THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

JUDGMENT

Reportable

Case no: J 779 / 2017

In the matter between:

RUSTENBURG LOCAL MUNICIPALITY **Applicant**

and

SOUTH AFRICAN LOCAL GOVERNMENT

BARGAINNIG COUNCIL **First Respondent**

T M GRAHAM N.O. **Second Respondent**

EDNA KELEBOGILE NGAKE **Third Respondent**

SHERIFF OF RUSTENBURG **Fourth Respondent**

Heard: 28 June 2017

Delivered: 30 June 2017

Summary: Suspension of arbitration award – objectives considered – provisions of Sections 145(3), (7) and (8) considered

Sections 145(7) and (8) – Court has discretion where it comes to furnishing security – considerations set out

Section 145(7) – no employer exempt from providing security in order to suspend award pending a review – Court must always exercise a discretion in this regard

Suspension of arbitration award – proper case made out for suspension – no case made out for waiving of security – award suspended provided that security is set

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JUDGMENT

SNYMAN, AJ

Introduction

[1] In this matter, I have been called upon to decide the still somewhat controversial issue of when, and on what terms, the execution of arbitration awards issued in terms of the dispute resolution processes under the Labour Relations Act ('LRA')[1] can be suspended or stayed, especially considering the recent amendments to Section 145 the LRA.[2]

[2] The current application by the applicant is an application brought on 3 April 2017 to stay an arbitration award and writ of execution issued in terms thereof, pending the finalization of a review application. The applicant has also applied that it be absolved from providing security in terms of Sections 145(7) and (8) of the LRA (this issue will be dealt with in detail hereunder). The application was brought as an urgent application, set down on 7 April 2017. It came before Steenkamp J, who on 7 April 2017 struck the application from the roll for want of urgency.

[3] The applicant then prosecuted the application to finality in the normal course, in terms of the Labour Court Rules, which application is now before me for determination on the merits thereof. I will commence deciding this application by setting out the relevant background.

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[1] Act 66 of 1995.
[2] These amendments were adopted by way of the Labour Relations Amendment Act 6 of 2014, and became effective on 1 January 2015.

Relevant background

[4] The current application arose from an arbitration award handed down by arbitrator T M Graham (the second respondent) against the applicant, and in favour of the third respondent, on 26 October 2016, and under case number NWD 111509 (referred to in this judgment as 'the award'). In terms of the award, the dismissal of the third respondent by the applicant was found to have been substantively unfair, and the third respondent was reinstated with retrospective effect to the date of his dismissal. In a variation of the award dated 20 January 2017, the second respondent quantified the back pay due to the third respondent in terms of his reinstatement award, to the date of his dismissal, in the amount of R271 684.27, being an amount equivalent to 13 months' salary.

[5] The applicant was dissatisfied with the award. It brought an application to the Labour Court, in terms of Section 145 of the LRA, to review and set aside the award. This application was brought on 11 November 2016 under case number JR 2441 / 16. The review application was properly brought, and brought well within the 6(six) weeks' time limit as contemplated by Section 145 of the LRA. The evidence shows that this review application is being properly prosecuted in the normal course by the applicant.

[6] Despite the pending review application, the CCMA on 7 March 2017 certified the award in terms of Section 143(3) of the LRA for the purposes of execution thereof. The CCMA then also issued, on the same date, a writ of enforcement of the award in the sum of R271 684.27, being the back pay component of the award. It is of course competent for the CCMA to issue such a writ of enforcement, following the amendments to the LRA.[3]

[7] On 31 March 2017, the Sheriff ('fifth respondent') attended at the premises of the applicant to execute the writ of enforcement referred to above. This then gave rise to the current application, in which the applicant has applied for the stay of this execution.

[3] See *Commission for Conciliation, Mediation and Arbitration v MBS Transport CC and Others; Commission for Conciliation, Mediation and Arbitration v Bheka Management Services (Pty) Ltd and Others* (2016) 37 *ILJ* 2793 (LAC) at paras 29 – 30

[8] Also in its application, and as touched on above, the applicant has applied to be absolved from providing security in order for the award to be suspended. The applicant's case in support of seeking this relief is a simple one. The applicant contends that it is subject to the provisions of the Local Government: Municipal Finance Management Act ('MFMA')[4]. According to the applicant, Section 29 of the MFMA places an impediment upon access to funding in respect of issues not budgeted for or approved in terms of the financial systems in place. The applicant then concludes that because the payment of security is not budgeted for, it would not be possible to provide it. In effect, the applicant is saying that because of it being subject to the MFMA, it should be exonerated from furnishing security under the LRA, where it comes to review applications brought by it.

