THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

JUDGMENT

Reportable

Of interest to other judges

Case no: J773/15

In the matter between:

FREE STATE GAMBLING AND LIQUOR AUTHORITY	**Applicant**
and	
COMMISSION FOR CONCILIATION, MEDIATION AND ARBITRATION	**First Respondent**
TSEITSI CHAKANE N.O,	**Second Respondent**
MAJORO MARVIN MOFOKENG	**Third Respondent**

Case no: J894/15

and in the matter between

FREE STATE LIQUOR AND GAMBLING AUTHORITY	**Applicant**
and	
PEHELO MOTAKE N.O.	**First Respondent**
MARINA TERBLANCHE N.O.	**Second Respondent**

COMMISSION FOR CONCILIATION, MEDIATION AND ARBITRATION **Third Respondent**

NEHAWU obo DINEO PATRICIA RANI **Fourth Respondent**

Heard: **19 May 2015**

Delivered: **26 June 2015**

Summary: A constitutionally sensitive reading of the provisions of section 145((7) and (8) of the LRA allows for the court to exercise its discretion as to whether security should be ordered or not; where an applicant employer is governed by the PFMA and Treasury regulations the object of providing security in the event that an award is upheld is met.

JUDGMENT

RABKIN-NAICKER J

[1] In these two urgent applications, the stay of the certification and/or enforcement of two arbitration awards is sought pending review applications, as well as relief to:

1.1 Absolve the Applicant from paying security in terms of sections 145(7) and (8) of the Labour Relations Act 66 of 1995, as amended (LRA);

1.2 Alternatively, declaring section 145(8) of the LRA to be in conflict with sections 66 of the Public Finance Management Act 1 of 1999, as amended (PFMA) and declaring further that the PFMA provisions override section 145(7) and (8); and

1.3 Further alternatively, interim relief pending an application in terms of which the Applicant is granted leave to make application to this Court to declare the provisions of section 145(8) of the LRA to be unconstitutional, within 30 days of granting of the order and the Applicant is directed to join all interested parties.

[2] The starting point of this judgment must be an interpretation of section 145(7) and (8) of the LRA which were inserted into the LRA by the Labour Relations Amendment Act 2014. The provisions read as follows:

> "(7) 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).
>
> (8) Unless the Labour Court directs otherwise, the security furnished as contemplated in subsection (7) must-
>
> (a) in the case of 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." (my emphasis)

[3] Before embarking on a reading of these provisions, the approach to statutory interpretation in *Natal Joint Municipal Pension Fund v Endumeni Municipality 2012 (4) SA 593 (SCA)* as reformulated by Wallis JA deserves re-statement:

> "The present state of the law can be expressed as follows: Interpretation is the process of attributing meaning to the words used in a document, be it legislation, some other statutory instrument, or contract, having regard to the context provided by reading the particular provision or provisions in the light of the document as a whole and the circumstances attendant upon its coming into existence. Whatever the nature of the document, consideration must be given to the language used in the light of the ordinary rules of grammar and syntax; the context in which the provision appears; the apparent purpose to which it is directed and the material known to those responsible for its production. Where more than one meaning is possible each possibility must be weighed in the light of all these factors. The process is objective, not subjective. A sensible meaning is to be preferred to one that leads to insensible or unbusinesslike results or undermines the apparent purpose of the document. Judges must be alert to, and guard against, the temptation to substitute what they regard as reasonable, sensible or businesslike for the words actually used. To do so in regard to a statute or statutory instrument is to cross the divide between interpretation and legislation; in a contractual context it is to make a contract for the parties other than the one they in fact made. The 'inevitable point of departure is the language of the provision itself', read in context and having regard to the

purpose of the provision and the background to the preparation and production of the document."[1]

[4] The crisp issue that the court must determine is whether its discretion in terms of the above provisions is fettered in the sense that it must order security to be furnished, albeit that it may determine the quantum thereof. In my judgment this is not the case, for the reasons set out below.

4.1 The inclusion of the phrase *"to the satisfaction of the Court"* in section 145(7) needs to be considered. The phrase *"to the satisfaction of"* has long been the subject of judicial interpretation in administrative law. In *Shifdi v Administrator-General for South West Africa and Others SA 631 (SWA)* the court considered and compared statutory enactments where the phrase is used, as opposed to those provisions where a discretion may only be exercised validly if certain jurisdictional facts are present stating that:

"… in the one instance, … the repository of the power has a free discretion, and in the other instance …. it exercises a bound discretion. Where in a statutory enactment words such as 'in his opinion' or 'to his satisfaction' are used the repository of the power is clothed with a free discretion. In contrast thereto the enactment may require certain jurisdictional facts to exist before a discretion may be validly exercised. In the latter instance the exercise of the discretion is bound and will be invalid unless those facts objectively exist."

4.2 The court is required to interpret Sections 145(7) and (8) in a constitutionally compliant manner. The LRA specifically provides in its interpretation clause that:

"Any person applying this Act must interpret its provisions-

(a) to give effect to its primary objects;

[1] At paragraph 18

(b) in compliance with the Constitution; and

(c) in compliance with the public international law obligations of the Republic."

