IN THE CONSTITUTIONAL COURT OF SOUTH AFRICA

Case No CCT: 04/16

LAC CASE NO: JA55/2014

In the matter between:

NATIONAL UNION OF METAL WORKERS

OF SOUTH AFRICA First Applicant

obo

MOSES FOHLISA & 41 OTHERS Second to further Applicants

and

HENDOR MINING SUPPLIES

A DIVISION OF MARSCHALK BELEGGINGS (PTY) LTD Respondent

APPLICANTS' SUBMISSIONS

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INTRODUCTION

2 This is an application for leave to appeal to this Court against the whole of the judgment and orders of the Labour Appeal Court ("LAC") dated 26 November 2015, which found that the applicants' claim for payment of arrear wages from 23 April 2007 to 18 September 2009 have prescribed.

3 The applicants had been reinstated retrospectively from 1 January 2007 by order of the Labour Court ("LC"), but the reinstatement was implemented on 29 September 2009 by the employer after a protracted period of attempts to appeal the order had failed.

4 After the Supreme Court of Appeal ("SCA") had dismissed the employer's application for leave to appeal on 15 September 2009, the applicants presented themselves for work on 29 September 2009. When the employer refused to pay their lost wages for the period of 23 April 2007 to 28 September 2009 they launched an application for payment of these arrear wages on 19 September 2009.

5 The LAC has found that this claim is hit by prescription and that prescription started running on 15 September 2009 when the SCA refused leave to appeal. Therefore, the LAC found that the claims

for the period of 23 April 2007, being the date on which the LC ordered the applicants to return to work, and 15 September 2009, being the date on which leave to appeal was refused, became a "debt due" which ought to have been claimed by 15 September 2012 whereas the applicants did so only on 19 September 2012[1].

6 The applicants seek leave to appeal the judgment, *inter alia*, on the grounds that the debt does not constitute a new cause of action but that the finding of unfair dismissal and the order of reinstatement is a remedy / relief contemplated in section 193 (1) of the LRA. It is submitted further that there are other periods later than 15 September 2009 on which prescription could be regarded as having started running. These are:

6.1 when the employer failed or refused to pay the debt; or

6.2 from the date of actual reinstatement; or

6.3 on the date on which the debt is quantified by the Court.

BACKGROUND

7 The second to further applicants are members in good standing of the first applicant. For convenience, all applicants will be collectively referred to as "the applicants".

[1] Judgment – Savage AJA, dated 26 November 2015 (Annexure A), Record vol 6, pp 502 – 510, para [16]

8 The respondent unfairly dismissed the applicants on 18 August 2003 for participating in an unprotected strike. On 16 April 2007 the LC (per Cele AJ) found the dismissals to be unfair and ordered that the applicants be reinstated from 1 January 2007 and report for duty on 23 April 2007[2].

9 The respondent applied for leave to appeal, which was dismissed with costs by the LAC on 19 June 2009[3]. Thereafter the respondent applied for leave to appeal to the SCA and its application was dismissed with costs on 15 September 2009[4].

10 On 29 September 2009 the respondent reinstated the applicants to their employment but failed to pay them arrear wages from 1 January 2007 until date of reinstatement. The court order of Cele AJ of 16 April 2007 ordered the respondent to *"reinstate the individual applicants in the same or not less favourable positions as they had at the time of their dismissal*"[5]. It did not specify the exact amounts owed by the respondent to the applicants.

11 On 4 February 2010 the applicants issued a letter of demand for payment of the arrear wages[6].

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[2] [2] Court Order – Cele AJ dated 2007-04-16 (Annexure NJX1), Record vol 2, pp 178 – 197
[3] Judgment – Davis AJ, dated 19 June 2009 (Annexure NJX 2), Record vol 3, pp 198 - 217
[4] Judgment – Navsa & Hurt AJA, dated 15 September 2009 (Annexure NJX 3), Record vol 3, p 218
[5] Court Order – Cele AJ dated 2007-04-16 (Annexure NJX1), Record vol 2, pp 178 – 197
[6] Letter from Minnar Niehaus Attorneys dates 4 February 2010, Record vol 3, pp 219 – 221

12 The applicants issued a writ of execution on 6 October 2010 against the respondent. On 23 June 2011 the LC set the writ aside and found that the applicants' claim does not sound in money and directed them to approach the LC for a declaration setting out the grounds and amounts claimed in respect of the individual applicants[7].

