Reportable

# THE LABOUR COURT OF SOUTH AFRICA,

# HELD AT CAPE TOWN

**Case no: C 202/15.**

In the matter between:

**PTAWU obo XOLOANI & OTHERS** **Applicant**

and

**MHOKO'S WASTE & SECURITY SERVICES** **Respondent**

**Heard**: 4 May 2018

**Delivered**: 5 October 2018

**Summary:** (Contempt – special plea – prescription – Prescription Act applicable to arbitration award - 3 year period for prescription passed by the time contempt application launched – award prescribed – special plea upheld)

## JUDGMENT

LAGRANGE J

Introduction

[1] The applicants in this matter have applied for an order holding the respondents in contempt for failing to comply with an arbitration award certified in terms of section 143 of the Labour Relations Act 66 of 1995 (the LRA). At the hearing, the respondent belatedly raised a special plea of prescription. In order to give the applicant a proper opportunity to deal with special plea, the contempt application was adjourned pending a ruling on the special plea once the applicant had an opportunity to file an answering affidavit and the respondent any reply, as well as filing heads of argument.

[2] The respondent also raised a point *in limine* claiming that on account of a previous contempt application in respect of the same award being dismissed that the matter was *res judicata.* At the hearing of the matter this objection was abandoned by the respondent and only sold to pursue the special plea of prescription.

[3] Following the adjournment, the applicant did not file an opposing affidavit but instead made submissions in a document entitled “Filing Sheet of Opposing the Prescription Application”. In circumstances where the union official is drafting pleadings, I will deal with the matter on the basis that the special plea is opposed but that the applicants did not feel it necessary to plead any factual issues for the determination of the application. As matters stand, the factual issues to be considered in determining the special plea are common cause and the substantive issues in dispute are essentially legal in nature.

Background

[4] On 29 April 2012, a CCMA commissioner issued an arbitration award in terms of which she found that the 51 individual applicants were unfairly dismissed and awarded their reinstatement with retrospective effect to 22 January 2012, but limited payment of back pay to two months’ remuneration.

[5] Initially, the respondent indicated that it was going to pursue a review application but appears not to have done so. The respondent claimed it was unable to reinstate the applicants because it did not work for them and on 15 November 2012, concluded a settlement agreement, which was made an award. The applicants however claimed that this settlement agreement did not supersede the arbitration award and was merely a settlement of monetary claims the applicants had against the respondent. Their claim for reinstatement remains intact based on the award issued on 29 April 2012. It was the respondent's failure to reinstate them in terms of that award which led to this contempt application and the previous one being launched. For the purposes of determining the special plea, the respondent's claim that the settlement agreement superseded the award is neither here nor there.

[6] The crisp issue is whether the award which was issued on 29 April 2012 and which was certified on 8 May 2014 as a binding award in terms of section 143(3) of the LRA, prescribed before this contempt application was launched on 17 August 2017.

[7] The first application for contempt of court in respect of the same award was dismissed by Steenkamp J on 26 October 2016. The first application had been filed on 23 March 2015. The respondent raised two *in limine* objections to that application. Firstly, it disputed the *locus standi* of Mr F Magidi as an official of the applicant union, PTAWU. Secondly, it pointed out that no personal service had been effected on the owner of the respondent, which is a pre-requisite for launching a contempt application. Steenkamp J dismissed the first *in limine* objection but upheld the second relating to defective service.

[8] Strictly speaking, the first application was fatally defective and could just as well have been struck off the roll on account of the second *in limine* point as there was no proper contempt application before the court in the absence of personal service.

Legal principles

[9] The Constitutional Court has deliberated on three occasions on the application of the Prescription Act 68 of 1969 to disputes concerning unfair dismissals under the LRA.

