.

3. The stay in paragraph 2 above is conditional on the applicant paying an amount of R408 000.00 (12 months' salary) into the trust account of its attorneys of record and delivering a security bond to that effect within 30 calendar days of this order.

4. In the event the applicant fails to comply with paragraph 3 above, the order in paragraph 2 shall lapse.'

[2] On 13 August 2024, the applicant, Africabin Building Systems (Pty) Ltd (company) filed a request for reasons for the order directing it to furnish security in terms of section 145(7) and (8) of the Labour Relations Act[1] (LRA). These are the reasons for the order.

- [3] The arbitration award referred to in paragraph 2 of the order was issued on 30 June 2023 by the second respondent (commissioner). The commissioner declared the dismissal of the first respondent (employee) to be substantively unfair and ordered the company to retrospectively reinstate the employee and to pay her backpay in the amount of R272 000.00.
- [4] On 20 July 2023, the company launched proceedings to review and set aside this award. That review application is pending before this Court. The company did not furnish security. The result of its failure to furnish security in terms of section 145(7) and
- (8) (security provisions) is that the review application did not suspend the operation of the award. Empowered by these security

provisions, the employee sought to execute the award. However, her basis for execution of the award was that the review application was deemed to have been withdrawn.

- [5] In *Bhekani Abantu Services (Pty) Ltd v Redelinghuys & others*[2], this Court observed a worrying trend on the part of some employers who choose deliberately to disregard the security provisions. This trend and behaviour often leads to employees enforcing their rights, as they must, and then employers rushing to Court on an urgent basis to stay the enforcement of the award in terms of section 145(3) and simultaneously apply for exemption from furnishing security.[3] In *Panorama Park Retirement Village v Commission for Conciliation, Mediation and Arbitration and Others*[4], Tlhohlalema J expressed his frustration with this trend. He said the following:

‘Sadly, it has become a practice in this court for parties seeking a review of unfavourable arbitration awards, to simply file such applications without furnishing the security required, and to only put an obscure prayer somewhere in the pleadings, seeking to be absolved from payment of security. In some instances, reviewing parties do not even make an attempt to be absolved from payment of security, and simply close their pleadings and request a set down date. It is appreciated that opposing parties in review applications can raise non-payment of security as preliminary point in the answering affidavit. Be that as it may, in most instances, as is in this case, it is only after a year or three when the matter comes before the court, that these preliminary points are addressed. By then, the reviewing party has, by default, been absolved from payment of security.

The above practices are an affront on the very purpose of the provisions of s 145(7) and (8) of the LRA, and must come to an end. The purpose of these provisions is essentially to dissuade employers in particular from bringing frivolous review applications with no prospects of success and ensure that they are timeously and expeditiously prosecuted.’[5]

- [6] To show complete disregard and disrespect to these security provisions, these employers make no attempt to approach the employees to reach an agreement on this issue, that is - whether or not to furnish security, for how much, and an undertaking from the employees not to proceed with execution. These employers continue to disregard these security provisions with impunity. This disrespectful

conduct must be brought to a halt. It is my view that the time has come for this Court to seriously consider awarding punitive costs orders against these employers.

- [7] The current matter is not different to the matters referred to above. After filing the review application in July 2023, the company, just like many other employers, conscientiously elected not to comply with these security provisions. It was as if these provisions did not exist. It was only when the employee sought execution of the award that the company launched these urgent proceedings and sought exemption from furnishing security.
- [8] The company sought to be exempted “from furnishing security, alternatively that [it] furnishes security in the amount determined by the Court to be reasonable”. In its founding affidavit, the company calculates the amount of security as 24 months’ remuneration (R816 000.00) plus backpay

in the amount of R272 000.00 as awarded by the commissioner, which amounts to R1.08 million. It then contends that the amount is

substantial and cannot be paid “without a serious impact on the [company’s] business and trade” and that it would severely hamper its business and ability to operate. Further, the company alleged that it requires sufficient cash flow to enable it to make upfront payment for its stock. It concluded:

‘Simply put, the applicant cannot afford to furnish security of R1 million while the review application is finalized, especially where the first respondent herself has failed to properly oppose the review application. Should the first respondent eventually file an answering affidavit, this would further delay the finalization of the review application while the funds remain held in security. This would be detrimental to the applicant.