13 On 19 September 2012 the appellants brought a claim in the LC for wages "backpay" as well as employment benefits sounding in money for the period 1 January 2007 to 28 September 2009, wherein they were away from work as a result their unfair dismissal by the respondent[8].

14 The Labour Court (per Gabie AJ) found in favour of the applicants and ordered the respondents to pay the applicants (except for the deceased employees) remuneration from 1 January 2007 to 28 September 2009, with interest. The respondent appealed the decision. The LAC overturned the Labour court's decision and found that in terms of the Prescription Act[9] the applicants' claim for arrear wages has prescribed. The LAC considered it unnecessary to determine whether the Labour Court erred in how it considered

[7] Court Order dated 23 July 2011 (Annexure NJX 5), Record vol 3, pp 222 – 223
[8] Amended Notice of Motion, Record vol 1, pp 1 – 4; Founding Affidavit, Record vol 1, para 9, p 7
[9] Act 68 of 1969

the substitution of the deceased estates of certain of the deceased employees. However, the LAC still found that the deceased [applicants] could not have sought the substitution relief that they did and that the Labour Court erred in failing to dismiss such applications on this basis[10].

15 We submit that:

15.1 This matter falls within the jurisdiction of this Court;

15.2 The appeal bears reasonable prospects of success; and

15.3 It is in the interests of justice that leave to appeal be granted.

16 We deal with the following issues in turn:

16.1 This court's jurisdiction to entertain this matter, the interests of justice as well as the reasonable prospects of success;

16.2 Grounds of appeal;

16.3 Statutory framework: section 193 of the LRA and its interpretation;

16.4 Why dealing with the interpretation of section 193 of the Labour Relations Act does not raise new issues on appeal;

16.5 The nature of reinstatement orders;

16.6 Interest;

16.7 Prescription;

16.8 Substitution of the deceased applicants;

[10] Judgment – Savage AJA, dated 26 November 2015 (Annexure A), Record vol 6, pp 502 – 510, para [17]

16.9 Relief sought; and

16.10 Conclusion

JURISDICTION

17 The Court has jurisdiction in this matter in terms of section 167(3)(b) of the Constitution which states that:

(3) The Constitutional Court—
- *(a) is the highest court of the Republic; and*
- *(b) may decide—*
  - *(i) constitutional matters; and*
  - *(ii) any other matter, if the Constitutional Court grants leave to appeal on the grounds that the matter raises an arguable point of law of general public importance which ought to be considered by that Court, and*
- *(c) makes the final decision whether a matter is within its jurisdiction.*

18 This application sets out constitutional matters, which this Court has jurisdiction to entertain as it involves the interpretation of a statute, namely the LRA, as we shall show below.

19 Section 23(1) of the Constitution of the Republic of South Africa provides that everyone has the right to fair labour practices. Section 23(6) of the Constitution provides that to the extent that legislation may limit a right in Chapter 2 of the Constitution, the limitation must comply with section 36(1) of the Constitution.

20 Section 36 of the Constitution provides as follows:

36. Limitation of rights
- *(1) The rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable*

and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including—

(a) the nature of the right;

(b) the importance of the purpose of the limitation;

(c) the nature and extent of the limitation;

(d) the relation between the limitation and its purpose; and

(e) less restrictive means to achieve the purpose.

(2) Except as provided in subsection (1) or in any other provision of the Constitution, no law may limit any right entrenched in the Bill of Rights.

21 Section 39 of the Constitution requires a purposive interpretation of the Constitution. Section 39(2) provides that when interpreting any legislation, and when developing the common law or customary law, every court, tribunal or forum must promote the spirit, purport and objects of the Bill of Rights. The applicants seek such an interpretation to section 193 (1) of the LRA should the Court find that the applicants had failed to make their claim within three years.

22 The LRA is legislation that was enacted in order to give effect to the right to fair labour practices contained in section 23 of the constitution. We submit that this matter is a constitutional matter because the applicants are seeking an interpretation of section 193 of the LRA, which is the legislation that gives effect to the right to fair labour practices contained in section 23 of the Constitution.