[9] I may add that since the application was brought, further developments have taken place where it comes to the prosecution of the review application under case number JR 2441 / 16. The missing parts of the record have been reconstructed, and the record was filed in terms of Rule 7A(6) on 27 June 2017. The applicant has also given notice under Rule 7A(8) on 27 June 2017 that it stands by its founding affidavit. All that remains is for the filing of an answering affidavit and replying affidavit, in terms of Rules 7A(9) and (10), and then the indexing and pagination of the Court file in terms of the Practice Manual. At this point in time, the review application is still well within the time limit as contemplated by clause 11.2.7 of the Practice Manual.[5]

[10] As regards to the merits of the review application, the case of the applicant on review is that the second respondent did not have jurisdiction to entertain the matter as it involved a dismissal based on discrimination, which kind of dismissal dispute needs to be adjudicated by the Labour Court. The applicant has also raised a number of instances of misconduct on the part of the arbitrator. If substantiated by the arbitration record, issues of misconduct are clearly issues that will deserve the attention of this Court and could lead to the

[4] Act 56 of 2003

[5] The clause reads: 'A review application is by its nature an urgent application. An applicant in a review application is therefore required to ensure that all the necessary papers in the application are filed within twelve (12) months of the date of the launch of the application (excluding heads of argument) and the registrar is informed in writing that the application is ready for allocation for hearing. Where this time limit is not complied with, the application will be archived and be regarded as lapsed unless good cause is shown why the application should not to be archived or be removed from the archive'.

award being vitiated.[6] In particular also, an issue of jurisdiction requires this Court to determine, for itself and *de novo*, whether the award of the second respondent is right or wrong.[7] There thus appears to be a proper review case for determination.

[11] I will now turn to deciding whether the applicant is entitled to the relief it seeks, based on the background as set out above.

Analysis

[12] From the outset, an arbitration award issued under the dispute resolution processes under the LRA is final and binding.[8] It is now trite that the filing of a review application to challenge such an award, does not stay or suspend the operation of an arbitration award. The arbitration award remains executable, despite the pending review.

[13] It is in this context that the enforcement provisions in Section 143 of the LRA have been adopted. It enables the beneficiary under an arbitration award to nonetheless, and despite the arbitration award being the subject of challenge, to still execute and enforce compliance with it.

[14] The above being the default position, the duty is then squarely upon the applicant for review to seek relief, in terms of what is specifically provided for in Section 145, to stay or suspend the execution of the arbitration award pending the conclusion of the applicant's review application. In other words,

[6] See *Baur Research CC v Commission for Conciliation, Mediation and Arbitration and Others* (2014) 35 ILJ 1528 (LC) at para 18; *Chabalala v Metal and Engineering Industries Bargaining Council and Others* (2014) 35 ILJ 1546 (LC) at para 13; *Naraindath v Commission for Conciliation, Mediation and Arbitration and Others* (2000) 21 ILJ 1151 (LC) at para 27; *ZA One (Pty) Ltd t/a Naartjie Clothing v Goldman No and Others* (2013) 34 ILJ 2347 (LC) at para 37. The judgment was referred to with approval in *Satani v Department of Education, Western Cape and Others* (2016) 37 ILJ 2298 (LAC) at paras 21 – 22. See also *Deutsch v Pinto and Another* (1997) 18 ILJ 1008 (LC) at 1011 and 1018; *Van Rooy v Nedcor Bank Ltd* (1998) 19 ILJ 1258 (LC) at para 17

[7] See *SA Rugby Players Association and Others v SA Rugby (Pty) Ltd and Others* (2008) 29 *ILJ* 2218 (LAC) at paras 39 – 40; *Trio Glass t/a The Glass Group v Molapo NO and Others* (2013) 34 *ILJ* 2662 (LC) at para 22; *Asara Wine Estate and Hotel (Pty) Ltd v Van Rooyen and Others* (2012) 33 *ILJ* 363 (LC) at para 23; *Hickman v Tsatsimpe NO and Others* (2012) 33 *ILJ* 1179 (LC) at para 10; *Protect a Partner (Pty) Ltd v Machaba-Abiodun and Others* (2013) 34 *ILJ* 392 (LC) at paras 5–6; *Gubevu Security Group (Pty) Ltd v Ruggiero NO and Others* (2012) 33 *ILJ* 1171 (LC) at para 14; *Workforce Group (Pty) Ltd v CCMA and Others* (2012) 33 *ILJ* 738 (LC) at para 2; *Stars Away International Airlines (Pty) Ltd t/a Stars Away Aviation v Thee NO and Others* (2013) 34 *ILJ* 1272 (LC) at para 21

[8] See Section 143(1) which reads: 'An arbitration award issued by a commissioner is final and binding and it may be enforced as if it were an order of the Labour Court in respect of which a writ has been issued …'

the review applicant must go out and secure the stay or suspension of the award, failing which the arbitration award will always remain executable and enforceable.

