



Not reportable

**THE LABOUR COURT OF SOUTH AFRICA,  
HELD AT CAPE TOWN**

**Case No: C493/2019**

In the matter between:

**IQRAM BUZ**

**Applicant**

And

**MINISTER OF DEFENCE AND MILITARY  
VETERANS**

**First Respondent**

**THE SECRETARY FOR DEFENCE**

**Second Respondent**

**THE SOUTH AFRICAN NATIONAL DEFENCE  
FORCE**

**Third Respondent**

**DEPARTMENT OF DEFENCE**

**Fourth Respondent**

Date of hearing: 29 June 2021

Date of judgment: This judgment was handed down electronically by circulation to the parties' legal representatives by email, publication on the Labour Court website and release to SAFLII. The date and time for handing down judgment is deemed to be 10h00 on 21 September 2021

**Summary:** Determination of preliminary points relating to jurisdiction and prescription (where the main claim is for repayment of monies unlawfully deducted, a contractual claim for performance bonus and overtime payments, and compensation for alleged unfair labour practices).

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## JUDGMENT

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HARVEY AJ

### Introduction

[1] The applicant, a medical practitioner, was employed by the Defence Force from 1999. He resigned effective July 2018, at which point he held the rank of Colonel and was the Officer Commanding of 2 Military Hospital in Wynberg.

[2] On 2 August 2019 the applicant filed his statement of claim in this court. In it, he makes four claims, being for:

2.1 monies allegedly unlawfully deducted from his salary in breach of section 34 of the Basic Conditions of Employment Act;<sup>1</sup>

2.2 performance bonus payments allegedly due to him for six consecutive performance cycles;

2.3 monies allegedly due to him in terms of a 'commuted overtime contract'; and

2.4 an amount equivalent to 12 months' remuneration as compensation for an alleged unfair labour practice, being his alleged constructive dismissal.

[3] The respondents, in their statement of defence, responded *in limine* that:

3.1 There was no notice of intended legal proceedings in terms of the Prescription Act 68 of 1969, and accordingly his claims had prescribed;

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<sup>1</sup> Act 75 of 1997, hereinafter referred to as the BCEA.

- 3.2 Applicant's claims for unlawful deductions, performance bonus and commuted overtime have all prescribed save for those which were less than three years old or in respect of which grievances had been lodged; and
- 3.3 The Labour Court lacks jurisdiction to determine the claims for non-payment of performance bonus and unfair labour practice.
- [4] Having raised these points *in limine*, the respondents proceeded to set out their defence to the claims on their merits.
- [5] The parties signed a pretrial minute on 16 March 2021 which recorded that the respondents now raised 4 preliminary issues, being:
- 5.1 Jurisdiction in respect of claims 2 and 4 (non-payment of performance bonus and unfair labour practice);
- 5.2 Prescription;
- 5.3 Failure to exhaust internal remedies; and
- 5.4 Nonjoinder of the Chief of the SANDF.
- [6] The matter was set down for a hearing on 29 June 2021 for determination of the preliminary points only.
- [7] In heads of argument in support of the preliminary points, the respondents for the first time raised the applicant's non-compliance with the Institution of Legal Proceedings against Certain Organs of State Act<sup>2</sup> (hereinafter 'the Institution of Legal Proceedings Act').
- [8] The applicant in its heads of argument disputed the respondents' right to raise new preliminary points, either in the pretrial minute or in heads of argument.

Which preliminary points are properly before this court?

- [9] The Labour Appeal Court in *SA Breweries (Pty) Ltd v Louw*<sup>3</sup> dealt with the status of pleadings and their relationship to pretrial minutes. It confirmed

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<sup>2</sup> Act 40 of 2002.

<sup>3</sup> *SA Breweries (Pty) Ltd v Louw* (2018) 39 ILJ 189 (LAC).

that parties are, in the first place, bound by their pleadings:<sup>4</sup> this is because knowing in advance what case one has to meet is a basic fair trial requirement.<sup>5</sup> The objective of the pretrial minute is to limit the issues which will go to trial.<sup>6</sup> Despite the fact that a pretrial minute is an agreement from which neither party can unilaterally *resile*,<sup>7</sup> the case pleaded cannot be changed or expanded by way of the pretrial minute without a concomitant amendment to the pleading.<sup>8</sup>

- [10] The respondents in their statement of response did not complain that the applicant had failed to exhaust internal remedies, or that he had failed to join the Chief of the SANDF. Nor did they mention the Institution of Legal Proceedings Act.
- [11] The respondents did not bring any application to amend their statement of response.
- [12] As the new complaints relating to internal remedies and nonjoinder were not pleaded, this court need not engage with them.
- [13] I do however think it necessary to consider the effect of the Institution of Legal Proceedings Act, which at section 3(1)(a) provides that no legal proceedings for the recovery of a debt may be instituted against an organ of state unless the creditor has given notice, in writing, of his intention to so claim within six months of the date on which the debt became due.<sup>9</sup>
- [14] The applicant resigned a year before filing his claim with this court. He did not give the required notice of his intention to institute legal proceedings to recover the debts he now claims. Is it proper to overlook the applicant's non-compliance with the Institution of Legal Proceedings Act on the ground that the respondents did not raise this point in their pleadings?