23 We submit therefore that interpretation of the right to fair labour practices must be given a purposive interpretation that is contained

in section 39 of the Constitution to hold that the applicants are not required to institute fresh claims for arrear wages where an order of reinstatement has been made.

24 Section 167(7) of the Constitution provides that "*a constitutional matter includes any issue involving the interpretation, protection or enforcement of the Constitution*".

25 It is submitted therefore that the Court has jurisdiction.

THE INTERESTS OF JUSTICE

26 We submit that granting leave to appeal would manifestly be in the interests of justice. This matter has a long history and it is in the interests of justice that it be brought to finality.

27 We submit that since the judgment of ***Coca-Cola Sabco v Van Wyk***[11] there has been no clarity on whether an employer is under a duty to pay the employees backpay for their period of absence from work while the employer exhausts its appeal and review options.

28 In ***Coca-Cola*** the court held that *"the money paid to an unfairly dismissed employee consequent to a retrospective reinstatement order is not compensation. Compensation and back-pay may only be granted in the alternative and are mutually exclusive. The back-*

[11] [2015] 8 BLLR 774 (LAC)

pay ordered by the commissioner can therefore only refer to the period between the date of dismissal and the date of the order and does not entitle an employee, without more, to remuneration between the date of the award and the actual date of implementation. The Labour Relations Act does not cater for such relief".

29 The ***Coca-Cola*** judgment was followed by the LAC in this matter to the letter. These judgments created a window for unscrupulous employers to delay matters while they "exhaust appeal and review options" and not pay the employees their wages because they are aware that the matter will be hit by prescription. As soon as the matter prescribes, they can decide to reinstate the employees but not reinstate their salaries and not pay them any back-pay, knowing that they can no longer claim it because their matters have prescribed. We submit that this position is untenable and that the findings of the LAC in this matter as well as the ***Coca-Cola*** judgment have to be scrutinized closely in order to offer the employees more protection as envisaged in the LRA.

IMPORTANCE OF THE MATTER

30 We submit that the issue that the case is concerned with is a Constitutional issue of public importance, on which it is desirable to have a decision by the Constitutional Court.[12] It is important that both workers and workers trade union and the employers and employer organisation obtain final clarity on this issue.

THE PROSPECTS OF SUCCESS

31 The LAC upheld the respondent's contention that the applicants' claims for arrear wages ("back pay") for the period after the date on which the respondent was ordered to reinstate them to the date of actual reinstatement "*did not relate to a judgment debt but were claims in contract which accrued weekly under the contract of employment; and that such claims were therefore a "debt due" within the meaning of section 11(d) of the Prescription Act[13] and subject to a three-year prescription period*"[14]

32 Sections 15(1) and (2) of the Prescription Act provide as follows:

> *(1) The running of prescription shall, subject to the provisions of subsection (2), be interrupted by the service on the debtor of any process whereby the creditor claims payment of the debt.*

[12] Frazer v Absa Bank Limited 2007 (3) SA 484 (CC) at [44]
[13] Act 68 of 1969
[14] Judgment – Savage AJA, dated 26 November 2015 (Annexure A), Record vol 6, pp 502 – 510, para [5] read with [14] and [16]

(2) Unless the debtor acknowledges liability, the interruption of prescription in terms of subsection (1) shall lapse, and the running of prescription shall not be deemed to have been interrupted, if the creditor does not successfully prosecute his claim under the process in question to final judgment or if he does so prosecute his claim but abandons the judgment or the judgment is set aside.

33 Section 15(1) of the Prescription Act provides that the running of prescription is interrupted by the service on the debtor of any process whereby the creditor claims payment of the debt.

34 We submit that the LAC's interpretation of the period of prescription laid down by the Prescription Act was treated as definitive. This, the LAC did without taking into account the fact that a lot more time was spent by the respondent dragging out the matter on appeal. If this judgment is left unchallenged then the scope for an employer to drag out appeal proceedings until an employee's claim for back pay in terms of an arbitration award has prescribed will open a door for all employers to follow suit.