[15] The design of Section 145 of the LRA is specific. It provides that a stay or suspension of execution or enforcement can either be in effect purchased by way of security, or obtained by leave of this Court.

[16] The purchasing of suspension of execution or enforcement of the award, for the want of a better description, is done in terms of Section 145(7) of the LRA. The Section provides as follows:

> '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).'

In turn Section 145(8) provides:

> '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.'

[17] Section 145(7) however does not prescribe how or in what form this security must be provided.It simply provides that this security must be to the satisfaction of the Court. One must therefore consider what would be security that is satisfactory to the Court. In *Moqhaka Local Municipality v Motloung and Others*[9] The Court held:

> 'On a plain reading of the phrase 'unless the applicant furnishes security to the satisfaction of the Court' in s 145(7), the reference to 'the Court' is obviously a reference to the 'Labour Court' in s 145 (8) which is entrusted with deciding whether or not the amount of security stipulated in s 145 (8)(a) and (b) needs to be provided. Moreover, the form which the security provided under either of

[9] (2017) 38 ILJ 649 (LC) at para 25.

those subsections must take is not prescribed by the LRA. 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.'

[18] Accordingly, security can be provided in the form of a payment into Court or the Sheriff's trust account. Further, the issuing of a security bond by a legal practitioner or a registered banking institution would also qualify as the requisite providing of security.[10] The reason for this is that such bonds are normally issued against actual funds dedicated or set aside for that very purpose, and for the specific sum of money recorded in the bond document itself. Further, the person or entity that issued the bond can be held accountable himself, herself or itself, directly, in terms of it. The common denominator of all these forms of security is that they sound in a specified and secured cash amount. In my view, the reference to 'security to the satisfaction of the Court' in Section 145(7) relates to the form in which the security is provided, which must satisfy the Court. On this basis, I conclude that any of these forms of security sounding in a specified and secured cash amount, as summarized above, would as a matter of general application be considered to be 'satisfactory' as contemplated by Section 145(7).

[19] Other forms of security can however also be provided, but in these cases the Court would have to be satisfied on an individual case by case basis that it is satisfactory. An example of this would be if a movable or immovable asset is put up as security. In such a case, the value would have to be determined so as to ascertain whether it would satisfy the amount specified in Section 145(8). So if an applicant for example puts up its stamp collection as security, it must be decided if it covers the amount required and how this asset must be secured so as to serve as security. In *Emfuleni Local Municipality v SAMWU obo Mokoena and Others; In re: Emfuleni Local Municipality v South African Local Government Bargaining Council ('SALGBC') and Others*[11] the Court considered whether the security provided in the form of a resolution of a

[10] *Lambons (Pty) Ltd t/a Lambons Peugot (Pty) Ltd v Barker and Others* [2017] ZALCJHB 124 (25 April 2017) at para 4.
[11] [2017] ZALCJHB 143 (3 May 2017) at para 14.

municipal council under section 48(2)(h) of the MFMA constituted security to the satisfaction of the Court in terms of Section 145(7), and held:

> '… The real question is whether the resolution of the Council and the declaration by the financial officers is sufficient. In my view, as long as the amount is contained as a line item in the applicant's current annual budget and until such time as the review application is determined, together with the resolution (provided it is not revoked), ought to be sufficient guarantee of payment.'

[20] Once such satisfactory security has been provided, the next question to be answered is what must be done in order to give practical effect to the suspension of execution or enforcement of the award. The difficulty in this respect was recognized by Lagrange J in *Moqhaka Local Municipality*[12] where the learned Judge said:

> 'Typically, security is often only provided when the applicant is compelled to bring an urgent application to stay the execution of a writ and the security tendered is then placed before a judge in court when the urgent application is considered. The facts of this case are somewhat unusual in that normally if a party has lodged security in the form of a security bond issued by the applicant's attorney of record, as in this case, the employee party seeking to enforce the award will not take any further steps to do so, in the realisation that in all probability the court will accept the form of security provided. The difficulty for an applicant on review is that until the court has made a ruling under s 145(7) to the effect that it is satisfied that the security provided meets the requirements of s 145(8), in the absence of an undertaking from the employee party that no further steps will be taken to enforce the award in the light of the security provided, the applicant has no guarantee that it will not be surprised by a sheriff arriving at its premises to execute the deemed writ. Unless an alternative procedure is developed, an applicant who cannot secure the agreement of the employee party not to attempt to enforce the award once security has been lodged, will have little option but to approach the court as the applicant did in this case …'

[12] (*supra*) at para 27.

