IN THE LABOUR COURT OF SOUTH AFRICA

HELD IN JOHANNESBURG

REPORTABLE

CASE NO: J246/06

In the matter between:

MAMANG JOHANNES MAMPURU

AND OTHERS APPLICANTS

AND

MAXIS STRATEGIC ALLIANCE (PTY) LTD RESPONDENT

JUDGMENT

MOLAHLEHI J

Introduction

[1] This is an application in terms of which the Applicants seek an order to make a settlement agreement concluded on the 19th August 2002, an order of Court. The Respondent has raised two points *in limine* in opposition to the claim.

Background facts

[2] The claim of the Applicants arises from an agreement concluded with Maxi Security Services (Pty) Ltd and the South African Transport and Allied Workers Union. The relevant clause of the agreement for the purposes of this application is clause 2(e) which reads as follows:

"(e) The employees in annexure "A" will receive their full salary on the 31st of July 2002. Their outstanding monies in respect of annual leave, outstanding days i.e from the period of the 15th of July 2002 to 26th of July 2002, severance pay and bonuses will be paid on the 30th of August 2002 provided that all outstanding uniforms has been handed in."

Each of the retrenched employees received a retrenchment letter from the branch manager, Maxi Security (Pretoria Branch). The deponent of the founding affidavit cites the Respondent as *"Maxi Security (Pty) Ltd Company."*

[3] The Applicants contend that the Respondent has failed to perform in terms of the agreement and as a result thereof they have not received their severance pay. It is for this reason that the Applicants seek an order directing the Respondent to comply with the terms of the agreement.

[4] In its defence the Respondent has raised two points *in limine.* The first point *in limine* raised by the Respondent is that it has been wrongly cited as a party to the agreement and also to this application. The second point raised by the Respondent concerns prescription of the claim of the Applicants.

[5] In as far as the first point *in limine* is concerned the Respondent contended that itself and Maxi Services (Pty) Ltd are two different entities. Mr Motshwane, counsel for the Applicants argued that this argument is unsustainable because the Respondent did not provide proof that the two were not the same. He contended that the Respondent should produce a deeds search to prove that the

Respondent and Maxi Security Services are two different entities. He argued in this regard that the Respondent was aware that the Applicants were its employees and at all material times laboured under such impression.

[6] With regard to the second point in limine the Respondent contended that the claim of the Applicants have prescribed in terms of section 10 read with 11 of the Prescription Act 68 of 1969. The Respondent's case is that the Applicant's case prescribed on the 30th August 2002 which was the last day the monies claimed by them were to have been paid.

[7] In attacking the point about prescription, Mr Motshwane for the Applicants argued that the retrenchment agreement is a document which stipulated the rights and obligations of the parties and therefore the case of the Applicants was not about a claim but enforcement of rights. For this reason the provisions of the Prescription Act did not according to him apply in the present instance. He argued in the alternative that should it be found that the retrenchment agreement was a debt then it be concluded that the provisions of section 11(c) of Prescription Act be regarded as applicable. Section 11(c) of the Act reads as follows:

> *"11 ...*
>
> *(c) six years in respect of a debt arising from a bill of exchange or other negotiable instrument or from a notarial contract, unless a longer period applies in respect of the debt in question in terms of paragraph (a) or (b)."*

[8] It is trite that this Court is empowered by s158 (1) (c) of the Labour Relations Act 66 of 1995 (the LRA) to make an agreement an order of Court. However, the LRA does not stipulate the time period within which the application must be filed to have an agreement made an order of Court.