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<sup>4</sup> Ibid at par 8.

<sup>5</sup> Ibid at par 4.

<sup>6</sup> Ibid at par 8.

<sup>7</sup> See *Zondo & others v St Martin's School* (2015) 36 ILJ 1386 (LC).

<sup>8</sup> *SA Breweries (Pty) Ltd v Louw* (note 3 above) at par 8.

<sup>9</sup> Section 3(2) of the Institution of Legal Proceedings against Certain Organs of State Act 40 of 2002 also sets out in detail the required contents of the notice and how it is to be served.

- [15] Upon consideration of the further provisions of section 3 of the Institution of Legal Proceedings Act, I think not: section 3(4) provides that where the organ of state relies on the creditor's failure to serve a notice in terms of subsection 2(a), the creditor may apply to a court having jurisdiction for condonation for such failure – and the court may grant condonation if satisfied that the debt has not prescribed, that good cause exists and that the state was not unreasonably prejudiced.<sup>10</sup>
- [16] This provision makes it clear that, despite it being mandatory for a creditor to give notice, the fact that the state intends to rely on the notice provisions in the Act must be brought to the creditor's attention.
- [17] Had the respondents in their statement of defence (or in an amended statement of defence) raised the provisions of the Institution of Legal Proceedings Act, the applicant could then have brought a condonation application setting out submissions in respect of prescription, good cause and whether the state was unreasonably prejudiced.
- [18] The respondents did not notify the applicant of their intention to rely on the notice provisions in the Institution of Legal Proceedings Act. The applicant has not placed submissions regarding condonation before me. I am satisfied that his claims are not defeated by his failure to give notice under the Institution of Legal Proceedings Act.
- [19] I conclude that the points regarding exhaustion of internal remedies, non-joinder and the Institution of Legal Proceedings Act are not before me. The preliminary points which this court must determine are:
- 19.1 Jurisdiction: whether this court has jurisdiction to determine claims 2 and 4 (non-payment of performance bonus and unfair labour practice);<sup>11</sup> and

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<sup>10</sup> Section 4 of the Institution of Legal Proceedings against Certain Organs of State Act 40 of 2002.

<sup>11</sup> This court must also of course also be satisfied that it has the jurisdiction to entertain claims 1 and 3, the question of jurisdiction – unlike prescription - being something the court investigates/ensures of its own accord.

19.2 Prescription: whether any of the four claims are extinguished by prescription by virtue of the provisions of the Prescription Act 68 of 1969.

### Jurisdiction

[20] This court in *Bonga*<sup>12</sup> confirmed that, notwithstanding the exclusion of SANDF members from the operation of the LRA, the provisions of the Basic Conditions of Employment Act<sup>13</sup> (BCEA) do apply to them. This court has jurisdiction over all matters in terms of the BCEA<sup>14</sup> including any matter concerning a contract of employment<sup>15</sup> and all matters necessary or incidental to performing its functions in terms of the BCEA.<sup>16</sup>

[21] The respondents nevertheless assert that this court lacks jurisdiction to determine the performance bonus and unfair labour practice claims, the former because of a term contained in an HR Instruction precluding such claim,<sup>17</sup> and the latter because the applicant is, it argues, not covered by the unfair labour practice provisions of the LRA.

[22] Neither contention has merit:

22.1 The applicant claims that his entitlement to performance bonus is sourced in his employment contract. The dispute concerning whether that claim is defeated by some other term or policy accordingly falls to be determined by this court; and

22.2 The applicant in his statement of claim expressly clarifies that his unfair labour practice claim is sourced, not in section 185 of the LRA, but in

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<sup>12</sup> *Bonga v Minister of Defence and others* (2006) 27 ILJ 799 (LC).

<sup>13</sup> Act 75 of 1997.

<sup>14</sup> *Bux v Minister of Defence and others* (2018) 39 ILJ 2298 (LC).

<sup>15</sup> Section 77 of the BCEA.

<sup>16</sup> Section 77A(g) of the BCEA.

<sup>17</sup> Respondents assert that HR Instruction 29 of 2012, an internal policy on performance management, precludes the applicant from pursuing any dispute with respect to the payment or non-payment of performance bonus, as such bonus is a discretionary benefit.

implied terms of the employment contract, the Constitution, and the Amended Regulations.<sup>18</sup>

[23] In *Murray*,<sup>19</sup> the SCA confirmed that notwithstanding the exclusion of SANDF members from the operation of the LRA, the section 23 constitutional right to fair labour practices vests in 'everyone'. Moreover, South African employment law implies into every contract of employment a general term that an employer will not conduct itself in a manner calculated or likely to destroy or seriously damage the relationship of confidence and trust between itself and an employee. The court held that, should it be found that unfair conduct compelled an employee of the SANDF to resign, such employee will be entitled to damages.