35 We submit that the LAC decided the question on the basis of the letter of the law without delving into the question of its fairness. However, section 210 of the LRA provides that, if any conflict "relating to the matters dealt with in this Act" arises between it and the provisions of any other law, the LRA must prevail. Therefore the interpretation and application of the Prescription Act in this

matter creates a conflict between “fairness” contemplated by the Act and the inappropriate rules of law. An interpretation of section 193(1) of the LRA to the effect that reinstatement encompasses the automatic remedy of backpay will therefore prevail over the Prescription Act. Furthermore, when prescription started running is a contested issue. Furthermore, knowledge of the facts from which the debt arises should include knowledge of the quantum. This fact could only be ascertained through a quantification thereof by a court after the amount set out in the letter of demand and the writ of execution was set aside by the LC.

36 We submit that the LAC erred in its decision when it found that the applicants’ claims for payment of arrear wages from 23 April 2007 to 18 September 2009 have prescribed. The application for leave to appeal should succeed on this ground.

GROUNDS FOR THE APPEAL

37 The learned judge in the LAC correctly summarised the background of this matter and recognised that the respondent’s petition for leave to appeal to the Supreme Court of Appeal was similarly dismissed with costs on 15 September 2009.

38 The judge held as follows:

"[12] ... When the appellant's petition for leave to appeal was refused on 15 September 2009, the suspension was uplifted and the judgment and order became operative and enforceable. As a consequence, the respondents' employment contracts were restored retrospectively to 1 January 2007 which entitled the respondents to claim arrear wages until the date of their reinstatement on 29 September 2009.

[13] ... The respondents' claims for wages from 23 April 2007 until date of reinstatement on 29 September 2009 were therefore founded on a cause of action distinct from that of unfair dismissal. These wage claims were claims for payment under the terms of the employment contract which had been reinstated by Cele AJ with effect from 1 January 2007 and were claims the Labour Court is empowered by s77(3) of the Basic Conditions of Employment Act 75 of 1997 (BCEA) to determine."

39 The judge concluded that:

"[14] It follows that on 15 September 2009 when the suspension of the execution of the judgment and order of Cele AJ was uplifted, the respondents' arrear wage claims from 23 April 2007 became a "debt due" within the meaning of s11(d) of the Prescription Act, which debt prescribed three years from 15 September 2009. Prescription began to run afresh in terms of s15(4) of the Prescription Act on the day on which the judgment became executable, being 15 September 2009. … The debt did not become owing or payable, as was contended by the respondents, only when the appellant failed or refused to pay the debt; nor from the date of actual reinstatement; nor on the date on which the debt was quantified by the Court."

40 The LAC erred in holding that the applicants therefore acquired a completely new cause of action for the recovery of arrear wages from 23 April 2007 and that such cause of action arose on 15 September 2009 when the respondent finally failed in its bid to appeal the 16 April 2007 judgment of Cele AJ[15].

41 The learned judge ought to have found that:

[15] Judgment – Savage AJA, dated 26 November 2015 (Annexure A), Record vol 6, pp 502 – 510, paras [13] and [14]

41.1 the order of reinstatement remains suspended while it is subject to appeals and comes into effect on the date on which it is confirmed by the court of appeal or review. Upon being confirmed on appeal the effect of the reinstatement order is to encompass the whole period from date of its retrospectivity (date of dismissal in this case) to date of compliance.

41.2 so long as the employer is bound to reinstate an employee, with the concomitant obligation to pay him or her the remuneration which but for the dismissal would be due to him or her, so long is the employer bound to act according to the order up to the date of its implementation. This is so because the employee's entitlement to payment for the period arises from a court order obliging the employer to pay for the period of non-payment occasioned by its own act of unfair dismissal. This is the period that the employer believes the dismissal to be still justifiable, hence its embarkation on judicial processes to assert / confirm the dismissal.

41.3 the period between the date of reinstatement order and the implementation thereof is the continuation of the dismissal period.

41.4 when an appeal fails in respect of an order for reinstatement the final order is one of reinstatement from the date set in the court of first instance or arbitration to the date of the final order, the effect of which is to extend the period of implementation to the date of the final order.