[9] This Court in the case of *Public Servants Association on behalf of Khaya v Commission for Conciliation, Mediation & Arbitration & others [2008] 29 ILJ 1546 (LC),* agreed with the case of *Mpanzama v Fidelity Guards Holding (Pty) Ltd [2000] 12 BLLR 1459 (LC),* that the provisions of the Prescription Act do apply to the provisions of the LRA. See also *Cape Town Municipality v Allie NO* 1981 (2) SA 1 (C). The same approach was adopted in the case of *Uitenhage Municipality v Mooley* 1998 (19) ILJ 757 (SCA), where the Court held that the provisions of s12 (1) of the Act were applicable to a determination of whether the debts which were due to the employee were recoverable in terms of the Basic Conditions of Employment Act 3 of 1983. This approach has now been endorsed by the Labour Appeal Court in he case of *Solidarity & others v Eskom Holdings Ltd [2008] 29 ILJ 1450 (LAC).*

[10] Section 11 read with s10 of the Act, provides for the period within which a debt becomes prescribed. The extinctive prescription period of thirty years applies to, (a) any debt secured by a mortgage bond, (b) any judgment debt, and (c) any debt in respect of any debt in relation to any taxation imposed under the law. The prescriptive period of fifteen years applies in respect of any debt owed to the State. And the prescriptive period of six years applies in the case of a debt arising from a bill of exchange or negotiable instrument. Any other debt that do

not fall under any of the above categories are governed by a three year prescriptive period. In *Deloitte Haskins and Sells Consultants (Pty) Ltd v Bowthope Hellerman Deutsch (Pty) Ltd* 1991 (1) SA 525 (A) page 532G-I, the Court held that:

> *"Prescription shall commence to run as soon as the debt is due. This means that there has to be a debt immediately claimable by the debtor or, stated in another way, that there has to be a debt in respect of which the debtor is under an obligation to perform immediately.''*

[11] The notion of a *"debt"* in the Prescription Act has been described as referring to an obligation to do something either by way of payment or by delivery of goods and services or not to do something. See *HMD Properties (PTY) Ltd v King 1981 (1) SA 906 (N) at 909A-B.*

[12] In *Electricity Supply Commission v Stewarts and Lloyds of SA (Pty) Ltd 1981 (3) SA 340(A) at 344F-G,* the Court held that a debt is:

> *"That which is owed or due; anything (as money, goods or services) which one person is under an obligation to pay or render to another."*

[13] In the case of *Solidarity (supra)* Khampepe AJA, when dealing with the same issue had this to say:

> *"[25] The meaning of what the term "debt due" denotes in terms of section 12(1) of the Act, has received the attention of the courts in many judicial pronouncements. It has authoritatively been determined to mean that "there has to be a debt immediately*

claimable by the debtor [sic creditor] or stated in another way, that there has to be a debt in respect of which the debtor is under an obligation to perform immediately.

[26] A debt is due in this sense, when the creditor acquires a complete cause of action for the recovery of the debt, that is when the entire set of facts which the creditor must prove in order to succeed with his or her claim against the debtor is in place or in other words when everything has happened which would entitle the creditor to institute action and to pursue his or her claim."

[14] In the present instance as indicated above the Applicant's contention in the alternative is that the retrenchment agreement does not constitute a "debt" as envisaged in the Prescription Act. There is no merit in this contention. In my view the debt as envisaged by the Prescription Act arose on the 30th August 2002, when the severance monies claimed by the Applicants were to have been paid. Thus the 3 (three) year period within which the Applicant should have claimed their debt has prescribed and therefore their current claim stand to be dismissed.

[15] In my view, although the Applicants delayed in bringing this application, it cannot be said that they acted unreasonably in bringing this application. It would accordingly be unfair in the circumstances to grant costs.

[16] In the premises the following order is made:

(i) The Applicant's application to have the settlement agreement concluded on 19th August 2002 made an order of Court is dimissed.

(ii) The Applicants' claim has prescribed.

(iii) There is no order as to costs.

Molahlehi J

Date of Hearing : 7th August 2008

Date of Judgment : 27th February 2009

Appearances

For the Applicant : Adv T Motshwane

Instructed by : Tau Phalane Incorporated

For the Respondent: Adv J Pansegrouw

Instructed by : Durant Du Toit Attorneys