REPUBLIC OF SOUTH AFRICA

THE LABOUR COURT OF SOUTH AFRICA, CAPE TOWN

JUDGMENT

Reportable

CASE NO C 214/14

In the matter between:

CEPPWAWU obo CYRIL LE FLEUR **APPLICANT**

and

ROTOLABEL, A DIVISION OF BIDPAPER PLUS (PTY) LTD **RESPONDENT**

Application argued: 11 September 2014

Judgment delivered: 17 October 2014

JUDGMENT

VAN NIEKERK J

Introduction

[1] This is an application in terms of s 158 (1) (c) of the Labour Relations Act to have an arbitration award issued under the auspices of a statutory council made an order of court. That label suggests a sense of the ordinary to these proceedings, but the nature of the opposition to the application raises the vexed question of the application (if any) of the Prescription Act to arbitration awards issued in terms of the Labour Relations Act (LRA).

Material facts

[2] The material facts are not in dispute. The individual applicant, Le Fleur, was employed by the respondent. On 23 April 2010, he was dismissed for misconduct. He disputed the fairness of his dismissal and referred the matter to arbitration under the auspices of the statutory council for the printing, newspaper and packing industries. The arbitrator's found that Le Fleur's dismissal was unfair. In terms of his award, Le Fleur was reinstated into the respondent's employ, but without any back pay.

[3] The arbitration award was issued on 18 September 2010. On 23 November 2010, within the statutory six-week period, the respondent filed an application in terms of s 145 of the LRA to review and set aside the award. The Rule 7A requires an applicant to file the record of the proceedings under review. Between late 2010 and mid-2012 attempts were made to obtain a complete record, with limited success. On 12 November 2013, the respondent's attorneys advised the application (the union) that reconstruction of the record was not possible and that in any event, the award had prescribed by virtue of s 11 of the Prescription Act. For these reasons, the respondent regarded the matter as 'finalised'. The union disputed this contention and on 28 March 2014, filed the present application.

The applicable principles

[3] Chapter III of the Prescription Act, 68 of 1969, regulates the prescription of debts. Section 16 of the Prescription Act provides:

16 Application of this Chapter

(1) Subject to the provisions of subsection (2) (b), the provisions of this chapter shall, save in so far as they are inconsistent with the provisions of any Act of Parliament which prescribes a specified period within which a claim is to be made or an action is to be instituted in respect of a debt or imposes conditions on the institution of an action for the recovery of a debt, apply to any debt arising after the commencement of this Act.

(2) The provisions of any law-

(a) which immediately before the commencement of this Act applied to the prescription of a debt which arose before such commencement; or

(b) which, if this Act had not come into operation, would have applied to the prescription of a debt which arose or arises out of an advance or loan of money by an insurer to any person in respect of an insurance policy issued by such insurer before 1 January 1974,

shall continue to apply to the prescription of the debt in question in all respects as if this Act had not come into operation.'

[4] The period of prescription of debts is regulated by s 11. It is not disputed, on the assumption that the Prescription Act applies to arbitration awards issued under the LRA, that none of the circumstances referred to in s 11 (a) to (c) are present and that only the provisions of paragraph (d) are relevant. That provision establishes a period of prescription of three years.

[5] There are four different approaches that have been adopted by this court to the prescription of arbitration awards. In the course of argument, Mr. Whyte, representing the union, proposed a fifth.

[6] The first approach, supported by the weight of authority, is to regard the Prescription Act as applicable to all awards made by arbitrators, irrespective of whether the relief granted sounds in money or in an order for reinstatement. On

this approach, an arbitration award is regarded as a 'debt' for the purpose of the Prescription Act and on the application of s 11 (d), an award prescribes three years after publication.

[7] The second approach is to regard the Prescription Act as applicable to arbitration awards, but to regard the filing of an application for review by the debtor (the unsuccessful employer in the arbitration proceedings) as interrupting the running of prescription (see *Aon SA (Pty) Ltd v CCMA & others* (2012) 33 *ILJ* 1124 (LC)).

[8] The third approach is to regard the Prescription Act as applicable to arbitration awards but to regard any remedy of reinstatement as an order more akin to specific performance and therefore something other than a 'debt'. On this basis, the Prescription Act does not apply to such awards of reinstatement (see, for example, *Circuit Breakers Industries Ltd v NUMSA obo Hadebe & others* (2014) 35 ILJ 1261 (LC)).

