



Of Interest to other Judges

**THE LABOUR COURT OF SOUTH AFRICA,  
HELD AT JOHANNESBURG**

**Case no: J 2961/16**

In the matter between:

**EMFULENI LOCAL MUNICIPALITY**

**Applicant**

and

**SAMWU obo MOKOENA & 72**

**First Respondent**

**OTHERS**

**COMMISSION FOR CONCILIATION,  
MEDIATION AND ARBITRATION**

**Second  
Respondent**

**KATHLHOLO WABILE N.O**

**Third  
Respondent**

In re:

**Case JR 741/16**

**EMFULENI LOCAL MUNICIPALITY**

**First Applicant**

and

**SOUTH AFRICAN LOCAL  
GOVERNMENT BARGAINING  
COUNCIL ('SALGBC')**

**First Respondent**

**M N S DAWSON N.O**

**Second Respondent**

**SAMWU obo MOKOENA & 72**

**Third Respondent**

**OTHERS**

**Heard:** 16 February 2017

**Delivered:** 3 May 2017

**Summary:** (Reinstatement of review application– unfair labour practice claim – local authority – security provided under s 48(2)(h) of the Local Government: Municipal Finance Management Act )

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**JUDGMENT**

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LAGRANGE J

Background

[1] On 16 March 2016, the second respondent in case no JR 741/16 (‘the arbitrator’) issued an arbitration award in an unfair labour practice dispute ordering the applicant to promote the seventy-three individual respondents, who are traffic officers represented by SAMWU, to the same level as certain Land Use Management employees. Previously, the traffic officers were on salary level 9. The applicant applied timeously on 25 April 2016 to review the award and did not give effect to it. The arbitrator had ordered that if the traffic officers were not placed on the same level, the matter could be brought back to him “for a proper assessment” whatever that might have been intended to mean.

[2] In view of the applicant not giving effect to the award by 15 April 2016 as required by the arbitrator, SAMWU referred the matter back to the arbitrator, who, in the exercise of his self-designated role of making ‘a proper assessment’, issued a second award ordering the applicant to pay back-pay to the traffic officers amounting to more than R 36 million and to pay the respondents’ legal costs of approximately R 50,000. To date the

applicant has not applied to review and set aside this supplementary award which was premised on the 16 March award.

- [3] On 17 October 2016, the respondent applied to dismiss the applicant's review application. On 26 October 2016, the applicant filed the record, although it was incomplete because the transcript did not include the cross examination of the applicant's main witness and the evidence of the respondents' witnesses.
- [4] Having certified the award, the respondents proceeded to have property of the applicant attached on 12 December 2016. Three days later, the applicant applied urgently to stay the enforcement of the award pending the outcome of the review proceedings.
- [5] The matter came before the honourable Justice H Cele on 28 December 2016 and the matter was postponed to 16 February 2017. In the order of Cele J, the enforcement of the award was stayed pending certain conditions being fulfilled, failing which the order would lapse automatically on 16 February 2017. In summary, those conditions were:
- 5.1 The applicant had to obtain "a Council resolution in order to furnish security as required in terms of section 145 (7) and (8) of the Labour Relations Act, 66 of 1995 ('the LRA').
  - 5.2 The applicant had to apply for an extension of time to file the record of the arbitration proceedings by 18 January 2017.
  - 5.3 The applicant had to obtain the missing parts of the record from the SALGBC, failing which it had to approach the Council to set up a meeting for the reconstruction of the record by 27 January 2017.
- [6] Further, the property attached by the sheriff would remain attached but the sheriff was ordered not to remove the same.
- [7] Before the hearing on 16 February 2017, the applicant filed two additional applications. Firstly, on 18 January 2017, it filed an application to reinstate the review and for an extension of time to file the record of the arbitration proceedings. Secondly, on 31 January 2017, it filed a rule 11 application to compel the bargaining Council to dispatch the missing portion of the records.

