REPUBLIC OF SOUTH AFRICA

IN THE LABOUR COURT OF SOUTH AFRICA, CAPE TOWN

JUDGMENT

Reportable

C724/2021

In the matter between:

CGT VAN RENSBURG AND 102 OTHERS	Applicants
and	
DEPARMENT OF JUSTICE AND CORRECTIONAL SERVICES	First Respondent
MAKGOTHI SAMUEL THOBAKGALE	Second Respondent
DELEKILE JACK KLAAS	**Third Respondent**
JUSTICE NEDZABMA NO	Fourth Respondent
GPSSBC	Fifth Respondent

Date heard: 6 May 2022

Judgment delivered by email: 20 May 2022

Summary: Application for contempt of Court in respect of Certified Award; Defence of prescription raised by the respondents; On the authority of Majebe *v Civil & General Contractors CC v Civil & General Contractors CC* (2021) 42 ILJ 1027 (LAC) and the majority judgment in *Food & Allied Workers Union on behalf of Gaoshubelwe v Pieman's Pantry (Pty) Ltd* (2018) 39 ILJ 1213 (CC) the application under section 158(1)(c) by the applicants found to be a 'process' as contemplated in section 15(1) of the Prescription Act. Prescription of the Award had thus been interrupted. However, the requirements of contempt in

respect of the second and third respondents not established. The application for those respondents to be found in contempt as prayed for dismissed.

JUDGMENT

RABKIN-NAICKER J

[1] On the 15 April 2022, I issued the following ex parte order:

> "1. A rule nisi is issued calling upon the First, Second and Third Respondents to appear and show cause on Friday 4 March 2022 why an Order should not be granted in the following terms:
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> 1.1 That the Second Respondent, MAKGOTHI SAMUEL THOBAKGALE, National Commissioner and/or the Third Respondent, DELEKILE JACK KLAAS, Provincial Commissioner (Western Cape) appear in the Labour Court, Cape Town on Friday 4 March 2022 at 10:00 to show cause why Second and/or the Third Respondent should not be found guilty of contempt for not complying with the certified arbitration award issued under case number GPBC737/2015 under the auspices of the Fourth Respondent;
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> 1.2 That the Second and/or Third Respondent may explain their default by serving and filing a sworn affidavit before the date hearing (although this will not excuse him/her from being present in Court);
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> 1.3 That in the absence of providing an explanatory affidavit to the satisfaction of the Court, or failing to appear in Court despite being properly served, the Second and/or Third Respondent be found guilty of contempt and that Second and/or Third Respondent be committed to prison for such contempt for a period of 30 days or be fined an amount of R100 000.00 or such amount as the Honourable Court deems just and equitable;

2. Directing that Second and/or Third Respondent's committal to prison be suspended for a period of one year on condition that:

2.1 First, Second and Third Respondents forthwith and fully comply with their obligations and the finding set out in the arbitration award issued under case number GPBC737/2015.

3. Directing that First, Second and Third Respondent pay the costs of this application, jointly and severally, the one paying the other to be absolved, if they oppose the relief sought."

[2] The rule was extended on the 4 March 2022 and I heard the application on May 6th 2022. The Award in issue is dated the 07 March 2016. The Fourth Respondent awarded the following relief to the applicants, arising of an unfair labour practice dispute relating to benefits:

"27. The respondent's failure and/or refusal to subsidise the applicants with the payment of water and electricity constitutes unfair labour practice.

28. The respondent is ordered to subsidise the applicants in respect of the water and electricity accounts within 21 working days of the service of this award.

29. The applicants must pay the prescribed uniform rates payable for domestic services at state owned houses in respect of the water and electricity rates."

[3] The referral to the fifth respondent (the bargaining council) was opposed by the first respondent (the Department). It should be noted at the outset that the Department has not at any stage applied to review the Award. Nor did it comply with it. The respondents in this contempt application have raised a number of defences. I shall first deal with that of prescription.

[4] The following common cause facts, *inter alia*, are relevant to the enquiry as to whether applicants claim has prescribed:

4.1 The applicants obtained a case number in this Court on the 24 August 2016 (C554/2016) and filed an application under section 158(1)(c) albeit filling out the pro forma form for making a settlement agreement (rather than an Award) an order of Court. The award was annexed to the papers[1].

4.2 The respondents filed a notice of intention to oppose the section 158(1)(c) application on the 22 September 2009.

4.3 The Award was certified in terms of section 143 of the LRA on the 27 July 2021.

[5] The law on prescription as it applies to claims under the LRA is complex. In this judgment I rely (as I am bound to) on the LAC Judgment in *National Union of Mineworkers on behalf of Majebe v Civil & General Contractors CC*[2] (the *Majebe* judgment). That judgment in turn follows the majority decision of the Constitutional Court in *Food & Allied Workers Union on behalf of Gaoshubelwe v Pieman's Pantry (Pty) Ltd* [3] (Pieman's) as is set out below.

