

SOUTH AFRICA / JUDGMENT

Kempston Employment Solutions v Commission For Conciliation, Mediation and Arbitration and Others (2025/057504) [2025] ZALCPE 13 (29 July 2025)

[2025] ZALCPE 13**COURT**

Labour Court Port Elizabeth

BEFORE

C de Kock

CASE / FILE NUMBER

2025/057504

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Source record**THE****LABOUR COURT OF SOUTH AFRICA, GQEBERHA****Not****Reportable****Case****No: 2025-057504****In****the matter between:**

KEMPSTON
EMPLOYMENT SOLUTIONS
Applicant
and
COMMISSION
FOR CONCILIATION,
MEDIATION
& ARBITRATION
First Respondent
JACOBS
PH N.O.
Second Respondent
ANTONI
THENJISWA
Third Respondent
Heard: 23 July 2025

Date of Judgment: This judgment was handed down electronically by circulation to the parties' legal representatives by email, publication on the Labour Court website and release to SAFLII. The date and time for handing down judgment is deemed to be 11h00 on 29 July 2025.

Summary: application to stay enforcement of CCMA arbitration award – no security furnished in terms of section 145 (7) and (8), and no acceptable reason advanced for such failure – application to stay the enforcement of the award dismissed – employer ordered to furnish security as provided in section 145 (8) failing which award may be enforced.

JUDGMENT

DE KOCK, AJ

Introduction

- [1] This matter comes before the court as an urgent application to stay the enforcement of the arbitration award of the Commission for Conciliation, Mediation and Arbitration (CCMA), in the matter between Thenjiswa Antoni v Kempston Employment Solutions (CCMA Case No. ECGQ6735-24) pending finalisation of the review application launched by the applicant under Case No. 2025-057504.
- [2] The review application was filed on 24 April 2025. The applicant, despite the review application and despite the provisions of section 145 (7) and (8) of the Labour Relations Act (LRA)[1], failed to furnish security and approached the court, on an urgent basis, to seek an order that the enforcement of the arbitration award be stayed.

Urgency

- [3] The arbitration award was issued on or about 12 March 2025. The review application was filed on 24 April 2025. The applicant failed to furnish security in terms of section 145 (7) and (8). The urgent application was filed on 3 June 2025, and the application was only heard on 25 July 2025, nearly two months later. The applicant failed to provide an explanation why it waited, from 12 March 2025 until 3 June 2025 to launch the urgent application, or alternatively why the applicant failed to immediately apply for an order seeking an exemption of the need to provide security.
- [4] The court has serious reservations as to whether the applicant has satisfied the requirement of proving the urgency of this application. The applicant, having filed the review application on 24 April 2025, was required to furnish security to avoid the enforcement of the award.

The applicant failed to do so. There was a legal requirement on the applicant to furnish security to avoid the enforcement of the award and if a lesser amount of security was sought to be provided, or no security at all, it was incumbent on the applicant to apply for an exemption from the Labour Court. The applicant failed to do so.

- [5] The urgency was therefore in the opinion of the court self-created by the applicant. Be that as it may, the third respondent, in her opposing affidavit, does not take issue with the issue of urgency and in fact agrees that the matter is urgent and needs to be determined on the urgent court roll. The court will therefore, instead of striking the application off the roll for lack of urgency, proceed to address the merits of the application.

Requirement to provide security

- [6] The Labour Court is inundated with urgent applications by employers seeking to stay the enforcement of arbitration awards in cases where employees have been reinstated, re-employed, or awarded compensation. This is despite the clear provisions of section 145 (7) and (8), which deal specifically with the requirements that must be complied with to suspend the operation of an award.

- [7] 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).’

- [8] 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.’

- [9] The Labour Court should not be burdened by these unnecessary applications, which places an unnecessary further strain on the speedy and effective resolutions of labour disputes in the Labour Court. To avoid the enforcement of an award, employers must simply comply with section 145 (7) and (8), and when delivering their review applications, simultaneously furnish security. There will be no need to approach the Labour Court with an urgent application to stay the award, as security would have been furnished in terms of section 145 (7) and (8).

- [10] However, in many cases an employer party fails to furnish security and simply sits back and wait for the review to be finalised. In the meantime, the employee will seek to enforce the award, which they are entitled to do given the employer’s failure to furnish security. Employers, when faced with a sheriff approaching them with a writ of execution, approach

the Labour Court with an urgent application. Employers that are able to furnish the required security and fail to do so and wait for employees to take steps to enforce the award before approaching the Labour Court with an urgent application, should not be allowed to do so. This, in the court's view, is an abuse of the court's valuable time and resources and a neglect on the part of employers to simply comply with section 145 (7) and (8). Any such urgent application will be self-created and will be without merit unless there is a compelling reason why security could not be furnished, or why a lesser amount was furnished as security.