[9] The fourth approach is a more principled approach and regards the Prescription Act as incompatible with the purposes of the Labour Relations Act and therefore inapplicable to arbitration awards made under the LRA. (See *Coetzee & others v Member of the Executive Council of the Provincial Government of the Western Cape & others* (2013) 34 *ILJ* 2865 (LC); *Cellucity (Pty) Ltd v CWU obo Peters* (2014) 35 *ILJ* 1237 (LC).)

[10] The respondent's case is based squarely on the first approach outlined above. The respondent contends that the Prescription Act applies to all arbitration awards (whether they are for reinstatement, re-employment or compensation) and that the award in the present instance is subject to a prescription period of three years. Further, the respondent contends that the delivery of the review application did not interrupt prescription and the award therefore prescribed, at best for Le Fleur, on 13 October 2013. Mr Ellis, on behalf of the respondent, accordingly submitted that there is no basis for the award to be made an order of court and that the application should be dismissed.

[11] The union contended for the last of the above approaches (i.e. that the Prescription Act does not apply to arbitration awards. In the alternative, Mr Whyte advanced the proposition that the provisions of the Prescription Act do not apply to arbitration awards issued in terms of the LRA because they constitute administrative action. While this form of administrative action is not regulated by the Promotion of Administrative Justice Act, 3 of 2000, it is subject to the constitutional right to fair administrative action (see *Sidumo & another v Rustenburg Platinum Mines & others* [2007] 12 BLLR 1097 (CC) at paragraph 94).

Analysis

[12] I deal first with the proposition that the Prescription Act does not apply to arbitration awards, an approach which, as I have indicated, enjoys the support of at least two judgments of this court. The two objections to the application of the Prescription Act that can be identified in these judgments (see, for example, the *Cellucity* judgment (*supra*) at paragraphs 15 and 16) are that the LRA includes specific time periods for the referral of claims and provides for the condonation by this court (and the CCMA presumably) where those periods are exceeded; the second objection is one based on an equality argument. In resepct of the first objection, reference is made to the structure or design of the LRA; in the case of the second, it is contended that litigants should have the same rules apply to them whether they are compelled to have their disputes arbitrated in the CCMA or adjudicated by this court. In other words, a party that is required to refer a dispute to this court and obtains a judgment in his or her favour is 27 years better off than a litigant in receipt of an arbitration award.

[13] The obvious answer to the first objection is that while the LRA contains a number of time-limitation clauses, these all apply in the pre-arbitration or pre-adjudication phase. Those provisions are intended to give effect to the legislative policy of expeditious dispute resolution. In the present instance, the situation is different – the issue is one of the enforcement of arbitration awards and judgments once the dispute resolution process has run its course. Here, a cogent argument can be

made for the value of the application of the Prescription Act and its consistency with the desired statutory objective of expeditious dispute resolution (at least in the sense that successful litigants are required to enforce their rights timeously) and with the values of certainty and finality. In this sense, and contrary to the reasoning of the *Cellucity* judgment, the LRA, in its design, is not inconsistent with the application of the Prescription Act. On the contrary, there is a relationship of compatibility between the two statutes.

[14] The answer to the equality objection is that a litigant who is required to have his or her dispute determined by arbitration (as opposed to adjudication) has a remedy to address any difference that might result – s 158 (1) (c) of the LRA is a mechanism especially intended to facilitate the enforcement of an arbitration award as an order of this court. An application in terms of s 158 (1) (c) constitutes 'process whereby the creditor claims payment of the debt' for the purposes of s 15 (1) and (6) of the Prescription Act. If an application in terms of s 158 is filed before the expiry of the prescription period, the running of prescription will be interrupted. There is thus no discrimination inherent in the bifurcation established by the statutory dispute resolution process or in the establishment of the different processes of arbitration and adjudication. The advantage to the recipient of an order made by this court of a 30-year prescription period is available to recipients of a CCMA award by way of an admittedly additional but expeditious and inexpensive process of enforcement. (In Johannesburg at least, the vast majority of applications in terms of s 158 (1) (c) are decided in Chambers.)

[15] There are two further fundamental difficulties with the *Cellucity* approach. The first is at least one judgment of the Labour Appeal Court (*see SA Post Office Ltd v Communication Workers Union on behalf of Permanent Part-time Employees* (2014) 35 *ILJ* 455 (LAC)) where the court impliedly acknowledged the application of the Prescription Act (if only by dismissing a claim of prescription proffered during argument because it had not been pleaded, something required by s 17 (2) of the Prescription Act). Further, the LRA does not exclude the application of

the Prescription Act. The provisions of the 2014 Labour Relations Amendment Act, assented to but not yet in force, stipulate that an application to review and set aside an arbitration award interrupts the running of prescription in terms of the Prescription Act in respect of that award. The clear implication is that the Prescription Act applies to arbitration awards - if the Prescription Act did not apply to arbitration awards issued under the LRA, the legislature would not have enacted this provision. The amendment makes clear that legislative policy is to the effect that the Prescription Act applies to arbitration awards issued under the auspices of the CCMA and bargaining councils.