[6] In *Majebe* the employer had brought an application to review an arbitration award and there was a substantial delay in the prosecution of it. While such prosecution was still in abeyance, the employee (almost 7 years later), brought an application in terms of section 158(1)(c). The employer opposed that application on the basis that the Award had prescribed.

[1] This is evident from a perusal of the said Court file
[2] (2021) 42 ILJ 1027 (LAC)
[3] (2018) 39 ILJ 1213 (CC)

[7] The LAC in *Majebe* traverses the various judgment of the Constitutional Court dealing with the compatibility between the Prescription Act and the LRA,[4] and relies on the majority decision in *Pieman's*. The LAC states as follows:

> "[33] *Pieman's* has produced a ratio and essentially establishes the following: (a) the Prescription Act is applicable to claims in terms of the LRA; (b) a claim for reinstatement (with or without back-pay) re-employment, or compensation, is a "debt" as envisaged in the Prescription Act; (c) the applicable prescriptive period is 3-years; (d) the referral of an unfair dismissal claim to the CCMA interrupts prescription and prescription remains interrupted until any review proceedings in relation to that process are *finalised*…..
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> [38] On the authority of *Pieman's*, the review brought by the respondent is "process" as contemplated in section 15(1) of the Prescription Act and it interrupts the running of prescription in respect of the award. Accordingly, the appellant's award (for reinstatement and backpay, which is a 'debt' as contemplated in the Prescription Act) has not yet prescribed because the respondent's application to review that award has not been finalised.
>
> [39] While the facts in Pieman's were slightly different from those in the present matter, they are similar in material respects. To reiterate, there the majority of the Constitutional Court concluded that a claim in terms of the LRA for reinstatement, or re-employment and/or compensation was a "debt" as contemplated in the Prescription Act and the prescriptive period was 3 years. While a claim for such relief and an award granting such relief are conceptually different, it is rather artificial to conclude that such a claim is a "debt" in terms of the Prescription Act, but that an award, in terms of which such a claim is granted, is not. In any event, an award made pursuant to a claim for reinstatement (or for re-employment, or compensation) also seeks to enforce a legal obligation and enjoins the employer to do something positive. In this instance, to essentially, resuscitate Mr Majebe's employment

[4] Mogaila v Coca Cola Fortune (Pty) Ltd 2018 (1) SA 82 (CC); (2017) 38 ILJ 1273 (CC); Myathaza v Johannesburg Metropolitan Bus Services (SOC) Ltd t/a Metrobus & others 2018 (1) SA 38 (CC); (2017) 38 ILJ 527 (CC)

agreement with it and to pay him back-pay. A quintessential "debt", and as contemplated in the Prescription Act.

[40] More importantly, the Constitutional Court in Pieman's held that a referral to the CCMA interrupts prescription, and prescription remains interrupted until the finalization of the processes relating to it, which would include the review proceedings of the award made consequent to the referral."

[8] In this application, the parties were *ad idem* that the Award in question constitutes a debt in terms of the Prescription Act. Although the dispute giving rise to the Award did not concern an unfair dismissal claim, the LAC in *Motsoaledi & others v Mabuza* [5] held as follows:

"[22] The appeal before us involves an unfair labour practice relating to promotion as opposed to an unfair dismissal considered in Gaoshubelwe. But as the LRA treats unfair dismissals and unfair labour practices in much the same way, this appeal is indistinguishable from the exposition of the law laid down in Gaoshubelwe.

[23] A dispute concerning an unfair labour practice must, in terms of s 19(1)(b)(ii) of the LRA, be referred to the CCMA or a bargaining council having jurisdiction within 90 days of the date of the act or omission which allegedly constitutes the unfair labour practice or, if it is a later date, within 90 days of the date on which the employee became aware of the act or occurrence. In terms of s 193(4) an arbitrator may determine any unfair labour practice dispute referred to the arbitrator on terms that the arbitrator deems reasonable, which may include ordering reinstatement, re-employment or compensation. A claim to remedy an unfair labour practice clearly gives rise to a debt as contemplated by the Prescription Act. I am of the opinion that the investigation and conclusion undertaken in the majority judgment in Gaoshubelwe apply equally to the case of an unfair labour practice concerning promotion."

