



IN THE LABOUR APPEAL COURT OF SOUTH AFRICA, JOHANNESBURG

Reportable

Case no. JA 120/2017

In the matter between:

CITY OF JOHANNESBURG

Appellant

and

SAMWU OBO LUCAS MONARENG

First Respondent

THE SHERIFF (JOHANNESBURG NORTH)

Second Respondent

Heard: 06 November 2018

Delivered: 20 March 2019

Summary: Whether a public sector employer should provide security in terms of section 145(7)(8) of the Labour Relations Act - employer contending that it is prohibited in terms of the Local Government: Municipal Finance Management Act from furnishing security – court upholding principles in *Rustenburg Local Municipality* that all employers whether in the public or private sector should be subject to the same requirement of providing security thereby disallowing the contrary view adopted in *Free State Gambling and Liquor Board*.

held that the MFMA does not prohibit the furnishing of such security by a municipality. Further that that employers in the public sector that are regulated by the PFMA or the MFMA are not automatically absolved from providing security on the stay of the enforcement of an arbitration award pending the

decision of the Labour Court on review. The general rule is that an employer is obliged to provide security in accordance with section 145(8) of the LRA unless the Labour Court orders otherwise. Section 145(8) confers upon the Labour Court a discretion that it may exercise in favour of, either dispensing altogether with the payment of security or, reducing the amount of security required.

court finding that Labour Court did not provide reasons for ordering the employer to provide security in accordance with section 145(8) of the LRA and that its discretion was not applied justifiably. Appeal upheld

Coram: Phatshoane ADJP, Sutherland JA and Kathree-Setiloane AJA

JUDGMENT

KATHREE- SETILOANE AJA

[1] This appeal concerns the question of whether a public sector employer should provide security in terms of section 145(8) of the Labour Relations Act (“LRA”).¹ The appeal lies against the Order of the Labour Court (Baloyi AJ) in which it set a condition for the stay of the enforcement of the arbitration award that the City of Johannesburg (“the appellant”) provide security in terms of section 145(8) of the LRA. The appellant is a municipality established in accordance with the Local Government: Municipal Structures Act.²

In the Labour Court

[2] On 8 June 2017, the appellant applied in terms of section 145(3) of the LRA for the stay of the enforcement of the arbitration award, made on 1 August 2016 by the first respondent under the auspices of the South African Local Government Bargaining Council (“SALGBC”), pending the finalisation of an application to review and set it aside.

[3] The Labour Court granted the application for the stay, but made it subject to the appellant delivering a resolution to furnish security as required in terms of

¹ No.66 of 1995.

² No. 117 of 1998.

section 145(8) of the LRA. The appeal lies against this order with leave of the Labour Court.

The Appeal

- [4] The appellant contends that the Labour Court erred in ordering it to provide security as contemplated in section 145(8) of the LRA because the giving of security would contravene section 48 of the Local Government: Municipal Finance Management Act 56 of 2003 ("MFMA"). The appellant relies in support of this contention on the decision of the Labour Court in *Free State Gambling and Liquor Authority v CCMA and Others*³ ("*Free State Gambling and Liquor Authority*"). There, the Labour Court (Rabkin-Naicker J) held that a public entity need not provide security because the object of doing so is satisfied since the public entity's budget and finance management is governed by the Public Finance Management Act⁴ ("PFMA") and Treasury Regulations.
- [5] Two years later, the Labour Court (Snyman AJ) in *Rustenburg Local Municipality v South African Local Government Bargaining Council*⁵ ("*Rustenburg Local Municipality*") held that the decision in *Free State Gambling and Liquor Authority* was wrong and that no distinction should be drawn between public and private entities when considering the need to provide such security. It is the divergence of views in these two judgments that is at the heart of this appeal.
- [6] Section 145(7) and (8) of the LRA provide:
- (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 –

³ *Free State Gambling and Liquor Authority v CCMA and Others* (2015) 36 ILJ 2867 (LC) at paragraph 6.

⁴ No. 1 of 1999.

⁵ *Rustenburg Local Municipality v South African Local Government Bargaining Council and Others* (2017) 38 ILJ 2596 (LC) at para 36.

- (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.'