The applicant is a profitable company and will be in a position to pay the value of the award in the event the review application is unsuccessful. The applicant’s gross asset is estimated at R114 455 827.00.’

- [9] The company’s contention that the amount of security is an equivalent of the employee’s 24 months’ remuneration plus backpay in the amount of R272 000.00 is misplaced. In terms of section 145(8), the company was only required to put up R816 000.00, which is the equivalent of the employee’s 24 months’ remuneration. Therefore, the company has exaggerated the amount.
- [10] Payment of 24 months’ remuneration as security is not dependent on whether the employee opposes the review application or whether the company is of the view that the employee has abandoned a claim for reinstatement. The employee might not oppose the application because of his or her confidence that the Courts would adjudicate the matter fairly and within the legal prescripts, particularly considering that in review applications, evidence has already been led by the parties at the arbitration proceedings, or she might lack financial resources to oppose the application. Therefore, it is irrelevant whether the review application is opposed or not or whether the company believes that the employee has

abandoned a claim of reinstatement. The prospects of success are equally irrelevant. This form of security is triggered only by two intertwined factors - an award or order of reinstatement

or re-employment, and the review application. Accordingly, where the award orders the employer to reinstate the employee, and the employer decides to challenge the award by way of review proceedings, the employer must comply with the provisions by furnishing security in terms of section 145(8). Absent security, the employee is entitled to execute the award.

[11] The company confirmed that it is profitable and that it would be in a position to pay the amount awarded in the event of an unsuccessful

review application. It also referred to the employee's answering affidavit where she alleged that the company is a multi-million rand worth of a business and contended that this should be the end of the enquiry. In other words, this Court should exercise its discretion in favour of exempting it from furnishing security. The upshot of the company's submission is that employers with

sufficient or adequate assets should be exonerated from furnishing security. For this contention, the company relied on the Labour

Appeal Court (LAC) judgment in *City of Johannesburg v SA Municipal Workers Union* on behalf of *Monareng & another*[6] (*City of Johannesburg*).

[12] However, the *City of Johannesburg* judgment does not advance the company's proposition that proof of adequate or sufficient assets is the overriding requirement in the enquiry whether to exempt an employer from furnishing security. What is clear from this judgment is that employers who seek to be exempted from furnishing security must show good cause and make the necessary averments for such relief in their founding papers.

[13] The LAC continued that:

'In *Rustenburg Local Municipality*, the Labour Court held as follows in relation to what good cause entails:

"Good cause in the context of motivating a departure from the security provisions prescribed in s 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 ten employees, which would then 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 be unduly onerous and harmful to be required to set the prescribed security."

Material prejudice to the employer is but one factor that the Labour Court must give consideration to - it is by no means decisive. In exercising its discretion, the Labour Court must have regard to the particular circumstances of the case as well as considerations of equity and fairness to both the employer and the employee. A factor that the Labour Court must take into consideration is whether the employer is in possession of sufficient or adequate assets to meet an order of the review court upholding the arbitration award; the principal concern being that the dismissed employee should not be left unprotected if the Labour Court decides the review application in his or her favour.

The onus is on the employer seeking an exemption from furnishing security under s 145(8) of the LRA to establish that it has assets of a sufficient value to meet its obligations should the arbitration award be upheld by the Labour Court on review. On a purposive or contextual construction, s 145(7) and (8) of the LRA must be construed as requiring all employers - whether in the public or private sectors - to provide security. I accordingly support the position adopted in Rustenburg Local Municipality that all employers whether in the public or private sector should be subject to the same requirement of providing security.’[7]

[14] The LAC rejected the notion of a blanket exemption from furnishing security to all state and private entities. Equally, adequate or sufficient assets of multi-million rands will not automatically absolve employers from compliance with the security provisions nor will it automatically mean that this Court should grant the exemption. Adequate assets are but just one factor in the enquiry which would require considerations of prejudice as well. Employers cannot be exonerated from the provisions of the law simply because they allege that they would be able to comply with the award should their review application fail. They must do more.