- [8] On 31 January 2017, the applicant had adopted a resolution approving “the necessary security to the amount of R36 776 150” to satisfy the court order of 28 December 2016. It further resolved that the Accounting Officer and Acting Chief Financial Officer as co-signatories should implement the decision of the Council and confirmed that the “necessary security as required by the Labour Court be extended under section 48(2)(h) as provided for in the Local Government: Municipal Finance Management Act (56 of 2003)”. These resolutions were then encapsulated in a declaration signed by the Accounting Officer and Acting Chief Financial Officer in the following terms:

“Furthermore that this declaration therefore serves to satisfy the provision of security as provided by the Emfuleni Local Municipality in favour of the Registrar of the Labour Court to the amount of R36 776 150 (...) by means of undertaking to make provision in ELM’s Amendment Budget of 2016/2017 financial year and subsequent budgets for payment of its financial obligations; including interest and capital; thus forth serving as security as envisaged in terms of section 48(2)(h) of the Local Government: Municipal Finance Management Act (56 of 2003).”

- [9] The pertinent portions of section 48(1) and (2) of the Local Government: Municipal Finance Management Act provide that:

“48 Security

(1) A municipality may, by resolution of its council, provide security for-

- (a) any of its debt obligations;
- (b) any debt obligations of a municipal entity under its sole control; or
- (c) contractual obligations of the municipality undertaken in connection with capital expenditure by other persons on property, plant or equipment to be used by the municipality or such other person for the purpose of achieving the objects of local government in terms of section 152 of the Constitution.

(2) A municipality may in terms of subsection (1) provide any appropriate security, including by-

- (a) giving a lien on, or pledging, mortgaging, ceding or otherwise hypothecating, an asset or right, or giving any other form of collateral;

(b) undertaking to effect payment directly from money or sources that may become available and to authorise the lender or investor direct access to such sources to ensure payment of the secured debt or the performance of the secured obligations, but this form of security may not affect compliance with section 8 (2);

(c) undertaking to deposit funds with the lender, investor or third party as security;

(d) agreeing to specific payment mechanisms or procedures to ensure exclusive or dedicated payment to lenders or investors, including revenue intercepts, payments into dedicated accounts or other payment mechanisms or procedures;

(e) ceding as security any category of revenue or rights to future revenue;

(f) undertaking to have disputes resolved through mediation, arbitration or other dispute resolution mechanisms;

(g) undertaking to retain revenues or specific municipal tariffs or other charges, fees or funds at a particular level or at a level sufficient to meet its financial obligations;

(h) undertaking to make provision in its budgets for the payment of its financial obligations, including capital and interest;

(i) agreeing to restrictions on debt that the municipality may incur in future until the secured debt is settled or the secured obligations are met; and

(j) agreeing to such other arrangements as the municipality may consider necessary and prudent.”

(emphasis added)

[10] In addition to the resolution mentioned above, on 08 February 2017, the applicant’s attorney issued a ‘security bond’ confirming that the applicant was firmly bound to pay the sum mentioned in the award within 30 days of the review application or an appeal arising therefrom being dismissed, if the Council failed to comply with the award.

Issues arising on 16 February 2017

[11] In view of the developments which had taken place since the matter came before Cele J, before an order was made, the parties were given an opportunity to make representations by 23 February 2017 on the applicant's request for extension of time to file the record of the proceedings so that the court could also address that application as well as the security for costs question. Both parties made written representations.

[12] Having considered the order made on 28 December 2016, I am satisfied that the only requirement which the applicant did not comply with was the requirement to request the Council to convene a meeting to reconstruct the record. Instead the application was made to compel the Council to produce the record. In substance, I am satisfied that the applicant conducted himself in a *bona fide* manner to comply with the order of Cele J.

[13] The second question is whether the security provided in the form of a resolution of the Council under section 48(2)(h) of the Local Government: Municipal Finance Management Act satisfies the requirements of section 145 (7) and (8) of the Labour Relations Act, 66 of 1995 ('the LRA'), which state:

"(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."