[7] The Labour Court has a discretionary power under section 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 section 145(8) of the LRA dispense with the requirement of furnishing security. Properly construed, section 145(3) read with section 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 section 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 section 145(3) of the LRA to stay the enforcement of the arbitration award pending the finalisation of the review application.

[8] However, should the employer wish to be absolved from providing security or to provide security in an amount less than the threshold in subsections (8) (a) and (b), then it is required to make an application to the Labour Court, in terms of section 145(3), for the stay of the enforcement of the arbitration award pending its decision in the review application. The employer must make out a proper case for the stay as well as for the provision of security in accordance with section 145(8) to be dispensed with or reduced.

[9] The words "unless the Labour Court directs otherwise" in section 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 sections 145(8)(a) and (b) of the LRA.⁶

⁶ *Free State Gambling and Liquor Board* at para 4.3.

- [10] Although section 145(8) of the LRA makes specific reference to “the applicant”, it effectively applies to only employers. It makes no provision for an employee who brings a review application to furnish security. The purpose of sections 145(7) and (8) is essentially to dissuade employers from bringing frivolous review applications with no prospects of success and ensure that they are timeously and expeditiously prosecuted.⁷
- [11] In support of the view adopted by the Labour Court in *Free State Gambling and Liquor Board*,⁸ the appellant maintains that a public entity has to do no more than aver that it is governed or regulated by public finance management legislation to satisfy the requirements of section 145(8) of the LRA in dispensing with security pending the review of an arbitration award. The rationale for that conclusion, so it contends, is self-evidently that the financial affairs of public entities are subject to the scrutiny of the Auditor-General and their debts are effectively underwritten by the State. The appellant also points to policy considerations which militate against public monies being encumbered as security, as they need to be used for their primary purpose of providing social services.
- [12] The appellant, in addition, argues that it is governed by the MFMA which prohibits it from providing security for debts other than those necessary for the provision of the minimum level of basic municipal services.⁹ In particular, it

⁷ *Rustenburg Local Municipality* at paras 38 and 39.

⁸ *Free State Gambling and Liquor Board* at para 6.

⁹ Section 48 of the MFMA provides:

‘(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;

relies on section 48 of the MFMA entitled “Security” which provides that 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.

[13] Section 48(3) of the MFMA provides that a council resolution authorising the provision of security in terms of subsection (2)(a) must determine whether the asset or right with respect to which the security is provided, is necessary for providing the minimum level of basic municipal services. If so, it must indicate the manner in which the availability of the asset or right for the provision of that minimum level of basic municipal services will be protected. In terms of section 48(4) of the MFMA, if the resolution has determined that the asset or right is necessary for providing the minimum level of basic municipal services, neither the party to whom the municipal security is provided, nor any successor or assignee of such party, may, in the event of a default by the municipality, deal with the asset or right in a manner that would preclude or impede the continuation of that minimum level of basic municipal services.

(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.

(3) A council resolution authorising the provision of security in terms of subsection

(2)(a) -

(a) must determine whether the asset or right with respect to which the security is provided, is necessary for providing the minimum level of basic municipal services; and

(b) if so, must indicate the manner in which the availability of the asset or right for the provision of that minimum level of basic municipal services will be protected.

(4) If the resolution has determined that the asset or right is necessary for providing the minimum level of basic municipal services, neither the party to whom the municipal security is provided, nor any successor or assignee of such party, may, in the event of a default by the municipality, deal with the asset or right in a manner that would

preclude or impede the continuation of that minimum level of basic municipal services.

(5) A determination in terms of subsection (3) that an asset or right is not necessary for providing the minimum level of basic municipal services is binding on the municipality until the secured debt has been paid in full or the secured obligations have been performed in full, as the case may be.’

[14] As I understand it, section 48 of the MFMA places no prohibition on the appellant to provide security in accordance with section 145(8) of the LRA. To the contrary, it enables a municipality to provide security by a resolution of Council for, amongst other things, “any of its debt obligations”. An arbitration award made in favour of a dismissed employee would, in my view, constitute a “debt obligation”. Section 48 does not prohibit the furnishing of such security by a municipality. However, even if, as contended for by the appellant, the MFMA did contain such a prohibition, section 210 of the LRA will prevail over it in all employment matters.¹⁰ Section 210 of the LRA provides:

‘(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 for the Constitution or any Act expressly amending this Act, the provisions of this Act will apply.’