[21] Whilst I agree with most of what is said by Lagrange J, *supra*, it is however my view that it is not contemplated by the phrase 'to the satisfaction of the Court' that the Labour Court must on each and every individual occasion decide what provision of security is satisfactory and declare it as such. This would in my view defeat one of the important objectives of introducing Sections 145(7) and (8), which is to limit the excessive amount of stay applications this Court is inundated with. The simple point is that if a security bond by an attorney, for example, is provided for the exact prescribed amount in Section 145(8)(a), then why should it be necessary for this Court to declare it to be satisfactory, considering, as Lagrange J himself points out, that a stay order should normally be granted on this basis alone. If the Labour Court still needs to be approached every time a review applicant applies Sections 145(7) and (8) as they stand, then there would be no need for Section 145(3). In my view, the idea / principle behind the introduction of Section 145(7) and (8) was to secure an automatic suspension of the enforcement or execution of an arbitration award, on the proviso that the actual specified security, in acceptable form, is provided. This is the only interpretation that makes logical sense.[13] In *Qubekela Properties CC v Mokoena and Another*[14] the Court held:

> 'It followed therefore that once the issue of security was attended to in view of the pending review application, the writ of execution had to be stayed in accordance with the provisions of section 145 (7) of the LRA. Thus any benefit arising from the award remained suspended. It therefore served no purpose for the First Respondent to have pursued the execution of the writ in the manner he had.'

[22] What then remains is really an issue of practical process. Lagrange J records that an alternative procedure needs to be developed in this respect. I cannot agree more. But I do not think that this means that it is an imperative that some or other formal rule or legislative change be adopted. After all, it is the function of this Court to interpret and apply the LRA, and this then serves as a precedent to all parties using the LRA, on what to do. This Court can competently, by way of judgments, decide what forms of security would be

[13] See *Natal Joint Municipal Pension Fund v Endumeni Municipality* 2012 (4) SA 593 (SCA) at para 18; *Bothma-Batho Transport (Edms) Bpk v S Bothma en Seun Transport (Edms) Bpk* 2014 (2) SA 494 (SCA) at para 12.
[14] [2016] ZALCJHB 422 (8 November 2016) at para 11.

satisfactory, and in my view, these are of the kinds as I have set out above. Once security in such forms are provided, it is the act of providing the prescribed security that effectively suspends the execution or enforcement of the award. In my view it not necessary for this Court to actually make an order staying or suspending execution, if such security is provided.

[23] In my view, the application of a simple process, can give effect to the above. This process would be the serving and filing of a bond document. The bond document specifies the amount and form of the security provided, and that it is provided in terms of Sections 145(7) and (8). This bond document must be filed in the Court file relating to the review application. It must be served on the other parties to the review application, so they are made aware this has been done. This would serve as proof of security as contemplated by Sections 145(7) and (8)[15], and should then avoid further steps in execution being taken by a beneficiary in terms of the award. If a beneficiary under an arbitration award nonetheless proceeds with execution necessitating this Court having to be approached on the basis of urgency to give effect to what has in reality already happened (the suspension of enforcement by filing the bond), then that beneficiary should be punished by way of an adverse costs order.[16] That way the right message will eventually get through to everyone participating in the LRA dispute resolution process as to what is the appropriate course of action.

[24] In summary therefore, and where the requisite security is provided in terms of Sections 145(7) and (8) in the actual prescribed amount, suspension of the award follows, and execution or enforcement of the award is not competent for as long as the review application persists and remains undecided / undetermined.

[25] This does not leave a beneficiary in terms of the award exposed and unprotected and at the mercy of the review applicant where it comes to a delay in the prosecution of the review application to finality. If the prosecution of the review is unnecessarily delayed, it would be up to the beneficiary under the award to have the review disposed of on the basis of a failure of timeous

[15] See *Moqhaka Local Municipality* (*supra*) at para 32.
[16] As in fact took place in *Moqhaka Local Municipality* (*supra*) at paras 33 and 38. See also *Qubekela Properties* (*supra*) at para 17.

prosecution of the same, as specifically provided for in terms of the Labour Court Rules[17] and the Practice Manual[18]. The beneficiary under the award can also bring an application to the Labour Court to dismiss the review based on the maxim *'vigilantibus non dormientibus lex subvenit'*.[19] Once the review is disposed of and the applicant was unsuccessful, execution or enforcement is immediately competent and the security provided can in fact be claimed by the beneficiary under the award.

[26] Where an applicant for review does not wish to 'purchase' suspension of the execution or enforcement of the award, so to speak, then the applicant must secure a stay or suspension of execution or enforcement of the award from this Court. This is done by way of an application under Section 145(3), which reads:

> 'The Labour Court may stay the enforcement of the award pending its decision'

The application can be brought in the normal course, or as one of urgency, provided the requirements for urgency have been satisfied.