(emphasis added)

[14] Since the Municipal Finance Act permits a local authority to provide security for a debt and since the arbitration award clearly constitutes one, subject to whether the award is upheld, the only issue to consider is

whether it is the kind of security that might be accepted under the section 145 (8). It is true that the typical form of security provided by private employers is usually in the form of a security bond issued by their attorney of record. In this case, the security bond issued by the applicant's attorney is not in the form of a typical security bond. All that document supposedly does is to confirm the resolution taken by the Council and add that, the payment will be made within 30 days of falling due. 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. I am also mindful of the fact that sections 145(7) and (8) were partly introduced to discourage review applications which brought solely for the purpose of delay. The value of the quantified award in this case is fairly high and the ultimate financial implications potentially go beyond the backpay award. The grounds of review relied on the initial award which decided the substance of the unfair labour practice claim also do not appear to be frivolous.

- [15] SAMWU correctly points out that the applicant has failed to bring a separate application to review the second award which determined substantive relief based following the applicant's non-compliance with the original award. That might give rise to further complications for the applicant's claim, if it fails to review the second part of the award also. However, I do not need to consider that because it is sufficient for present purposes that it is reviewing the first award on which the second is premised.
- [16] In the circumstances, I am happy to agree to the execution of the award been stayed pending the outcome of the review application, subject to the conditions set out in the order below.
- [17] I have also considered the application for further time to file the complete review record. In this regard, it is evident that the applicant had taken steps to obtain the record and had been partially successful by October

2016. It has been hampered in finalising the review by the missing portion of the transcript which appears to be substantial. I do not believe the applicant has been unduly remiss or tardy in prosecuting the review to date. Consequently, in so far as the review application is deemed withdrawn in terms of paragraphs 11.2.2 and 11.2.3 of the Labour Court Practice Manual, I am satisfied that the applicant has made out a case for reviving the review application and for obtaining an extension of time to file the review record, including attempts to reconstruct it if necessary.

[18] To expedite matters, there is no reason why an order should not be made compelling the first and second respondents to make the remainder of the record available, as prayed for in the application launched on 17 January 2017. I am mindful of the possibility that the council will not be able to provide the missing portion of the record, but that does not mean the reconstruction of the record is unattainable through other efforts. Accordingly, the order requires all those involved to assist in the reconstruction of the record if necessary.

#### Order

Accordingly, it is ordered that -

- [1] Provided the applicant does not rescind or amend the resolution adopted and recording in the declaration attached hereto as Annexure "A" (dated 1 February 2017) and provided the applicant makes provision for payment of the amount stipulated in the resolution as a distinct item in its final expenditure budget each financial year until such time as the review application under case number JR 741/16 is finalised, the execution of the arbitration awards issued by the second respondent under case number GPD 061501 on 10 March and 16 August as authorised by the CCMA under case HO 3118-16 are stayed and any attachment of the applicant's assets pursuant thereto must be uplifted.
- [2] The applicant's review application under case no JR 741/16 is reinstated.
- [3] The first and second respondents in case no JR 741/16 are ordered to dispatch the missing portion of the record to the Registrar of the Labour Court, being the recording and, or handwritten notes of the evidence of the

applicant's main witness and the evidence of the respondents' witnesses, within 15 days of receipt of this order.

- [4] The applicant must file the missing portion of the record within one calendar month of the missing portion of the record being received by the registrar and simultaneously comply with rule 7A(8) of the Labour Court rules.
- [5] If the applicant is unable to file the remaining record or a reconstruction of the missing portion of the record by 15 July 2017, it must approach the court in writing for further directions on the conduct of the review giving a full account of the steps taken to finalise the record and why they were unsuccessful.
- [6] No order is made as to costs.

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**Lagrange J**  
**Judge of the Labour Court of South Africa**

**APPEARANCES**

APPLICANT:

J Makamu of KNT  
Incorporated

FIRST RESPONDENTS:

R Venter instructed by  
Maenetja Attorneys

LABOUR COURT