[24] Jurisdiction is determined on the pleadings; I am satisfied that this court has jurisdiction to determine all four claims.

#### Prescription

[25] The respondents in their statement of defence assert that the applicant's claims have prescribed, save for those in respect of which grievances were timeously lodged.

[26] The Prescription Act<sup>20</sup> deals at chapter 3 with the prescription of debts. Debts are extinguished by prescription after three years,<sup>21</sup> which period commences to run when the debt is 'due'.<sup>22</sup> Prescription is interrupted by service upon the debtor of 'any process whereby the creditor claims payment of the debt'<sup>23</sup> where 'process' includes a petition, notice of motion,

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<sup>18</sup> Regulation 4(1) of the Amendment to the General Regulations for the SANDF (GN R1043 in GG 20425 of 1 September 1999) which in section 1 defines an unfair labour practice as an unfair act or omission arising between a member of the SANDF and the employer including unfair discrimination or unfair dismissal.

<sup>19</sup> *Murray v Minister of Defence* 2009 (3) SA 130.

<sup>20</sup> Act 68 of 1969.

<sup>21</sup> Section 11(d) of the Prescription Act.

<sup>22</sup> Section 12(1) of the Prescription Act.

<sup>23</sup> Section 15(1) of the Prescription Act.

rule *nisi*, claim in reconvention, third party notice and any document whereby legal proceedings are commenced.<sup>24</sup>

- [27] Section 17 of the Prescription Act provides that a court 'shall not of its own motion take notice of prescription'.<sup>25</sup> A party invoking prescription must do so in pleadings, provided that a court may allow prescription to be raised at any stage of the proceedings.<sup>26</sup>
- [28] Neither party referred me to any legal authority in support of the notion that the filing of a grievance would interrupt prescription. A grievance is not a 'process' commencing legal proceedings. The timing of the grievance process might, however, have a bearing on when the debt became 'due'. This would be a matter for evidence.
- [29] Prescription of the applicant's claims was interrupted on 22 August 2019 when he filed his statement of claim in this court.
- [30] The applicant's first claim is for monies deducted from his salary in the months December 2017 through May 2018, which deductions were allegedly unlawful (being in contravention of section 34 of the BCEA). The claim having been brought in August 2019, comfortably within the 3-year period, claim 1 has not prescribed.
- [31] The applicant's second claim is for payment of performance bonuses: he asserts that, had his performance been correctly and properly assessed, he would have qualified for a performance bonus in the 2012/2013 year and for every subsequent performance cycle up to and including the 2017/2018 year. It is not in dispute that he lodged formal grievances in respect of the unpaid performance bonuses for the 2012/2013 and 2013/2014 years, which grievances have still not been resolved.
- [32] The applicant's statement of claim having been filed on 22 August 2019, any performance bonus claim which became due prior to 22 August 2016 is extinguished by prescription. If the applicant succeeds in providing his

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<sup>24</sup> Section 15(6) of the Prescription Act.

<sup>25</sup> Section 17(1) of the Prescription Act.

<sup>26</sup> Section 17(1) of the Prescription Act.



contractual entitlement to the performance bonus payments claimed, the trial court will be in a position to determine which parts of claim 2 have prescribed.<sup>27</sup> Claim 2 has potentially prescribed in part.

[33] Claim 3 is for payments due under a 'commuted overtime' contract entered into between the parties on 29 January 2014. The Department of Defence cancelled the contract on 19 August 2014, upon which event the applicant filed a grievance. He claims that he is entitled to payment for 16 hours of overtime per week for the period August 2014 to July 2018. If applicant succeeds in proving his contractual entitlement to 'commuted overtime' payments, any such payments which fell due before 22 August 2016 have prescribed. Claim 3 has potentially prescribed in part.

[34] Claim 4 is in respect of an alleged unfair labour practice, being the respondents' conduct in variously mistreating the applicant with the result that his continued employment allegedly became intolerable. The debt in this instance arose on the date on which he ceased employment, being 31 July 2018. His claim was filed just over a year later: Claim 4 has not prescribed.

### Costs

[35] The parties agreed to request that the court determine the preliminary points separately. The preliminary point on prescription has succeeded in part. I make no order as to costs.

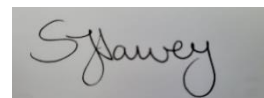
### Order

- [1] The Labour Court has jurisdiction to hear and to determine the applicant's claims.
- [2] Claims 1 and 4 have not prescribed.
- [3] Those portions of claims 2 and 3 which became due before 22 August 2016 have prescribed.

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<sup>27</sup> The trial court will consider when each bonus payment became 'due' having regard to (amongst others) when it would ordinarily have been paid and when a final decision not to pay it was taken and/or communicated.

[4] There is no order as to costs.



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**Harvey AJ**  
**Acting Judge of the Labour Court of South Africa**

**Appearances:**

**On behalf of the applicant: RT Williams SC with S Mahomed**  
**instructed by Herold Gie Attorneys**

**On behalf of the respondents: SM Shaba SC**  
**instructed by the State Attorney**