

SOUTH AFRICA / JUDGMENT

Bhekani Abantu Services (Pty) Ltd v Redelinghuys and Others (J145/24) [2024] ZALCJHB 102; (2024) 45 ILJ 1242 (LC) (4 March 2024)

[2024] ZALCJHB 102

COURT

Labour Court Johannesburg

BEFORE

M Makhura

CASE / FILE NUMBER

J145/24

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FLYNOTES:

LABOUR

– Review – Suspension of award – Security to satisfaction of court – Security provided in form of movable assets – Employee objects to security provided and urges court to reject it as unsatisfactory – No explanation how applicant would pay shortfall in event value of assets diminished – Security furnished is unsatisfactory and rejected – Applicant afforded an opportunity to provide security that satisfies court – Labour Relations Act 66 of 1995, s 145(7).

IN

THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not

Reportable

Case

No: J145/24

In

the matter between:

BHEKANI
ABANTU SERVICES (PTY) LTD
Applicant
and
JOHAN
REDELINGHUY
First
Respondent
COMMISSION
FOR CONCILIATION,
MEDIATION
AND ARBITRATION
Second Respondent
SHERIFF

OF THE MAGISTRATES
COURT:

ROODEPOORT
NORTH
Third Respondent

Heard:

27 February
2024

Delivered:

4 March 2024
This
judgment was handed down electronically by circulation to the parties
and legal representatives by email. The date and time
for hand-down
is deemed to be 4 March 2024

JUDGMENT

MAKHURA, J

Introduction

[1] In January 2015, section 145(7) and (8) of the Labour Relations Act[1] (LRA) was promulgated. Section 145(7) provides:

‘The institution of review proceedings does not suspend the operation of an award, unless the applicant furnishes security to the satisfaction of the Court in accordance with subsection (8).’

[2] Subsection 8 reads:

‘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.'
- [3] Section 145(3) of the LRA was retained. In terms of this provision, the Court has discretionary powers to stay the enforcement of arbitration awards.
- [4] Almost 10 years since the promulgation of the above provisions, this Court remains inundated with applications to stay writs of execution where security is not furnished or not furnished in compliance with

the provisions, and without an application for exemption. The attitude adopted by some employers is that because the security must

be to the satisfaction of the court, and the court at that time has not ordered otherwise, they can put any form of security that they believe is reasonable. Employees, on the other hand, believe that security must be strictly in compliance with section 145(8) and that for as long as the security provided does not comply with this provision, they are entitled to execute. This inevitably leads to employers approaching this court for an interdict and a declaration that the security furnished is to the satisfaction of the court.

- [5] Employers who seek to be exempted from section 145(7) and (8) must provide reasons for not complying with these provisions and why the security furnished should be found by this Court to be satisfactory,

or why the failure to provide security should be exempted. In my view, this type of litigation can be avoided if employers provide

security in accordance with section 145(7) and (8) of the LRA, alternatively, if they immediately launch proceedings for exemption.

- [6] In casu, the applicant has provided security. However, the security provided is in the form of movable assets, the motor vehicles. The first respondent (employee) objects to the security provided and urges this Court to reject it as unsatisfactory.

Material

facts

- [7] Briefly, the facts are that on 18 October 2023, the Commission for Conciliation, Mediation and Arbitration (CCMA) issued an arbitration award declaring the dismissal of the employee substantively unfair and ordering the applicant to pay the employee R326 050.00 as compensation.
- [8] On 14 December 2023, the applicant launched review proceedings against the award. The applicant did not furnish security as contemplated in section 145(7) and (8) of the LRA.

- [9] On 10 January 2024, the employee's attorneys addressed a letter to the applicant's attorneys, noting the applicant's failure to comply with the security provisions. The employee gave the applicant ten days to furnish security in terms of the provisions, failing which he would proceed to enforce the award. The ten-day period lapsed without a response from the applicant. According to the employee, he then instructed the sheriff to proceed with the enforcement on 29 January 2024.
- [10] On 2 February 2024, the applicant filed a security bond. The applicant provided four vehicles as security bond – all Nissan NP200. However, one of the vehicles' title holder and owner is Soccer Scene Outfitters CC. According to the applicant and the valuations on the vehicles, the collective retail value of the vehicles, including the fourth one owned by a third party, is R335 600.00.
- [11] On 8 February 2024, the employee's attorneys served a notice of objection on the applicant's attorneys. The employee sets out the grounds for objecting to the form of security furnished by the applicant as follows:
1. It is unclear where the vehicles are held, whether it is being used, or kept in a safe place;
 2. Whether it is sufficiently insured;
 3. What would happen if it gets damaged or stolen;
 4. The value of vehicles irrespective of whether it is used or kept in a safe place, continuously depreciates;
 5. The court's roll is currently so clogged that it might take years before the review may be finalised and by then the value of the vehicles would have drastically diminished.'
- [12] On 9 February 2024, the sheriff attached the applicant's assets. The assets attached include the four vehicles, lockers, office desks and chairs.
- [13] The applicant then launched these proceedings. It seeks an order that the security furnished is satisfactory, staying the execution of the award pending the finalisation of the review application and interdicting the sheriff from removing the attached assets pending the finalisation of the award. In its founding affidavit, the applicant seeks, in the alternative that in the event the Court is not satisfied with the security furnished, to make an order in relation to the manner in which the security ought to be furnished.