42 We submit that properly construed, and read with the object of the LRA and infused with a purposive interpretation provided for in section 39 of the Constitution, section 193 of the LRA inevitably leads to the conclusion that whilst a court or an arbitrator is authorised to only order reinstatement to a date not earlier than the date of dismissal, it does not restrict the implementation date as the date of the order. In the circumstances the date of implementation of the reinstatement order is the date of final pronunciation of the reinstatement.

43 We further submit that an appellant employer assumes the risk inherent in that process with the attendant risk that the prospective part of the Labour Court order is intertwined with the original cause of action for unfair dismissal and is not subject to prescription in terms of the Prescription Act.

44 Finally, we submit that all applications for substitution in the cases of deceased applicants ought to succeed and that the declaratory relief sought by the applicants is competent. To require the

applicants to institute fresh proceedings by way of declaration or statement of claim would create further burdens on the applicants not envisaged in the Labour Relations Act ("LRA").

45 Therefore the learned judges in the LAC erred in failing to dismiss the appeal.

46 The respondent incorrectly categorised the "crisp" issue between the parties as whether certain claims of the applicants for arrear wages for the period 23 April 2007 to 18 September 2009 have prescribed. It therefore incorrectly contends that the question of prescription neither raises a constitutional issue nor does it raise an issue of general public importance[16]. The respondent is also incorrect that this matter has no prospects of success and that the applicant seeks to raise new issues on appeal.[17]

47 It is submitted that leave to appeal should be granted.

THE MERITS

STATUTORY FRAMEWORK

48 Section 193(1) of the Labour Relations Act provides as follows:

[16] Answering Affidavit in these proceedings, Record vol 6, p 515 paras 8 and 11.1
[17] [17] Answering Affidavit in these proceedings, Record vol 6, p 515 paras 11.2 – 11.3

(1) If the Labour Court or an arbitrator appointed in terms of the Act finds that a dismissal is unfair, the Court or the arbitrator may –

Order the employer to reinstate the employee from any date not earlier than the date of the dismissal;

Order the employer to re-employ the employee, either in the work in which the employee was employed before the dismissal or in other reasonably suitable work on any terms and from any date not earlier than the date of dismissal, or order the employer to pay compensation to the employee.

Order the employer to pay compensation to the employee.

49 The applicants' contention is that section 193 of the Labour Relations Act[18] ("the LRA") properly construed permits a court or arbitrator to:

49.1 set a date of retrospective reinstatement; and

49.2 set a date upon which the order must be complied with.

50 However, the order does not set the date of reinstatement as fixing the end of the dispute between the parties and of the cause of action. It may be extended by a subsequent order should there be an appeal.

51 Section 193(1)(a) of the LRA must be read to contemplate payment of arrear wages ("back pay") from the date of reinstatement to date of actual implementation of the reinstatement order. Therefore, "reinstatement" has to be construed broadly as encompassing the reinstatement of the contract and all the wages

[18] Act 66 of 1996

that would have been earned and all ancillary benefits up to the date of actual reinstatement.

INTERPRETATION OF SECTION 193 OF THE LRA DOES NOT RAISE NEW ISSUES

52 The issue between the parties has always been around the interpretation of section 193 of the LRA, in particular, what the effect of the reinstatement is on the claim for arrear amounts. We submit that the respondent is incorrect in asserting that the interpretation of section 193 is for the first time raised in these proceedings.

53 In ***Minister of Justice and Constitutional Development and Others v Southern African Litigation Centre and Others***[19] the court held that if a point of law emerges from the undisputed facts before the court it is undesirable that the case be determined without considering that point of law. The reason is that it may lead to the case being decided on the basis of a legal error on the part of one of the parties in failing to identify and raise the point at an appropriate earlier stage[20]

[19] 2016 (4) BCLR 487 (SCA); [2016] 2 All SA 365 (SCA) (15 March 2016) at para [24]
[20] *Van Rensburg v Van Rensburg & andere* 1963 (1) SA 505 (A) at 510 A-C. The approach has been endorsed by this Court. *CUSA v Tao Ying Metal Industries & others* (CCT 40/07) [2008] ZACC 15; 2009 (2) SA 204 (CC) para 68.