- [11] There appears to be a misconception that, because section 145 (7) refers to “furnishes security to the satisfaction of the court” and section 145 (8) refers to “unless the Labour Court directs otherwise”, the parties are free to determine in their own views what security needs to be furnished to avoid the operation of an award. This misconception is clearly wrong. An employer is required to furnish security in accordance with section 145 (8) should they wish to avoid any attempt by employees to enforce the award despite the review application.
- [12] If such security is furnished, there will be no need for an employer to burden the Labour Court with unnecessary urgent applications, and employees will not be entitled to enforce the award. This is after all what the LRA requires when it comes to the suspension of the operation of awards.
- [13] Where an employer is unable to furnish security in accordance with section 145 (8), it is incumbent on the employer to approach the Labour Court to seek an exemption to the security referred to in section 145 (8). This application must be done immediately and should not be delayed until such time that the employee is now effectively seeking to enforce the award, resulting in an unnecessary urgent application. Such an exemption application must be based on justifiable grounds. It will not be sufficient for an employer to make a bald allegation that they do not have the cash flow, or that tying the cash flow up in a security bond will be prejudicial. The employer must prove to the court why it is unable to furnish the security as per section 145 (8). Unless the employer can substantiate its claim that they are unable to furnish the security required in terms of section 145 (8), the employer risks the application for exemption being dismissed and will face the enforcement of the award by the employee despite review proceedings having been launched.
- [14] Two scenarios may unfold. The first is that the employer can furnish security, but of a lesser amount prescribed by section 145 (8). Should the employer be able to substantiate the lesser amount, a court may well be inclined to accept such lesser amount as sufficient security to suspend the operation of the award. The second scenario is where the employer furnishes no security at all but wishes to suspend the operation of the award. It will be difficult to convince the court that an employer is unable to furnish any security. Difficult, but not impossible and each case must be judged on its own merits. Only if the employer can substantiate their inability to furnish any security, which will be a high hurdle to overcome, may the court issue an order suspending the operation of the award.

Reasons

advanced by applicant to stay enforcement

- [15] The applicant has failed to furnish any security whatsoever. In fact, the applicant does not even address the possibility of providing a lesser amount of security in support of the application.
- [16] As stated already, it will be a big hurdle for an employer to overcome when it fails to provide any security whatsoever but still seeks this court to stay the enforcement of an award. The applicant's pleadings fall dismally short of giving any reasonable and justifiable reason why they are unable to furnish security. All that is contained in the founding affidavit is that tying up cash flow will be prejudicial to the applicant. The applicant does not state that it does not have the cash flow available, and neither does the applicant say what the prejudice would be if an amount of R160 247.40 is to be used to enable it to furnish security.
- [17] It is also important to note, as referred to by the third respondent in her answering affidavit, that the applicant appears to have money to obtain the services of an attorney to bring this application, yet it is unable to furnish any security at all. The applicant also states that they are part of the Kempston / Vincemus Group, which is a successful brand without there ever having been suggestions of it not being able to honour debts. Yet, in the same breath, the applicant fails to satisfactorily explain why security cannot be furnished in accordance with section 145 (8).
- [18] The applicant also states that, if the third respondent is to be paid the sum awarded and the applicant is thereafter successful, recovery of the money from the third respondent is impractical. On the other hand, according to the applicant, if the review were not to succeed and the third respondent is to be paid, she will be paid together with interest.
- [19] The applicant is however missing the point. The applicant was not expected to pay the third respondent. The applicant was expected to furnish security, which will only be paid to the third respondent in the event of the review application being unsuccessful. Should the review application be successful, the monies will be returned to the applicant.
- [20] The application to stay the enforcement of the award, in the absence of the applicant having furnished security, can therefore not be granted. The applicant had sufficient time, from the date of the award to the date of this application being heard, to furnish security. They have failed to do so without providing any substance as to the reason why they have failed to do so or are unable to do so.
- [21] The court is therefore required to consider whether the applicant should be afforded the right, at this late stage, to furnish security to avoid the enforcement of the award, or whether the application should be dismissed in totality, which will allow the third respondent the right to pursue the enforcement of the award.

- [22] It is the court's view that it will be fair that the applicant be afforded an opportunity to furnish security, as provided for in section 145 (8), and in the event of a failure to do so that the third respondent be allowed to enforce the award. Employer parties must however be cautioned against this current practice of not complying with section 145 (7) and (8) and then, when employees commence legal proceedings to enforce the awards, approach the court on an urgent basis. This is an abuse of court processes and may well, in future applications, lead to such application being dismissed with costs, as well as a failure to allow an employer party with a further opportunity to furnish security.
- [23] Legal practitioners are also cautioned to properly advise their clients regarding the requirements of section 145 (7) and (8) and the need to comply with such provisions to avoid having to burden this court with unnecessary urgent applications. This application could have and should have been avoided had the applicant been advised that, unless there are sufficient reasons to convince the court that security could not be furnished, security must be furnished. There is a duty on legal practitioners to properly advise their clients and to avoid this constant abuse of approaching the court for urgent applications to stay awards pending finalisation of the review application. A failure to do so may well result in this court ordering costs de bonis propriis in any such future applications.

Costs

- [24] The third respondent's representative did not persist in seeking costs in having to oppose the application during arguments in court. Notwithstanding this, the court must state its complete displeasure regarding the way this application was brought before the court and the abuse of court processes. This application should never have been made in the first place and the applicant ought to have complied with the provisions of section 145 (7) and (8). The applicant ought also to have been properly advised that there is no merit in its failure to furnish security.
- [25] Had the third respondent persisted in its application for costs, the court would have ordered the applicant to pay the third respondent's costs in having to oppose this unnecessary and unacceptable application.
- [26] In the premises, the court makes the following order:

Order

1. The application to stay the enforcement of the award is dismissed.
2. The operation of the award is suspended on condition that the applicant furnishes security in the amount of R160 247.40 within 14 days from the date of this order.
3. Should the applicant fail to furnish security, as ordered, the suspension of the award will be uplifted, and the third respondent will be allowed to enforce the award.
4. There is no order as to costs.

C. de Kock

Acting Judge of the Labour Court of South Africa

Appearances:

For the Applicant:

I Lambrechts

Instructed by:

Kirchmanns Inc.

For the Respondents:

E van Staden - Legal Aid South Africa

[1] No 66 of 1995, as amended

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