[10] The first decision in ***Myathaza v Johannesburg Metropolitan Bus Services (SOC) Ltd t/a Metrobus & others***[1] contained three separate judgments, without yielding any majority *ratio*. Despite the differences in the judgments, there was agreement on the order. In the Constitutional Court's subsequent unanimous decision in ***Mogaila v Coca Cola Fortune (Pty) Ltd***[2] it characterized the effect of the outcome in *Myathaza as follows:*

> [27] Because of the parity of votes in *Myathaza*, in which none of the judgments secured a majority, no binding basis of decision (*ratio*) emerges from the court's decision. But, on either approach, that of Jafta J and Zondo, or that of Froneman J, Ms Mogaila is entitled to an order declaring that the arbitration award ordering her reinstatement has not prescribed. She is entitled to secure its certification under s 143(3) of the LRA, and its enforcement under s 143(1).[3]

Accordingly, in *Mogaila*, without deciding whether the Prescription Act was applicable to arbitration awards, the court reasoned on the basis of the factual similarities between the case before it and those in *Myathaza* the outcome would be the same.

[11] In *Myathaza*, the court was seized with deciding whether or not an arbitration award prescribed three years after it was issued in terms of the Prescription Act. In that case, the employee had been a victim of a common litigation strategy in terms of which an arbitration award in favour of the employee was taken on review by the employer and when the review application was dismissed and the employee sought to enforce the award, the employer would retort that the award had prescribed.

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[1] (2017) 38 *ILJ* 527 (CC)

[2] (2017) 38 *ILJ* 1273 (CC)

[3] At 1281-2.

[12] The essential facts were that in April 2008, a CCMA commissioner had issued an arbitration award to the effect that the applicant employee had been unfairly dismissed and had awarded her reinstatement with six months' back pay. The employer's application to review and set aside the arbitration award was dismissed. When the employee then presented herself for work to be told by the employer that the arbitration award constituted a 'debt' for the purposes of the Prescription Act 68 of 1969, and that, because more than three years had elapsed since the date of the award, her claim had prescribed.

[13] In the first judgment of Jafta J, in which Nkabinde ADCJ, Khampepe J and Zondo J concurred , it was held that:

13.1 The Prescription Act did not apply to the LRA primarily for two reasons. Firstly, the provisions of the Prescription Act were inconsistent with the provisions of the LRA[4], within the meaning of the term 'inconsistent' in section 16 (1) of the Prescription Act.[5]

13.2 Secondly, even if the Prescription Act did apply to the LRA, an award of reinstatement did not amount to a debt within the meaning of the Prescription Act as it was not an obligation to pay money or deliver goods or render services and accordingly could not prescribe like one.[6] In the sense of inconsistency 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 (and therefore Mr Myathaza's arbitration award had not prescribed);

[14] In the second judgement by Froneman J, in which Madlanga J, Mbha AJ and Mhlantla J concurred, it was held that:

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[4] At 540-545, paras [43] to [58].

[5] Section 16 of the Prescription Act provides:

'(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.

(emphasis added)

[6] At 545, para [59].

14.1 The Prescription Act and the LRA are capable of complementing each other in a way that best protected the fundamental right of access to justice but also preserved the speedy resolution of LRA disputes.[7]

14.2 The injustice of an employee being deprived of the benefits of an award in his favour by way of the institution of review proceedings then the employer "crying prescription on the back of the time wasted by the review can be met by application of the principle that prescription should not run until court proceedings are finalised."[8]

14.3 Setting in motion the dispute resolution processes of the CCMA, served to interrupt prescription under section 15 of the Prescription Act and, similarly, the institution of review proceedings ought to have the same effect of extending the finalization of a judgment until the review is decided.[9]

[15] The third judgment by Zondo J, as he then was, provided additional reasons in support of the order, namely that :

15.1 An arbitration award is not a debt as contemplated by The Prescription Act.[10]

15.2 In any event, it would be legally untenable to hold that prescription in terms of the Prescription Act starts to run once an arbitration award is issued, until it had been made an order of court.[11]

15.3 Further, a referral of a dismissal dispute to the CCMA could not interrupt prescription since that could occur only by the service on the debtor of the process contemplated in s 15(1) read with subsection (6) of the Prescription Act.[12]

15.4 Without legislative amendment , it would be impossible to apply the Prescription Act to the LRA without doing serious violence to the

[7] At 547, para [66].