54 In the event that this is found to be a new point, we submit that the pleadings permit its ventilation because it is a point of law. Furthermore, the Court and the LAC are under a duty to interpret section 193(1) in accordance with the Bill of Rights even if the applicants have failed to rely on section 39(2).[21] In the ***Frazer*** case[22] Van der Westhuizen stated the role of section 39(2) as follows:

> *"When interpreting legislation, a court must promote the spirit, purport and objects of the Bill of Rights in terms of section 39(2) of the Constitution. This Court has made clear that section 39(2) fashions a mandatory constitutional canon of statutory interpretation" (Footnotes omitted.)*
> *……...*
> *Section 39(2) requires more from a court than to avoid an interpretation that conflicts with the Bill of Rights. It demands the promotion of the spirit, purport and objects of the Bill of Rights*."[23]

THE NATURE OF THE REINSTATEMENT ORDER

55 Reinstatement, in principle, means the restoration of the employment contract to ensure continuity of the employment relationship.

56 In ***Whall v BrandAdd Marketing (Pty) Ltd***[24] it was held that a court has a discretion to decide on the extent to which orders of reinstatement or re-employment in terms of subsections 193(1)(a) or (b) may be made retrospective.

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[21] Phumelela Gaming and Leisure Ltd v Gründlingh 2007 (6) SA 350 (CC) at [26] –[27]
[22] at [43]
[23] [2006] ZACC 24; 2007 (3) SA 484 (CC); 2007 (3) BCLR 219 (CC) at para 47
[24] [1999] 6 BLLR 626 (LC) at para 28

57 In ***NUMSA v Fibre Flair CC***[25] the Honourable Court held that section 193(1) conferred on the Labour Court a discretion to order non-retrospective reinstatement.

58 The Court also held that while "reasonable persons" might differ when choosing the period of retrospectiveness, interference is only justified when a court *a quo* has acted capriciously, or upon a wrong principle, or has exercised its discretion improperly, or unfairly fails to bring an unbiased mind to bear on the issue or when the decision is vitiated by some misdirection.

59 In ***Kroukam v RSA Airlink (Pty) Ltd***[26] the court held that reinstatement or re-employment may be ordered retrospectively to the date of dismissal, even if that period exceeds 12 months, in the case of substantively unfair dismissal, or 24 months, in the case of automatically unfair dismissal.

60 The majority held that when an order of reinstatement is made, the contract is restored and the employee will be entitled to backpay, the extent of which is in the discretion of the court. The only limitation is that the reinstatement cannot be fixed at a date earlier than the date of dismissal[27].

[25] [2000] 6 BLLR 631 (LAC)
[26] [2005] 12 BLLR 1172 (LAC) at paras 61 - 64
[27] At paragraph 59 and 61

61 In ***Republican Press (Pty) Ltd v Chemical Energy Printing Paper Wood & Allied Workers Union***[28] the retrenched employees' reinstatement was made retrospective to the date of dismissal but the matter only went to the SCA six years after the dismissal of the employees. The full paragraphs warrant quotation and read as follows:

"[*19] I respectfully disagree with that construction. I do not think that the back-pay to which a worker ordinarily becomes entitled when an order for reinstatement is made is to be equated with compensation (thus allowing for the limitation contained in s 194 to be applied in relation to back-pay). As pointed out by Davis AJA in Kroukam, (and I respectfully agree) an order of reinstatement restores the former contract and any amount that was payable to the worker under that contract necessarily becomes due to the worker on that ground alone. Perhaps a court (or an arbitrator) that makes such an order may also order that part of that remuneration shall not be recoverable (I make no finding on that point) but I agree with Davis AJA that the remuneration becomes due under the terms of the contract itself and does not constitute compensation as envisaged by s 194. I can also see no proper reason to read into the Act the limitation that is suggested in Latex Surgical Products. I do not think it is permissible to interpret a statute with reference to the supposed intention of parties who had an interest in its enactment and it would be most undesirable to do so. The meaning of a statute is ordinarily to be interpreted with reference to the language in which it is expressed. It is true that the language must be seen in its context, which includes its background, but the background must necessarily play a limited role when the language is clear. In the present case it is apparent from the statute that it was carefully and meticulously crafted to create a coherent structure for resolving labour disputes and I can see no grounds for assuming that the limitation that is now suggested was inadvertently omitted from section 194(1) but not omitted from the next section. I might add that the very existence of two separate remedies (reinstatement and re-employment) to restore the worker to*