[15] In *Free State Gambling and Liquor Board*, the applicant advanced the argument that it was exempt from furnishing security on the basis that sections 145(7) and (8) of the LRA were in conflict with section 66 of the Public Finance Management Act (PFMA).¹¹ As indicated, there the Labour Court found that the objects of providing security were satisfied where the applicant’s budget and financial management are governed by the PFMA and Treasury Regulations, and “duly authorised” averments to that effect were made by the applicant. Although called upon to declare sections 145(7) and (8) of the LRA to be in conflict with section 66 of the PFMA and that the latter provision overrides the former, the Labour Court in *Free State Gambling and Liquor Board* did not consider section 210 of the LRA.

[16] Rightly so, in the subsequent case of *National Department of Health v Pardesi and Another*,¹² (“*Pardesi*”) the Labour Court (Van Niekerk J) held that *Free State Gambling and Liquor Board* was not authority for a blanket exemption that all state or other entities subject to the PFMA do not have to provide security in terms of section 145(8) of the LRA. It furthermore held that a public entity would have to make the necessary averments before the Labour Court could exercise its discretion in its favour. In other words, the public sector

¹⁰ *Rustenburg Local Municipality* at para 37.

¹¹ No. 1 of 1999.

¹² *National Department of Health V Pardesi and Another* [2016] ZALCJHB 492 at para 6.

employer must establish on the facts why it should be exempt from furnishing security. The Labour concluded in *Pardesi* that there were no facts before it that would enable it to exercise its discretion against ordering that security should not be furnished. It accordingly held that the default position must apply and the provision of section 145(7) must prevail.

- [17] What emerges from this exposition is that employers in the public sector that are regulated by the PFMA or the MFMA are not automatically absolved from providing security on the stay of the enforcement of an arbitration award pending the decision of the Labour Court on review. The general rule is that an employer is obliged to provide security in accordance with section 145(8) of the LRA unless the Labour Court orders otherwise. Section 145(8) confers upon the Labour Court a discretion that it may exercise in favour of, either dispensing altogether with the payment of security or, reducing the amount of security required. However, before the Labour Court exercises its discretion under section 145(8), the employer seeking to dispense with the requirement to provide security for the suspension of the enforcement of the arbitration award, must show cause for why it should not do so.
- [18] In *Rustenburg Local Municipality*, the Labour Court held as follows in relation to what good cause entails:¹³

‘Good cause in the context of motivating a departure from the security provisions prescribed in s145(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 ten employees, which would then 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.’

¹³ *Rustenburg Local Municipality* at para 33.

- [19] Material prejudice to the employer is but one factor that the Labour Court must give consideration to – it is by no means decisive. In exercising its discretion, the Labour Court must have regard to the particular circumstances of the case as well as considerations of equity and fairness to both the employer and the employee. A factor that the Labour Court must take into consideration is whether the employer is in possession of sufficient or adequate assets to meet an order of the review court upholding the arbitration award; the principal concern being that the dismissed employee should not be left unprotected if the Labour Court decides the review application in his or her favour.
- [20] The *onus* is on the employer seeking an exemption from furnishing security under section 145(8) of the LRA to establish that it has assets of a sufficient value to meet its obligations should the arbitration award be upheld by the Labour Court on review. On a purposive or contextual construction, sections 145(7) and (8) of the LRA must be construed as requiring all employers – whether in the public or private sectors – to provide security. I accordingly support the position adopted in *Rustenburg Local Municipality*¹⁴ that all employers whether in the public or private sector should be subject to the same requirement of providing security.
- [21] The Labour Court in *Rustenburg Local Municipality* noted that the amendment to section 145 of the LRA to include subsections (7) and (8) was largely directed at discouraging government entities and municipalities from instituting review applications that have little or no prospects of success.¹⁵ It remarked that the requirement in section 145(8) of the LRA to provide security would compel senior management in the public sector not to commit funds unless satisfied that the review application has prospects of succeeding, thus avoiding wasteful expenditure on litigation with little prospect of success.¹⁶ I consequently agree with the conclusion in *Rustenburg Local*

¹⁴ *Rustenburg Local Municipality* at para 36.

¹⁵ *Rustenburg Local Municipality* at paras 38.

¹⁶ *Rustenburg Local Municipality* at paras 38 - 40.