Legal principles

- [14] In *City of Johannesburg v SA Municipal Workers Union* on behalf of Monareng and another, [2] the Labour Appeal Court held that:

'[7] The Labour Court has discretionary power under s 145(3) of the LRA to stay the enforcement of an arbitration award pending its decision in the review application. It may stay the enforcement of an arbitration award pending finalisation of a review application against the award with or without conditions. It may in terms of s 145(8) of the LRA dispense with the

requirement of furnishing security. Properly construed, s 145(3) read with s 145(7) and (8) should be interpreted to mean that where an applicant in a review application furnishes security to the Labour Court in accordance with s 145(8) of the LRA, the operation of the arbitration award is automatically suspended pending its decision in the review application. In other words, the employer need not make an application in terms of s 145(3) of the LRA to stay the enforcement of the arbitration award pending finalisation of the review application.

- [8] However, should the employer wish to be absolved from providing security or provide security in an amount less than the threshold in subsection (8)(a) and (b), then it is required to make an application to the Labour Court, in terms of s 145(3), for stay of the enforcement.
- [9] The words ‘unless the Labour Court directs otherwise’ in s 145(8) of the LRA must be construed broadly to mean that the Labour Court is afforded a discretion to either: (a) exempt the employer from paying security on the stay of the enforcement of an arbitration award pending its decision on review or (b) reduce the quantum of security to be furnished by the employer to an amount below the threshold in s 145(8)(a) and (b) of the LRA.’[3]
- [15] In *Moqhaka Local Municipality v Motloung and others*, [4] this Court, per Lagrange J, considered the type of security that may be furnished by the review applicant. Lagrange J held that although the furnishing of a bond of security may be the typical and most convenient form of security, other forms of security might also be considered satisfactory, such as depositing funds with the sheriff.[5] Snyman AJ in *Rustenburg Local Municipality v South African Local Government Bargaining Council and others*[6] also found that security can also be provided by payment into a court or sheriff’s trust account and that a security bond by a legal practitioner or a registered banking institution would suffice.[7] He added that other forms of security such as a movable or immovable assets may be provided as security and that the value of the asset would have to be determined to satisfy the amount in terms of section 145(8) of the LRA.[8]

Evaluation

- [16] The applicant’s case is that there is a pending review application before this Court and that it has furnished security. That there is a review application is common cause. The primary issue is whether the security provided by the applicant, in the form of motor vehicles, is to the satisfaction of this Court.
- [17] The applicant was made aware as early as 8 February 2024 of the employee’s grounds for objection of the type of security furnished. The applicant did not respond to the objections nor did it, in light of the argument that the value of the assets diminishes, supplement the security bond.
- [18] Instead, when confronted by the sheriff’s attachment of its assets, the applicant decided to approach this Court on an urgent basis. The attitude adopted by the applicant is that it provided security and that if the employee is not happy, the court should make a determination. The applicant’s founding affidavit provides no

reasons

why it could not provide any other form of security than the vehicles or that this is the only form of security it could provide.

The valuations only speak to the value of the vehicles on 29 January

2024. The value of these vehicles is only known on 29 January 2024, not in the future.

[19] In its replying affidavit, the applicant flimsily appears to provide the reason for not providing cash as security and a response to the employee's objection to the form of security provided. The applicant said:

'I replied to this email and indicated that the matter will be discussed internally. Upon this letter being discussed by the decision makers in the employ of the Applicant it became apparent that it would have a detrimental impact on the business and operations of Applicant should this amount of cash be put up as security for the duration of the review application. The Applicant was advised that the security may be provided in any form as long as the security so provided is to the satisfaction of the court as stipulated by the act.' (Own emphasis)

[20] During arguments, Mr Biggs, appearing for the applicant, submitted that there will be nothing stopping the applicant from paying the awarded amount in cash in the event its review application is unsuccessful. He submitted that the LRA does not provide the manner in which security should be furnished and that the security bond furnished by the applicant is satisfactory. Mr Biggs conceded, however, that the assets may depreciate albeit, according to him, nominally.

[21] The employee argued that it is discomfoting that the applicant's view is that the payment of cash or setting aside of the awarded amount would have a detrimental impact on the applicant's operations. He argued that this in fact makes it more compelling for the applicant to provide monetary security as this may suggest that the applicant may not be able to satisfy its obligation in terms of the award should its review application be unsuccessful. The applicant has not provided any facts before this Court regarding its financial position, whether it would comply with the award and how it would comply with it in the event of an unsuccessful review application. There is also no explanation on how the applicant would pay the shortfall in the event the value of the assets diminished. The applicant's argument, unsubstantiated as it is, raises

issues of affordability now and in the future. The dismissed employee should have comfort that in the event the review application is unsuccessful, the award is complied with and implemented.