4.3 A court should have a discretion as to whether security is to be put up. For example, Superior Court Rule 49(13)[2] dealing with the provision of security for costs in an appeal, where no such discretion was provided for was held to be unconstitutional and amended thereafter. The court in *Shepherd v O'Niell 2000 (2) SA 1066 (N)* stated that:

"It is clear from what is set out earlier in this judgment, that in virtually every case where security is demanded of a litigant, the Court has a discretion whether to order that such security be put up. As matters stand at present in terms of Rule 49(13) the Court has no power to either exempt an appellant from putting up security or to interfere with the amount fixed by the Registrar. There is much to be said for protecting a respondent in an appeal from an impecunious appellant who drags him from one court to the other. On the other hand to in effect bar access to a Court of Appeal because a deserving litigant is unable to put up security appears to me to be unfair and in conflict with the provisions of the Constitution. The conflicting rights of the litigants can, in my view, be adequately safe-guarded were the Court to be vested with the power to determine, in the exercise of its discretion, whether a particular appellant should be compelled to put up security and in what amount. To the extent that Rule 49(13) does not embody that power I consider it to be in conflict with the Constitution and to that extent invalid."

4.4 Accepting that a proper, constitutionally compliant reading of section 145(7) should allow that the court may decide whether a litigant is compelled to put up security or not, the phrase *"Unless the Labour Court*

[2] Rule 49(13) provided that: 'Unless the respondent waives his right to security, the appellant shall, before lodging copies of the record on appeal with the Registrar, enter into good and sufficient security for the respondent's costs of appeal. In the event of failure by the parties to agree on the amount of security, the Registrar shall fix the amount and his decision shall be final.'

directs otherwise" in section 145(8), should be read widely to mean that unless the court directs an exemption from the provision of security, or directs that security is to be paid in an amount lesser than those amounts set out in 145(8)(a) and (b).

4.5 The above interpretation takes into account that the amendments contained in the provisions were drafted to target a particular mischief i.e. to deter those litigants bringing review applications to frustrate or delay compliance with arbitration awards and to speed up the finalization of review applications.[3] Therefore, the provisions should also be read to allow for the court to exercise its unfettered discretion to order that security be paid or not, and if so, whether there should be a deviation from the quantum set out in section 145(8) (a) and (b) thereof, bearing in mind the objectives of the amendment to section 145, and on a case to case basis.

4.6 This reading of the amended provisions is also sensitive to the Constitution in recognizing the constitutionally protected right to "to have any dispute that can be resolved by the application of law decided in a fair public hearing before a court or, where appropriate, another independent and impartial tribunal or forum."[4] In addition, the Constitution requires a reading of the provisions with proportionality in mind i.e. the weighing of an employer's right to review an award in terms of the LRA, against the right of dismissed employees to obtain their due redress despite the inherent inequality in power and resources between employers on the one hand, and employees on the other.

[5] Given the interpretation accorded to the provisions above, it is only necessary for me to decide whether the court should order the applicant, which is recognized by the National Treasury Department, as a Provincial Government Enterprise[5] and is partly funded from 'government grants' as its financial statements reflect, to pay

[3] Memorandum of Objects LRA Amendment Bill 2012.
[4] Section 34 of the Constitution of the Republic of South Africa, 1996.
[5] Listed in schedule 3 to the Constitution as a Provincial Public Entity.

security in these applications. The applicant is a regulator of the gambling and liquor industries and is accountable to the responsible MEC of the Province. The applicant submits that the provision of security is contrary to the provisions of section 66 of the PFMA, and to comply with those provisions and the requisite treasury regulation would mean that a notice would have to be gazetted by the Minister of Finance each time such a "borrowing" is permitted[6]. It is submitted that this is impractical. I would add that it is also unnecessary.

[6] In my judgement, in applications such as these, where the applicant's budget and financial management is governed by the PFMA and Treasury Regulations, and duly authorized averments are made to this effect, the object of providing security is satisfied. The respondent employees in these applications are safeguarded if the awards in question are ultimately upheld, as is an employee in the private sector whose private sector employer provides a security bond in an application in terms of section 145(7) and (8).[7]

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[6] Treasury regulation 32.1 Borrowing [Section 66 of the PFMA]:

32.1.1 For purposes of section 66(5) of the Act, public entities listed in Schedule 3A or 3D of the Act may borrow money for bridging purposes with the approval of the Minister of Finance, subject to the following conditions:

(a) the debt must be repaid within 30 days of the end of the financial year;
(b) borrowing may not exceed a limit determined in advance by the Minister of Finance, in consultation with the national executive authority or provincial MEC for finance, whichever appropriate;
(c) foreign borrowing may not be undertaken;
(d) a request for borrowing for bridging purposes must be submitted to the Minister of Finance at least 30 days before the borrowing. The following must be submitted together with the request –
  (i) detailed cash flow and income and expenditure statements indicating how the debt will be repaid during the prescribed period; and
  (ii) the terms and conditions on which the money is borrowed.

32.1.2 This regulation does not preclude the use of credit cards, fleet management cards or other credit facility repayable within 30 days of the date of statement.

[7] As has been directed by the Judge President of the Labour Court

[7] In the circumstances of this case, I find it equitable that the applicant should pay the costs in these applications given that they were brought to test the amended provisions of the LRA. I therefore make the following order:

Order

1. The enforcement and/or certification of the awards under cases numbers FSBF3091-14 and FS8655-13 is stayed pending the finalization of the review applications under case numbers J894/15 and J773/15

2. Applicant to pay the costs of these applications.

H. Rabkin-Naicker

Judge of the Labour Court of South Africa

Appearances:

For the Applicant in J773/15 and J894/15:

FA Boda SC and T Govender instructed by Sunil Narian

For the Respondents in J773/15:

S. Grobler instructed by Kramer Weihmann & Joubert Attorneys