[15] The ability and affordability to meet the value of the award in the event of an unsuccessful review application is not the overriding factor in the enquiry whether the Court should exercise discretion in favour of exemption or not. In my view, the intention of the legislature in this enquiry is of utmost importance. In businesses, solvency is not guaranteed. That the company is profitable today is not a guarantee that it will be profitable at the time when the review application is determined. That time could be 24

months away. In fact, it does not guarantee the company’s existence in future.

[16] Therefore, in addition to the intention of the inclusion of the security provisions in the LRA – to dissuade employers from launching unmeritorious review applications aimed at delaying the enforcement of the award and engender prompt prosecution of review

applications[8] – these provisions are in my view also intended to give comfort to the employees that in the event of the employers’ failed review applications, their successes at the CCMA or bargaining council do not ring hollow and that the award is implementable at the end of the review proceedings.

[17] The company made bald and unsubstantiated allegations that its business activities and operations would be severely hampered, that it “must” have sufficient cash flow to enable upfront payment to its service providers and that payment of R1.08 million would have a serious impact on its business and trade.

[18] I am not persuaded that the company proved, on a balance of probabilities, that it would suffer any prejudice if ordered to furnish security. In fact, the company did not prove any prejudice. Its case is one of an employer who simply prefers not to furnish security because it believes that it has adequate assets. Further, the company prefers to make upfront payment of its stock from service providers, without providing details why this is important or is a requirement in its industry. It said nothing about the cash available in its bank accounts and nothing about why and how furnishing security of R816 000.00 would hamper its operations. There

are no financial statements nor management accounts to assess its previous, current and projected cash flow challenges, if any. Nothing is said about how furnishing security would impact on its daily, weekly or monthly obligations.

[19] Therefore, the company failed to show good cause why it should be exempted from furnishing security. It has failed to explain with particularity how payment of any portion of the amount would be unduly onerous and harmful to its business and/or operations. The provision of security is a legal requirement and this Court should enviously guard against employers who do not consider this requirement as binding and who willingly ignore them. Exemption from complying with this legal requirement is not there for the taking.

[20] During the hearing, I made it clear to Mr Naidoo, appearing on behalf of the company, that based on the pleadings, I was not inclined to grant full exemption and urged him to take instruction on the amount of security the company would furnish. This was raised in light of the fact that in its alternative relief, the company requested the Court to determine reasonable security. The company offered to furnish security in the amount of R272 000.00, which is the equivalent of backpay awarded to the employee in terms of the award. Having considered the papers and submissions, it was my view that fairness and equity to both parties required payment of 50% of the equivalent of 24 months’ remuneration. Accordingly, I ordered that security equivalent to 12 months’ remuneration (R408 000.00) be furnished.

[21] For the above reasons, I proceeded to issue the order as set out above.

M. Makhura

Judge of the Labour Court of South Africa

Appearances:

For the Applicant: Mr K. Naidoo

Instructed by:

Maharaj Attorneys

For the First Respondent: Mr M.I. Mahlokwane

c/o Mahlokwane Attorneys

[1] Act 66 of 1995, as amended. Section 145(7) provides that: “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)”. Subsection (8) provides as follows: “Unless the Labour Court directs otherwise, the security furnished as contemplated in subsection (7) must — (a) in the case if 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.”

[1] Act 66 of 1995, as amended. Section 145(7) provides that: “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)”. Subsection (8) provides as follows: “Unless the Labour Court directs otherwise, the security furnished as contemplated in subsection (7) must —

- (a) in the case if 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.”

[2]

(2024) 45 ILJ 1242 (LC).

[3] Ibid at para 4.

[4]

[2020] ZALCJHB 8; (2020) 41 ILJ 1200 (LC).

[5] Ibid at paras 8 - 9.

[6]

(2019) 40 ILJ 1753 (LAC); [2019] ZALAC 54.

[7] Ibid at paras 18 – 20.

[8] See: Memorandum of Objects, Labour Relations Amendment Bill, 2012; City of Johannesburg at para 21; Italsafaris CC t/a Viva Safaris v NUFBWSAW obo Members and Others

[2024] ZALAC 28 at para 17.

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