Municipality that the decision in *Free State Liquor and Gambling Board* is clearly wrong¹⁷ in particular because:

‘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 s 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 kinds of employers want this court to exercise a discretion where it comes to the issue of 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...

,¹⁸

- [22] When assessing, on appeal, the Labour Court’s exercise of its discretionary powers in s145(8) of the LRA, this Court must consider whether the Labour Court properly took into account all the factors and circumstances present in coming to its decision, and that the decision arrived at was justified. In essence, this Court must consider all the facts and circumstances which the Labour Court had before it and then decide, based on a proper evaluation of those facts and circumstances, whether or not the decision was judicially a correct one.
- [23] The facts before the Labour Court in determining whether to absolve the appellant from furnishing security in accordance with section 145(8) of the LRA were these:
- (a) The applicant is a municipality established in accordance with the Local Government: Municipal Structures Act and as such is an organ of state with perpetual succession;
 - (b) It is the largest metropolitan municipality with a substantial asset base;
 - (c) Its budget reveals that it is financially sound;

¹⁷ *Rustenburg Local Municipality* at para 36.

¹⁸ *Rustenburg Local Municipality* at para 41.

- (d) Its asset and income base demonstrates that it is financially stable;
- (e) It has a Moody's credit rating of Prime -1.za and Aa3.za.
- (f) A rating of Prime -1 is the highest short term rating achievable. A Prime -1 rating means that the appellant has a superior ability to pay short term debt obligations.
- (g) A rating of aA is the second highest long term rating achievable. The obligations of a public entity that receives an aA rating are judged to be of high quality and are subject to a very low credit risk.
- (f) policy considerations militate against public monies being encumbered as security, as they need to be used for their primary purpose of providing social services; and
- (g) As things stood at the time, there were 36 arbitration awards made against the appellant with pending review applications. The appellant was the applicant in 13 of those applications. In most of these matters, there was more than one respondent. In one particular review application, there were in excess of 35 respondents. If the appellant is required to put up security in each review application, the quantum of security to be provided would be staggering. On a tally of the existing awards against the appellant, the quantum would be in excess of two million rands. Taking into account the pending matters that may go against the appellant, the quantum would in all likelihood increase substantially.

[24] The respondent did not file an answering affidavit to gainsay these averments. It, therefore, remains undisputed that as a result of the numerous review applications instituted by the appellant, the requirement to furnish of security in each one of these applications is likely to have a staggering impact upon its ability to provide social services and service delivery in its area of jurisdiction. Its financial stability, asset and income base, and favourable credit rating by an international rating agency demonstrate its ability to satisfy the arbitration award in the event of not succeeding on review.

- [25] The Labour Court did not provide reasons for ordering the appellant to provide security in accordance with section 145(8) of the LRA. The absence of reasons inclines me to conclude that the Labour Court did not consider the factors listed above in exercising its discretion under section 145(8) of the LRA. Had it done so, it would surely not have required the appellant to encumber public monies that should be directed at service delivery, by furnishing security in accordance with section 145(8) of the LRA. In particular, because the facts more than adequately demonstrate that the appellant is in possession of sufficient assets to meet an order of the review court upholding the arbitration award in the dismissed employee's (third respondent) favour.
- [26] Crucially, therefore, the third respondent is shielded should the review application be decided in his favour. In the circumstances, I find that that the Labour Court erred as it was not just and equitable, on the facts presented, for it to order the appellant to provide security as a condition for the stay of the enforcement of the arbitration award, pending its decision in the review application. The appeal accordingly succeeds.

Costs

- [27] There were two conflicting judgments on the question of security for costs that needed resolution in this appeal. The appeal also concerns a novel question of law. I consider it fair and just that there should be no order as to costs.

Order

- [28] In the result, I order that:
1. The appeal is upheld with no order as to costs.
 2. Paragraphs 2 and 3 of the order of the Labour Court is set aside and substituted with the following order:

"The enforcement of the award issued under case number JMD 011607 and HO362-17 is stayed pending the decision of the Labour Court in the review application."

F Kathree-Setiloane AJA

Sutherland JA and Phatshoane ADJP concur:

APPEARANCES:

FOR THE APPELLANT:

MJ Van As

Instructed by Moodie and Robertson