[5] (2019) 40 ILJ 117 (LAC)

[9] Accepting the authority of the cases cited above, the interruption of prescription in respect of the debt/claim, in casu, occurred on two occasions. First, on the referral of the claim to the Bargaining Council. Secondly, during the three years after the Award was issued, when the applicants referred the section 158(1)(c) application to this Court. The applicants submitted that the said 158(1)(c) process did interrupt prescription. The first to third respondents (hereinafter referred to as the respondents), on the other hand, argued that given the 158(1)(c) application was abandoned, it did not.

[10] In *Majebe*, the LAC was satisfied that prescription had remained interrupted even though the employer in that matter had not prosecuted the review to finality. In addition to the law as set out in *Pieman's*, it relied on the amendment to the LRA contained in section 145(9) to the LRA that:

> "(9) An application to set aside an arbitration award in terms of this section interrupts the running of prescription in terms of the Prescription Act, 1969 (Act 68 of 1969), in respect of that award.
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> [Sub-s. (9) added by s. 22 of Act 6 of 2014 (wef 1 January 2015).]"

[11] The majority in *Pieman's* gave a broad interpretation to the term 'process' in section 15(6) of the Prescription Act:

> "[195] Section 15(6) of the Prescription Act defines process to include 'a petition, a notice of motion, a rule nisi, a pleading in reconvention, a third party notice referred to in any rule of court and any document whereby legal proceedings are commenced'. While most of the documents to which reference is made ordinarily constitute documents associated with the courts and the litigation advanced there, the reference to 'any document whereby legal proceedings are commenced' is clearly indicative of a broader and more generous approach to what may constitute such a document. The second judgment in Myathaza, referred to a Zimbabwean case which dealt with a similar provision to s 15(6) and defined the precise meaning of 'process'. The Zimbabwe Supreme Court per Georges CJ held:

‘The definition of “process” in subsection (6) is not exclusive in its scope. The section merely enumerates some documents which fall within the ambit of the word. It clearly contemplates that other documents may fall within that ambit.’

All that s 15(6) requires is that the document in question is one by which legal proceedings are commenced.

[196] The interpretation I have attached to the term ‘any document’ is not offensive to the section, nor is it overly broad and inconsistent with the context within which it is used. In addition, and to the extent that it may be necessary, interpreting the term ‘any document’ in a narrow sense, as being confined to documents used in formal court processes, would not accord with what is required if the interpretation exercise, as it must, is viewed through the prism of s 39(2). The interruption of prescription, in effect, releases the constraint that the running of prescription has on the right of access to courts, which is provided for in s 34 of the Constitution. It accordingly justifies a broader meaning to be attached to the term ‘any document’, for the same reasons advanced above in support of a narrower meaning to be ascribed to the term ‘debt’.

[197] If ultimately the re-interpretation of the Prescription Act must demonstrate a fidelity to the values of the Constitution, then there can be no justification in seeking to assign a narrow meaning to the term ‘any document’, which in any event is qualified by the reference to it being ‘any document’ commencing legal proceedings. In Wessels, the High Court held that the meaning ascribed to ‘any’, as contemplated in s 15(6), did not even require a reading in of the term, because the subsection was already ‘wide’ and clearly ‘inclusive of a wide range of documents’. “

[12] The majority judgment in Pieman’s proceeds to follow Froneman et al’s approach in *Myathaza*, finding that a referral to conciliation constitutes such a process in terms of the Prescription Act. Kollapen AJ (as he then was) went on to state that:

> "[203] What is instructive from this decision is that it recognises that the judicial process may consist of various steps that are intertwined and that it is not necessary that the process that commences proceedings must result in a judgment in the same action. Thus, it matters not that the process that constitutes a referral to conciliation does not result in a judgment. It may still, and does indeed, constitute the commencement of proceedings for the enforcement of a debt.
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> [204] For these reasons, I would conclude that, although prescription began to run when the debt became due on 1 August 2001, it was interrupted by the referral of the dispute to the CCMA on 7 August 2001 and continued to be interrupted until the dismissal of the review proceedings by the Labour Court on 9 December 2003. Accordingly, when the dispute was referred to the Labour Court for adjudication on 16 March 2005, it clearly had not prescribed. It is for these reasons that the appeal must succeed."

[13] The respondents in countering the argument that the section 158(1) (c) was a process, relied on the judgment of Zondo J (as he then was) in *Myathaza* (supra). This reliance is puzzling not least because the judgments which Zondo J concurred in and penned in that matter, were premised on the view that the Prescription Act has no role to play in, nor is applicable to the LRA dispute-resolution system.