[27] The Court's powers under section 145(3) would extend to any kind of enforcement of arbitration awards, and would include the recent writs of enforcement issued by the CCMA itself and sent to the various Sheriffs for execution. As held in *MBS Transport*[20]:

> '… Section 145(3) is clear. The enforcement of an arbitration award may be stayed by the Labour Court. The section has no qualification or limitation. The enforcement of any arbitration award issued in terms of the Act may be stayed

[17] Rule 11 can be used for this purpose – for the most recent judgments in this regard see *Toyota SA Motors (Pty) Ltd v Commission for Conciliation, Mediation and Arbitration and Others* (2016) 37 ILJ 313 (CC) at paras 25 and 46; *Mantshiyane v Kopanong Local Municipality and Others: In re Kopanong Local Municipality v Mantshiyane and Others* (2016) 37 ILJ 1695 (LC) at paras 9 – 10; *MJRM Transport Services CC v Commission for Conciliation, Mediation and Arbitration and Others* (2017) 38 ILJ 414 (LC) at para 20.

[18] In terms of Clause 11.2.2 and 11.2.3 the review application shall be deemed to be withdrawn if the record is not filed within 60 days after the registrar advised the applicant that it is available. Clause 11.2.7, quoted above, provides that the review application will be archived and considered to have lapsed if not ready for hearing within 12 months of having been brought.

[19] See *3G Mobile (Pty) Limited v Raphela NO and Others* [2014] JOL 32479 (LC) at para 38 and authorities cited there. See also *BP Southern Africa (Pty) Ltd v National Bargaining Council for the Chemical Industry and Others* (2010) 31 ILJ 1337 (LC) at para 10; *Karan t/a Karan Beef Feedlot and Another v Randall* (2009) 30 ILJ 2937 (LC) at para 14.

[20] (*supra*) footnote 3 at para 40.

> by the Labour Court. Therefore, the enforcement of a certified award which is deemed to be an order of the Labour Court in respect of which a writ was issued may be stayed by the Labour Court pending its decision. The Labour Court may therefore stay the enforcement of an award pending its decision in the review application.'

[28] The Labour Court, in an application as contemplated by Section 145(3), exercises a discretion as to whether to grant a stay or suspension of execution or enforcement of the award, which discretion must be exercised judicially on the basis that real or substantial justice requires such stay or suspension. In *Robor (Pty) Ltd (Tube Division) v Joubert and Others*[21] the Court held:

> '… The discretion to stay execution must be exercised judicially, but generally speaking a court will grant a stay of execution where real and substantial justice requires it or, put differently, where injustice would otherwise be done.
>
> The discretion is a wide one. It is founded on the court's power to control its own process. Grounds on which a court may choose to stay execution include that the underlying cause of action on which the judgment is based is under attack, and that execution is being sought for improper reasons. But these are not the only circumstances in which the court will exercise the power …'

Other factors identified by the Court in *Robor* for consideration are whether the underlying challenge to the arbitration award was bought in time, the parties' interest in finality, the cost to all parties of a delay in finality or of instituting or opposing further proceedings, and the risk of injustice being done to the less powerful party to the dispute.[22]

[29] The Court may also impose, in exercising such discretion, whatever conditions it may deem appropriate. The Court may even determine that the stay or suspension would only apply for a specified period of time, and then lapse. This being said, the Court should always bear in mind the security

[21] [2009] 8 BLLR 785 (LC) at para 10 – 11. See also *Chillibush Communications (Pty) Ltd v Gericke and Others* (2010) 31 ILJ 1350 (LC) at para 18.
[22] See *Robor* (*supra*) at para 16; *Cape Clothing Association v De Kock No and Others* (2013) 34 ILJ 1957 (LC) at para 9.

requirements in Sections 145(7) and (8) of the LRA, when exercising its discretion, which I will specifically elaborate on hereunder.

[30] Another consideration in the Labour Court exercising its discretion whether or not to stay or suspend the execution or enforcement of the award is that of having regard, on a *prima facie* basis, of the prospects of success of the review application on the notice of motion and founding affidavit in the review application, as it stands. It is not necessary to decide whether the case advanced in the review application has merit or not. All that is necessary to consider is whether this case, should it be substantiated when the matter ultimately comes up for hearing, could sustain a successful review.[23]

[31] It is clear, in my view, that the Labour Court, when exercising its discretion as contemplated by Section 145(3) of the LRA, would be entitled to reduce the quantum of security a review applicant needs to provide, or even dispense with it all together. In *Free State Gambling and Liquor Authority v Commission for Conciliation, Mediation and Arbitration and Others; Free State Liquor and Gambling Authority v Motake No and Others*[24] the Court held:

> 'Accepting that a proper, constitutionally compliant reading of s 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 directs otherwise' in s 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 a lesser amount than those amounts set out in s 145 (8)(a) and (b).'