[8] At 547, para [67].

[9] At 551, para [83] and 553 para [86].

[10] At 562, para [119]

[11] At 564, para [129]

[12] At 568-9, paras [140] – [141].

> language of either or both of those acts and to do so as the second judgment did would amount to impermissible legislation by the court.[13]

[16] As previously mentioned, the second decision in *Mogaila's* case also was concerned with the prescription of an arbitration award and simply found that on the facts of that case the court in *Myathaza* would have come to the same conclusion despite the lack of a single *ratio* in that judgment. Accordingly, *Mogaila* did not resolve any of the legal issues which remained indeterminate after the *Myathaza* decision.

[17] The third decision bearing on the application of prescription to claims under the LRA is that of ***Food & Allied Workers Union on behalf of Gaoshubelwe v Pieman's Pantry (Pty) Ltd***[14] , in which there was a majority decision yielding a *ratio* for the judgment. That case concerned if and when a claim of unfair dismissal prescribes. Contrary to the views expressed in the first and third judgments in *Myathaza*, the majority held that the Prescription Act was not inconsistent with the LRA and that a claim of unfair dismissal which sought to enforce three possible kinds of obligations against an employer, namely reinstatement, re-employment and compensation and that any one of these amounted to an obligation to pay or render something. As such, a claim for unfair dismissal constitutes a debt as contemplated in s 16(1) of the Prescription Act, which states that the provisions of the Prescription Act provisions apply to "any debt arising after the commencement of this Act".[15] The court also held, contrary to the first judgment in *Myathaza*, that there was no inconsistency between the Prescription Act and the LRA in the sense contemplated by s 16(1) of the Prescription Act. The crux of the court's reasoning appears in the following paragraphs:

> [177] Are the time periods provided for in s 191 of the LRA inconsistent with the provisions of the Prescription Act? As I have demonstrated, while they both deal with time periods, they do so for different reasons and to achieve different objectives. The time periods in the LRA indicate when a litigant is

[13] 569-570 at [145].

[14] (2018) 39 *ILJ* 1213 (CC)

[15] At 1260-1261, paras [154] to [157].

expected to take the necessary steps in the dispute-resolution process to properly prosecute a claim, while the Prescription Act provides a cut-off point when those steps are no longer available to a litigant on account of the claim having prescribed.

[178] Simply on that analysis, it can hardly be said that there is inconsistency between the provisions of the LRA and the Prescription Act, insofar as they relate to time periods. Of course, if the LRA provided for a prescription period, as did the RAF Act in *Mdeyide*, that would have been a different matter, but that is not the case here.

[179] The time periods in the LRA and in the Prescription Act regulate different features of the litigation process and are not only reconcilable but can exist in harmony alongside each other.

[180] The application of the Prescription Act to the LRA would advance the speedy resolution of employment disputes by firstly, leaving wholly intact the mandated time periods for referrals that s 191 provides for. The application of the Prescription Act cannot have as an unintended consequence the implied extension of those time periods to coincide with the period of prescription. Secondly, subjecting claims under the LRA to an outer time limit would considerably enhance the efficiency of the dispute-resolution process. Placing an outer limit beyond which the litigation process simply cannot continue prevents employment disputes from being litigated after a considerable passage of time. This may impact negatively on both the quality of adjudication as well as I the important policy considerations that relate to the quick and speedy resolution of employment related disputes, the ability of workers to continue to earn a living, as well as the ongoing ability of businesses to continue operating.