[22] In response to the concern raised by the employee that the assets may be stolen, the applicant argued that even if it makes payment of the awarded amount into its attorneys' trust account, there is no guarantee that the money would not be stolen. This is a very weak argument. Comparing the vehicles with payment into the attorneys' trust account is farfetched and an attempt to play down the high-risk factor of theft of motor vehicles.

- [23] The applicant faces a number of challenges. The value of the security depreciates. Second, the fourth vehicle, retail valued at R87 300.00, is not, on the papers before me, owned by the applicant. Therefore, the security bond before this Court and in the security bond is R87 300.00 less. Third, although the applicant submitted that the vehicles are insured, no proof of insurance has been provided. Therefore, it is not known whether the vehicles are insured for incidents such as theft, damage and/or hijacking and whether they are insured on retail or market value. Fourth, the applicant has not provided how, in the event the assets are found to have depreciated, it would pay the shortfall. Finally, the applicant did not provide proof of its audited financial statements and/or management reports, which would also disclose its total assets.
- [24] As the LAC said, the phrase ‘unless the Labour Court directs otherwise’ means that this Court can exempt the employer from paying security or reduce the quantum of security to be furnished by the employer to an amount below the threshold in section 145(8)(a) and (b) of the LRA. Read together with the phrase ‘to the satisfaction of the Court’, there can be no doubt that this is a matter within the Court’s discretion. In my view, the Court’s discretion extends to directing the type of security to be furnished.
- [25] Whilst I note from Rustenburg Local Municipality judgment that movable assets may be provided as security, this form of security that depreciates in value is objectionable and will inevitably lead to this type of litigation, further burdening the already overloaded court roll. I note that the purpose of sections 145(7) and (8) of the LRA is to reduce the number of review applications brought to frustrate or delay the compliance with arbitration awards and finalisation of review applications.[9] In my view, these provisions also serve another important purpose – to ensure that the arbitration awards issued in favour of employees, even after many years of litigation, are still complied with and/or implementable and employees get their redress, regardless of the status of the company at the end of the litigation process.
- [26] All the applicant said in its papers is that if the cash amount is provided as security, this would have a detrimental impact on its operations. No further details are provided. There are no facts to show how the payment of R326 050.00 would be to the applicant’s detriment and why the vehicles should be considered to be to the court’s satisfaction.
- [27] The applicant decided that because the LRA does not prescribe the manner and form of security, it would put a depreciating asset as security. Even after the objection, the applicant’s attitude was that the Court should decide on the issue and that it is of the view that the security furnished is satisfactory. Well, it is not. It is incomprehensible how an employer would believe that a depreciating asset would be satisfactory security for the purpose of section 145(7) of the LRA. Accordingly, the security furnished by the applicant is unsatisfactory and is hereby rejected.

Conclusion

[28] The rejection of the applicant's security bond is not the end of the enquiry. The discretion granted on this Court extends to determining or prescribing the form of security to be furnished. I have considered that the applicant has applied to review and set aside the award. In my view, the applicant will suffer irreparable harm and injustice if it is not afforded the opportunity to provide the security that satisfies this court and the underlying causa is later removed. Therefore, the applicant should be afforded an opportunity to provide security that satisfies this court. The court will be satisfied if the applicant pays the awarded amount into its attorneys' trust account.

[29] Regarding costs, the parties asked that no costs order be awarded. In the circumstances, I have decided to exercise my discretion in favour of both parties' wish.

[30] In the premises, the following order is made:

Order

1. The matter is heard as one of urgency.
2. The security bond dated 1 February 2024 and filed on 2 February 2024 is not to the satisfaction of this court and is therefore rejected.
3. The execution of the arbitration award issued by the second respondent under case number GAVL3886-23 is suspended pending the finalisation of the review application instituted under case number JR2245/23.
4. The suspension in paragraph 3 above is conditional on the applicant paying an amount of R326 050.00 into the trust account of its attorneys of record within 21 days of this order and delivering a security bond to that effect.
5. In the event that the applicant fails to comply with paragraph 4 above, the order in paragraph 3 shall lapse.
6. There is no order as to costs.

M. Makhura

Judge of the Labour Court of South Africa

Appearances:

For the Applicant : Mr. J. Biggs of Snyman Attorneys

For the First Respondent : Adv. C.P. Naude

Instructed by

: Isaac Teke Mothibe Attorneys

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- [1] No. 66 of 1995, as amended.
- [2] (2019) 40 ILJ 1753 (LAC).
- [3] Ibid at paras 7 - 9.
- [4] (2017) 38 ILJ 649 (LC).
- [5] Ibid para 25.
- [6] (2017) 38 ILJ 2596 (LC).
- [7] Ibid para 18.
- [8] Ibid para 19.
- [9] Memorandum of Objects, Labour Relations Amendment Bill, 2012.
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