[14] On the basis of the authority in *Magebe* that : "prescription remains interrupted until the finalization of the processes relating to it, *which would include* the review proceedings of the award made consequent to the referral" , and in line to the wide definition of 'process'endorsed in the majority decision in Pieman's, that the section 158(1)(c) filing of court process interrupted prescription after the Award was issued. The respondents have submitted that the applicants abandoned their claim. This is not borne out in the pleadings, even taking into consideration the contents of the founding affidavit, and without reliance of the reply. What is undisputed is that even having been alerted by the section 158(1)(c) application, and having referred same to the state attorney to oppose, the respondents did not see fit to bring a review application at any stage before the Award was ultimately certified.

[15] Having found that the defence of prescription is not available to the respondents, I consider their reliance on the applicant's alleged lack of standing to bring this application, on the basis that Mr van Rensburg did not have a mandate to bring it on behalf of the further applicants. At the hearing of the matter, the attorney of record for the applicants handed up a confirmatory affidavit to its founding papers, with a list of the names of over fifty (50) of the further applicants attached and signed. The affidavit also confirmed the authorization of Van Rensburg to bring the application on their behalf. There was no formal objection to the admission of same from the Bar.

[16] The respondents relied in submission on the need for all applicants to be identified by citing a judgment arising from a referral to this Court. In *Coca Cola and others v Cola Cola Fortune (Pty Ltd*[6], a respondent filed an exception to the statement of claim in which the claimants were not all identified. I note that in a contempt application, the individual applicants do not stand to obtain a remedy. Any relief *in casu* is punitive as against the respondents by means of a fine and/or incarceration. It would seem then, that Mr van Rensburg could have brought this application in his own right in any event. The lack of identification of all the applicants would thus not be a bar to a finding of contempt in my view. Be that as it may, the respondents did not object to the admission of the confirmatory affidavit and the issue was not further pursued.

[17] What remains is for the Court to decide if the requirements for contempt have been met in this application. In *Fakie NO v CCII Systems (Pty) Ltd* [7] the SCA summarized the law on civil contempt as follows:

> "(a) The civil contempt procedure is a valuable and important mechanism for securing compliance with court orders, and survives constitutional scrutiny in the form of a motion court application adapted to constitutional requirements.

[6] (2015) 36 ILJ 677 (LC)
[7] 2006 (4) SA 326 (SCA)

(b) The respondent in such proceedings is not an 'accused person', but is entitled to analogous protections as are appropriate to motion proceedings.

(c) In particular, the applicant must prove the requisites of contempt (the order; service or notice; non-compliance; and wilfulness and mala fides) beyond reasonable doubt.

(d) But, once the applicant has proved the order, service or notice, and non-compliance, the respondent bears an evidential burden in relation to wilfulness and mala fides: Should the respondent fail to advance evidence that establishes a reasonable doubt as to whether non-compliance was wilful and mala fide, contempt will have been established beyond reasonable doubt.

(e) A declarator and other appropriate remedies remain available to a civil applicant on proof on a balance of probabilities."

[18] In the answering affidavit, the second respondent, the Acting National Commissioner of the Department, denies that there are allegations in the founding papers that he and the third respondent were made aware of the certified award and had any knowledge of it. He further avers that the third respondent does not have the authority to implement the Award in any event. The authority on the liability of officials such as the second and third respondents is as follows: In order to give rise to contempt of the second and third respondents non-compliance with a court order must be 'wilful and mala fide'. In general terms, this means that the official in question, personally, must deliberately defy the court order. Hence, where a public official is cited for contempt in his personal capacity, the official himself or herself, rather than the institutional structures for which he or she is responsible, must have wilfully or maliciously failed to comply[8]. There is no basis on the papers to find the second and third respondents in willful disobedience of the certified award in their personal capacities.

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[8] Meadow Glen Home Owners Assoc v Tshwane City Metro Muni 2015 (2) SA 413 (SCA) at paragraph 20 cited with approval in Matjhabeng Local Muni v Eskom Holdings Ltd 2018 (1) SA 1 (CC) ([2017] ZACC 35) a paragraph 76

[19] The application to find the second and third respondents in contempt of Court must therefore fail. The applicants did not seek to find the Department in contempt by way of declaratory order. However, I have found that the Certified Award is enforceable as though it was an order of this Court. It is still open to the Applicants to apply for a mandamus against the responsible officials and the Department to ensure compliance by the Department with it. I make the following order:

Order

1. The application to find the second and third respondents in contempt of Court is dismissed.

2. There is no order as to costs.

H. Rabkin-Naicker
Judge of the Labour Court of South Africa

Appearances

Applicants: Marias Muller Hendricks Inc

Respondents: T. Madima SC with J Bernstein instructed by the State Attorney