I agree with these sentiments.

[32] However, a proper case must always be made out by the applicant, in seeking to dispense with the requirement of providing security, which would form the basis upon which such a discretion might be exercised. In simple terms, the default position must be that the Labour Court will require security to be provided as prescribed by Section 145(7) and (8) as a condition for any stay or

[23] *Robor* (*supra*) at para 16.
[24] (2015) 36 ILJ 2867 (LC) at para 4.4.

suspension order being granted by the Court, unless the applicant can show good and proper cause in the application why this should not be the case.[25]

[33] Good cause in the context of motivating a departure from the security provisions prescribed in Section 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 10 employees, which would in effect 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. By comparison, albeit in the context of dealing with urgency, the Court in *Harley v Bacarac Trading 39 (Pty) Ltd*[26] said:

> 'If an applicant is able to demonstrate detrimental consequences that may not be capable of being addressed in due course and if an applicant is able to demonstrate that he or she will suffer undue hardship if the court were to refuse to come to his or her assistance on an urgent basis, I fail to appreciate why this court should not be entitled to exercise a discretion and grant urgent relief in appropriate circumstances. Each case must of course be assessed on its own merits.'

[34] This then brings me neatly back to the judgment in *Free State Gambling*. This judgment was relied on by the applicant from the outset of its intended challenge to the award. Even before bringing its review application, and in an e-mail dated 28 October 2016, the applicant informed the third respondent's attorneys that it was exempted from providing security based on this judgment. The applicant contends that this judgment is supportive of its view that the application of the provisions of the MFMA in effect exonerated the applicant

[25] *National Dept of Health v Pardesi and Another* [2016] ZALCJHB 492 (12 September 2016) at para 6.
[26] (2009) 30 ILJ 2085 (LC) at para 8.

from providing security. The Court in *Free State Gambling*[27] dealt with the Public Finance Management Act ('PFMA')[28] and held:

> '… The applicant submits that the provision of security is contrary to the provisions of s 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. It is submitted that this is impractical. I would add that it is also unnecessary.
>
> In my judgment, in applications such as these, where the applicant's budget and financial management are governed by the PFMA and Treasury Regulations, and duly authorised 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 s 145(7) and (8).'

[35] I am mindful of the fact that the principle of *stare decisis* applies in the Labour Court, which means that I am bound by the judgment in *Free State Gambling* unless I am of the view that it is 'clearly wrong'.[29]

[36] In my view, and respectfully, insofar as the judgment in *Free State Gambling* could be construed and applied as a precedent to the effect that public service entities subject to the provisions of the PFMA or related legislation are exempt / exonerated from providing security under Section 145(7) and (8), this would clearly be wrong. I can see no reason why all employers, whether in the public service or the private sector, should not be subject to the same requirement of providing security under Sections 145(7) and (8) of the LRA. In *Pardesi*[30] the

[27] (*supra*) at paras 5 – 6.
[28] Act 1 of 1999.
[29] *Public Servants Association on behalf of Liebenberg v Department of Defence and Others* (2013) 34 ILJ 1769 (LC) at para 22; *SA Transport and Allied Workers Union and Another v Garvas and Others* (2012) 33 ILJ 1593 (CC) at para 114; *Gcaba v Minister for Safety and Security and Others* (2009) 30 ILJ 2623 (CC) at para 58; *Chizunza v MTN (Pty) Ltd and Others* (2008) 29 ILJ 2919 (LC) at para 7; *National Education Health and Allied Workers Union v University of Cape Town and Others* (2003) 24 ILJ 95 (CC) at para 26; *National Union of Metalworkers of SA v Commission for Conciliation, Mediation and Arbitration and Others* (2000) 21 ILJ 1634 (LC) at para 22; *Eskom v Hiemstra NO and Others* (1999) 20 ILJ 2362 (LC) at para 17; *United Transport and Allied Trade Union/SA Railways and Harbours Union and Others v Autopax Passenger Services (SOC) Ltd and Another* (2014) 35 ILJ 1425 (LC) at para 55.
[30] (*supra*) footnote 25 at para 6.

Court declined to express a firm view on the correctness or otherwise of the decision in *Free State Gambling*, but did comment as follows on the judgment:

> '… The applicant in the *Free State Gambling* case sought exemption from furnishing security on the basis that sections 145(7) and (8) were in conflict with s 66 of the PFMA. The *Free State Gambling* judgement is not authority for the proposition that all departments of state or other entities subject to the PFMA do not have to furnish security. There are no facts before me that enable me to exercise a discretion to order that security should not be furnished. The default position must therefore apply. That being so, the provisions of s 145 (7) prevail, i.e. the institution of review proceedings does not suspend the operation of the arbitration award.'