[16] In so far as it might be suggested that the real incompatibility is between the equity based jurisdiction established byteh LRA and the inflexibility of the Prescription Act, In *Police & Prison Civil Rights Union obo Sifuba* (2009) 30 *ILJ* 1309 (LC) rejected a submission that considerations of equity ought to be brought into account to determine the application of prescription. The court stated:

> '[44] …The Prescription Act does not give the court a discretion. If the requirements for a plea of prescription have been established by the party taking the point then that party is entitled as a matter of right to have that plea upheld. Although this court is a court of equity, in my view considerations of equity do not come into play when all the requirements for a successful plea of prescription are established. Extinctive prescription renders unenforceable a right by the lapse of time. See s 10(1) of the Prescription Act.'

[17] For these reasons, I am not persuaded that the approach adopted in *Cellucity* is correct. There is no policy-related reason or reason in principle that serves to exclude the application of the Prescription Act to arbitration awards issued in terms of the LRA.

[18] Next, it seems logical to consider whether an arbitration award constitutes a 'debt' for the purposes of the Prescription Act, and whether the nature of the remedy granted by an arbitrator is relevant. As I have indicated, the Prescription

Act does not define the word 'debt'. There is a weight of authority which adopts a broad approach, and which cautions against confusing debts and causes of action.

[19] In *Electricity Supply Commission v Stuarts and Lloyds of SA* Pty) Ltd 1991 (3) SA 340 (A) what was then the Appellate Division of the Supreme Court held that a 'debt' comprised '*that which is owed all due; anything (as money, goods or services) which one person is under an obligation to pay will render to another'*. In *Oertel & others NNO v Director of Local Government and others* [1981] 4 All SA 608 (T), what was then the Supreme Court approved of this formulation and added:

> This is a definition in wide terms. That it is not confined to obligations sounding in money was also decided in *HMBMP properties (Pty) Ltd v King* 1981 (1) SA 906 (N) at 909 A-B.

[20] Loubser, In *Extinctive Prescription*, (at 100 *et seq*), notes that a 'debt' is used primarily to describe the '*correlative of a right or claim to some performance, in other words, as the duty side of an obligation …produced by contract, delict, unjust enrichment, statute or other source*.' Saner, in *Prescription in South African Law*, comes to a similar conclusion (at 3-45).

[21] The weight of authority in this court is to the effect that an arbitration award issued under the LRA constitutes a 'debt' for the purposes of the LRA. (See, for example, *Mpanzama v Fidelity Guards Holdings (Pty) Ltd* [2000] 12 BLLR 1455 (LC) at paras 6-7; *Police & Prison Civil Rights Union obo Sifuba v Commissioner of the SA Police Service & others* (supra) at para 34; *Fredericks v Grobler NO & others* [2010] 6 BLLR 644 (LC) at paras 22-23; *Magengenene v PPC Cement (Pty) Ltd & others* (2011) 32 ILJ 2518 (LC) at para 6; *SA Transport & Allied Workers Union obo Hani v Fidelity Cash Management Services (Pty) Ltd* (2012) 33 ILJ 2452 (LC) at para 22; and *Sampla Belting SA (Pty) Ltd v Commission for Conciliation, Mediation & Arbitration & others* (2012) 33 ILJ 2465 (LC) at para 14.)

[22] Similarly, the weight of authority, both in the High Court and in this court, is that an award, whether it obliges an employer to reinstate an employee or to pay compensation constitutes an obligation to restore the employment relationship and therefore a 'debt' for the purposes of the Prescription Act. (See *Mpanzama v Fidelity Guards Holdings (Pty) Ltd* [2000] 12 BLLR 1459 (LC) and *NUMSA v Espach Engineering* (2010) 31 *ILJ* 987 (LC), at paragraphs 15 to 19.)