[181] For these reasons, I must also conclude, regard being had to s 210 of the LRA, that the provisions of the LRA are not in conflict with the provisions of the Prescription Act. It must follow that if there is no inconsistency then, *being* (with stronger reason), there can be no conflict. The definition of conflict is a considerably higher bar to meet than the consistency evaluation which I have undertaken. I also conclude that the existence of conflict between the two statutes has not been established.[16]

[16] At 1266-7.

Evaluation

[18] The issue which arises in the context of this application is what the effect of the *Pieman's* decision is on those issues which remained unresolved in the *Myathaza* and *Mogaila* decisions. For the purposes of this judgment, the only question which arises is whether this court is still at large to make a decision based simply on the common result in *Myathaza* , and if not, how does the *Pieman's* judgement affect matters?

[19] Superficially, this case is also concerned with the prescription of an award, as was the case in *Myathaza* and *Mogaila,* rather than the prescription of the right to pursue a claim of unfair dismissal, which was the issue in *Pieman's.* However, unlike the first two matters this is not a case where the applicants launched proceedings to enforce the award after unsuccessful review proceedings. The respondent had merely indicated its intention to launch review proceedings in a letter dated 18 May 2012, but had taken no steps to do so by the time the six week period for doing so in terms of section 145 (1) (a) of the LRA had expired.

[20] On the strength of the decision in *Piemans*, it appears to me that the uncertainty regarding the application of the Prescription Act to the LRA has been resolved. Accordingly, I must approach the special plea on the basis that an arbitration award obliging an employer, amongst other things, to reinstate employees amounts to a debt in terms of the Prescription Act.

[21] The first contempt application was filed on 24 March 2015, a few weeks short of three years since the award was handed down. At this juncture, it should be mentioned that the fact that it was certified on 8 April 2014 did not change its status. In ***Tony Gois t/a Shakespeare's Pub v Van Zyl and Others***[17] the Labour Court was concerned with the recent amendments to section 143(3) that had been made at that time. The court was seized with a review of a ruling by a commission that an application to rescind an award could not be entertained because the award had already been certified in terms of section 143 (3). The court had the following to say on the effect of certification:

[17] [2003] 11 BLLR 1176 (LC)

> If the third respondent had considered the reasons for the amendments to the Act it would have realised that the purpose of the amended section 143 of the Act was to simplify the process of executing CCMA awards. The amendments arose out of the recognition that the process in terms of section 158(1)(c) was cumbersome. The Labour Court can now be omitted from the process of enforcing CCMA awards. The effect of the second respondent's ruling is to artificially include the Labour Court in a process from which the legislature has chosen to exclude it. …
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> As stated above the process of certification is merely designed to streamline the execution process. Whether or not an award is certified has no bearing on the merits of the causa underlying the award.
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> …
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> The Amendment Act – the new section 143 – did not alter the nature or the composition of the award. The award remains a CCMA arbitration award. It is not transformed into a court order as a result of the certification process and as such there is no need to involve this Court in the process of rescinding CCMA awards.[18]

[22] The first contempt application, as mentioned, was dismissed on 26 October 2016. Assuming that this application had interrupted prescription until judgment was handed down, prescription resumed running from that date. This contempt application was only launched in August 2017, by which stage the three year period had long expired in November the previous year, and there is no longer an enforceable award, which the respondent can be compelled to comply with.

[23] In the circumstances, I conclude that the special plea of prescription must succeed. It should be mentioned that the award in question was handed down before the 2015 amendments to the LRA which resulted in further changes to s 143. Accordingly, the application of prescription on the facts of this case might not be applicable to awards issued after those amendments were promulgated.

[18] At 1176, paras [21] – [24].

Order

[1] The special plea of prescription is upheld.

[2] This contempt application is dismissed.

[3] No orders matters to costs.

**Lagrange J**

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

**APPEARANCES**

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| APPLICANT: | A T Mgidi of PTAWU |
| RESPONDENT: | R Nyman instructed by Mariaise Muller Yekiso Inc. |