[37] Insofar as it can be said that the application of Sections 145(7) and (8) is in conflict with the PFMA or the MFMA or any kind of related legislation, where it comes to government departments or municipalities or similar public service entities, then the simple answer is that in terms of Section 210[31] of the LRA, the LRA must prevail. In *City Power (Pty) Ltd v Grinpal Energy Management Services (Pty) Ltd and Others*[32] the Court dealt with the Local Government: Municipal Systems Act[33], an Act related to the MFMA, and in particular with the contention that it was in conflict with the LRA. The Court specifically relied on Section 210 of the LRA and held:[34]

> '… What it means in this context is that the provisions of the LRA prevail over the Municipal Systems Act in employment matters. …'

The same consideration should equally apply to any conflict between the LRA and the MFMA.

[38] It should also not be left out of the equation what one of the important considerations for the introduction of Sections 145(7) and (8) was. In my view, and unashamedly, these provisions have as an objective to discourage review

[31] The Section reads: '(1) If any conflict, relating to the matters dealt with in this Act, arises between this Act and the provisions of any other law save the Constitution or any Act expressly amending this Act, the provisions of this Act will prevail'.
[32] (2015) 36 ILJ 1423 (CC).
[33] Act 32 of 2000.
[34] Id at para 30.

applications that have little prospects of success.[35] This objective came about as a result of an approach that developed, often in the case of employers in the public service, to review arbitration awards even if the review application had little merit, especially considering the fairly stringent review test that currently prevails[36], solely for the purposes of obstruction or delay or to give effect to a desire not to comply. This meant that the Labour Court became inundated with review applications which often have no merit, to the detriment of expeditious dispute resolution. It is envisaged that if a review applicant has to in effect commit money to the review application, up front, such an applicant may think twice about proceeding with the review, and this reconsideration could have the potential effect of limiting review applications, and especially those frivolous or obstructive ones.

[39] The necessity of having to pay security may also serve to motivate review applicants to prosecute their review applications with expedition. After all, and once the review application is disposed of and should the review applicant succeed, it can have its security back. It is common sense that any applicant would want to have this happen as soon as possible.

[40] In my view, the objective referred to above may very well be best applied in the case of review applications by government departments or municipalities and related institutions. Often, litigation is conducted by functionaries at lower levels, so to speak, in these entities, without the evaluation of the matter at senior management level. But considering the strict statutory regulation that exists where it comes to paying out money, the requirement of setting security may well bring the matter to the attention of responsible senior management, who would be compelled not to commit such funds unless they are satisfied that the review application has prospects of succeeding. Again, this could potentially reduce the instances of such kind of litigation and may well service to avoid further wasteful expenditure in litigation that has little hope of success.

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[35] *Emfuleni Local Municipality* (*supra*) at para 14.

[36] See *Sidumo and Another v Rustenburg Platinum Mines Ltd and Others* (2007) 28 ILJ 2405 (CC) at para110; *Herholdt v Nedbank Ltd and Another* (2013) 34 *ILJ* 2795 (SCA) at para 25; *Gold Fields Mining South Africa (Pty) Ltd (Kloof Gold Mine) v Commission for Conciliation, Mediation and Arbitration and Others* 2014) 35 ILJ 943 (LAC) at para 14. The *Gold Fields* judgment was followed by the LAC itself in *Monare v SA Tourism and Others* (2016) 37 ILJ 394 (LAC) at para 59; *Quest Flexible Staffing Solutions (Pty) Ltd (A Division of Adcorp Fulfilment Services (Pty) Ltd) v Legobate* (2015) 36 ILJ 968 (LAC) at paras 15 – 17; *National Union of Mineworkers and Another v Commission for Conciliation, Mediation and Arbitration and Others* (2015) 36 ILJ 2038 (LAC) at para 16.

[41] In the end, the provisions of the PFMA, MFMA and related legislation, cannot serve as a basis to exonerate any government departments or municipalities or like public service entities, as employers, from having to provide security under Sections 145(7) and (8) of the LRA, in order to secure a stay or suspension of the execution or enforcement of an arbitration award, pending a review application brought. If these kind of employers want this Court to exercise a discretion where it comes to the issue or reducing or even dispensing with security when deciding to grant a stay or suspension of the execution or enforcement of an arbitration award, then a proper case must be made out in line with what I have set out in this judgment, above, just like any other employer would have to do.