[24] As I have indicated, there is at least one decision by this court to be effective that the filing of an application to review and set aside the award interrupts prescription for the purposes of the Prescription Act (See *Aon SA (Pty) Ltd v CCMA & others*). In *Hani's* case (supra) the court observed that the 'predominant approach' in the Labour Court is that prescription is not interrupted by a review. In *POPCRU obo Sifuba*, the court stated the following:

> There is no legal provision that provides for the automatic suspension of the enforceability of an arbitration award by an application for review. … The court may, if it considers that the circumstances so required, stay the enforcement of the award-winning its decision on the review of an award. The mere fact that the review application is pending is not a bar to making the award an order of court.'

[25] In summary: An arbitration award issued by a CCMA commissioner or a bargaining council arbitrator constitutes a debt for the purposes of the Prescription Act and prescribes three years after publication, whether or not the award is one of reinstatement or compensation. Until the Labour Relations Amendment Act 2014 is brought into operation, an application to review and set aside the award does not interrupt the running of prescription. I am not persuaded that I should follow a different approach.

[26] This brings me to the submission made by Mr Whyte to the effect that an arbitration award does not prescribe since it constitutes administrative action. The constitutional court, as a vindicated above, is clearly held that an arbitration award issued under the auspices of the CCMA and bargaining councils constitutes administrative action that is not subject to PAJA.

[27] The submission made by Mr. Whyte is foreshadowed in the judgment of Chetty AJ in *Circuit Breakers Industries Ltd v National Union of Metalworkers of SA obo Hadebe and others* (supra). In that case, the court appeared to find that while a 'debt' for the purposes of the Prescription Act was to be accorded a wide meaning, but that where a debt arises from a fundamental right (in this instance, an award of reinstatement) the legislature did not intend that it could be up-ended by a plea of prescription. In coming to this decision, the court relied on *Njongi v Member of the Executive Council, Department of Welfare, Western Cape* 2008 (4) SA 257 (CC), and in particular a passage from paragraph [41] of the judgment:

> 'It was contended in this Court that grant arrears could not be a debt because the Provincial Government had failed to perform an obligation imposed on it by the Constitution Therefore, however broadly the term might be defined, it is not a debt for the purposes of the Prescription Act. The argument was that an obligation of this kind can never prescribe. Debts arriving from fundamental rights are of a genre different to that envisage by prescription legislation which was in any event pre-constitutional.

The court took a different view of an award of compensation, which it considered to be a 'debt' and liable to prescription after three years.

[28] The authority on which Chetty AJ relied raised but expressly did not decide whether prescription ran in favour of a provincial government against a person entitled to claim arrear disability grant payments for a period during which an unlawful administrative decision that the grant should not be paid had effect. The paragraph quoted and relied on for the proposition that forms the basis of the court's conclusion in *Circuit Breakers* is nothing more than a recordal of a submission made by counsel. (The first sentence that appears in the above quote and which makes clear that the passage was no more than a record of submission, omitted in the judgment by Chetty AJ.).

[29] While it is correct that the Constitutional Court expressed its doubts as to whether prescription would apply in the circumstances, given that what was at

stake was a fundamental right, as I have indicated, the issue was expressly left open. (See paragraph 42 of the judgment, where Yacoob J says '*Despite constitutional concerns, I reluctantly conclude that this important issue should not be decided in this judgment*.) The *Njongi* judgment is therefore not authority for the proposition that an administrative act does not give rise to a debt for the purposes of the Prescription Act. Even less is it authority for any assertion that only an order for reinstatement (as opposed to an award of compensation) concerns a fundamental right and is therefore immune from the running of prescription.

[30] The definition of the word 'debt' and the interpretations of that term to which I have referred above indicate that what is significant is the existence of an obligation, not its source. What matters is whether an obligation has been created, by whatever means. The fact that an obligation was created in the present instance in terms of an administrative act serves only to illustrate the public law/private law interface at work when reinstatement is granted and a contract of employment restored. It does not in itself serve to exclude the application of the Prescription Act.

[31] For these reasons, I am not persuaded that the administrative law origins of an award of reinstatement exclude the application of the Prescription Act. In my view, the arbitration award that is the subject of these proceedings has prescribed and there is accordingly no basis to make the award an order of court.

Costs

[32] Finally, in relation to costs, this court has traditionally been disinclined to make orders for costs in the dispute between parties to a collective-bargaining relationship. Given this consideration and the novelty of the point raised by the applicant, the requirements of law and fairness do not demand an order for costs.

For the above reasons, I make the following order:

1. The application is dismissed.

ANDRÉ VAN NIEKERK
JUDGE OF THE LABOUR COURT

REPRESENTATION

For the applicant: Mr. J Whyte, Cheadle Thompson and Haysom Inc

For the respondent: Mr. Ellis, ENS Inc.