Conclusion

[42] In this instance, the applicant has elected not to 'purchase' suspension of the execution of the award by simply applying Sections 145(7) and (8) of the LRA. The applicant has rather elected to approach this Court to exercise a discretion in terms of Section 145(3) of the LRA. In exercising this discretion, I am satisfied that the applicant, as a matter of principle, has made out a case that the execution and enforcement of the award be stayed, as prayed for in the notice of motion. There is a proper review application pending, timeously brought, which has been expeditiously prosecuted, and which on face value on the issues raised could lead to the setting aside of the award if upheld. I am of the view that it would be inequitable and unfair to enforce and execute the award now, whilst this review application has still not been determined, and real justice demands that the award be stayed until the review has been decided. Any prejudice to the third respondent is ameliorated by the requirement of security, which I will next address.

[43] I am not satisfied that the applicant has made out a case justifying the relief that the applicant be exonerated from the providing of security. To simply rely on the provisions of the MFMA which makes it, according to the applicant, hard to provide security, is entirely insufficient. As I have also said, and insofar as the applicant sought to rely on the *Free State Gambling* judgment as a basis for a blanket exoneration, that judgment is in my respectful view, wrong,

in this respect. There is no reason in this instance why the applicant should not be required to furnish security as stipulated in Section 145(8) of the LRA, as a condition for securing a stay / suspension of enforcement.

[44] The award was for the reinstatement of the third respondent. In terms of Section 145(8)(a), it is stipulated that the amount of security required is 24 (twenty four) months' salary. Therefore the amount that must be provided as security is a total sum of R402 210.96, considering the third respondent's monthly salary of R16 758.79.

[45] The third respondent has asked for security to also include the 13 months' salary in back pay as quantified by the second respondent in his amendment award of 20 January 2017. I however cannot agree that this should be case. Section 145(8)(a) provides for prescribed security of 24 months' salary in the case of a reinstatement award. This would include any amount in back pay due, which is nothing else but a component of and part of the reinstatement award.[37] Back pay in terms of a reinstatement award is also not compensation[38], and thus the provisions of Section 145(8)(b) cannot also apply. The applicant accordingly does not have to provide security for this additional amount of 13 months' salary (amounting to R271 684.27).

[46] Considering the conclusion I have come to above, the third respondent's counter application under case number J 864 / 17, which is still pending, falls to be dismissed.

[47] This only leaves the issue of costs. I have a wide discretion where it comes to the issue of costs, having regard to the provisions of Section 162(1) of the LRA. In this instance, I believe a costs order would not be appropriate. The applicant was after all mostly successful in its application, which was opposed by the third respondent on all fronts. I also believe that it was not unreasonable for the applicant to have relied on the judgment in *Free State*

[37] *Equity Aviation Services (Pty) Ltd v Commission for Conciliation, Mediation and Arbitration and Others* (2008) 29 ILJ 2507 (CC) at para 40; *De Beer v Minister of Safety and Security and Another* (2013) 34 ILJ 3083 (LAC) at para 27; *Themba v Mintroad Sawmills (Pty) Ltd* (2015) 36 ILJ 1355 (LC) at para 23.

[38] See *Equity Aviation Services* (*supra*) at para 42; *Republican Press (Pty) Ltd v Chemical Energy Paper Printing Wood and Allied Workers Union and Others* (2007) 28 ILJ 2503 (SCA) at para 19; *Msikinya v General Public Service Sectoral Bargaining Council and Others* (2016) 37 ILJ 1457 (LC) at para 12.

Gambling in the manner that it did The third respondent has already received all its costs in the earlier, and abortive proceedings. It should also not be overlooked that this matter concerned an important legal principle. I believe that no order as to costs is appropriate in this instance.

Order

[48] For all of the reasons as set out above, I make the following order:

1. The execution and/or enforcement of the arbitration award of the second respondent dated 24 October 2016 and issued under case number NWD 111501, as amended on 20 January 2017, is suspended / stayed pending the finalization of the applicant's review application under case number JR 2441 / 16.

2. The execution of the writ of enforcement dated 7 March 2017 and issued under case number HO 881 – 17, is stayed / suspended pending the finalization of the applicant's review application under case number JR 2441 / 16.

3. The suspension / stay granted in terms of paragraphs 1 and 2 of this order is conditional upon the applicant providing security in the amount of R402 210.96, within 30(thirty) Court days of date of this order, failing which the order in paragraphs 1 and 2 shall automatically lapse.

4. The third respondent's counter application under case number J 864 / 17 is dismissed.

5. There is no order as to costs.

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S Snyman

Acting Judge of the Labour Court

Appearances:

For the Applicant:	Adv X Mofokeng
Instructed by:	Majang Attorneys
For the Third Respondent:	Adv A Tema
Instructed by:	De Swart Vogel Myambo Attorneys