[28] (2007) 28 ILJ 2503 (SCA), paras 19 and 20

employment, but by different means, might in itself suggest that it is inherent in reinstatement, as that word is used in the Act, that the contract revives from the date of dismissal (notwithstanding the apparent power to restore it from a later date) but it is not necessary to decide whether that is so. It is sufficient to say that there are no proper grounds for inferring that the limitation suggested in Latex Surgical Products was inadvertently omitted and ought now to be read into the section. (Emphasis added)

62 Paragraph [19] means the following:

62.1 Arrear wages or backpay is due to the reinstated worker on that ground alone and there is no need to commence new and separate proceedings by way of summons or declaration.

62.2 The court or an arbitrator that orders reinstatement may order that not the whole amount of arrear wages be paid. This statement, although obiter, clearly indicates that arrear wages constitute a judgment debt.

63 In ***Equity Aviation Services (Pty) Ltd v CCMA***[29] the Constitutional Court held that the sum of money paid to an unfairly dismissed employee subsequent to an order of reinstatement with retrospective effect is not compensation as contemplated in section 193(1)(c) or section 194. The court found that:

63.1 The backpay to which an unfairly dismissed employee becomes entitled when retrospective reinstatement is ordered is not limited to the maximum periods of

[29] 2009 (1) SA 390 (CC); (2008) 29 ILJ 2507 (CC)

compensation as contemplated in section 194. It is competent for a court or CCMA to make a reinstatement order that requires the employer to pay backpay for more than 12 months.

63.2 The fact that the dismissed employee has been without income during the period since his or her dismissal must, among other things, be taken into account in the exercise of the discretion, given that the employee's having been without income for that period was a direct result of the employer's conduct in dismissing him or her unfairly[30]. Emphasis added.

63.3 The Court also held that fairness ought to be assessed objectively on the facts of each case bearing in mind that the core value of the LRA is security of employment. In this regard, it is important to bear in mind that where a court or commissioner has decided that reinstatement is the appropriate remedy, it will also have to be decided that the worker has been unfairly dismissed. The worker will thus have been deprived of wages, unfairly, as a result of the conduct of the employer.'

[30] At paragraphs 36 and 43

64 In ***Billiton Alluminium SA Ltd v Khanyile***[31] the Constitutional Court confirmed an award of retrospective re-instatement with eight years' backpay as being fair and equitable because neither the institutional part of the system nor the employee was to blame for the unnecessary prolonging of the proceedings.

65 The court held that if the employee earned some income since that order was granted it was because he had to do so in order to survive and live a decent life. The employer could have prevented that necessity by implementing the reinstatement order. This shows that delays due to genuine institutional failure could raise the sympathy of the court.

66 In ***National Union of Metalworkers of SA on behalf of Maifo & others v Ulrich Seats (Pty) Ltd***[32] the court held as follows:

> *"It is clear from the above that, in the absence of the factors listed in [s 193(2) paras] (a) to (c) above, the court or the arbitrator as the case may be must require the employer to reinstate or re-employ the employee where the dismissal has been shown to be substantively unfair. It is for this reason that the courts have interpreted the LRA to be saying that the primary remedy in an unfair dismissal case is reinstatement or re-employment. The underlying consideration for this approach is set out in the case of* ***'Kylie' v Commission for Conciliation, Mediation & Arbitration & others*** *as follows:*
>
> *'The central purpose of dismissal legislation is to provide work security ... [and] reinstatement or re-employment is the primary remedy.* (Emphasis added)

[31] [2010] 5 BLLR 465 (CC)
[32] (2012) 33 ILJ 2918 (LC) at para 39

67 The framework of the LRA is to protect vulnerable workers from their work security being threatened or eroded. Employers can therefore not benefit from protracting legal processes and thereafter claim protection under the Prescription Act.

68 We submit that this Honourable Court should be guided by the SCA's decision in ***Republican Press*** where it was held that an order of reinstatement restores the former contract and any amount that was payable to the worker under the contract necessarily becomes due to the worker on that ground alone.

69 We also submit that this Honourable Court should follow the majority decision of the Labour Appeal Court in ***Kroukam*** where it was held that when an order of reinstatement is made the contract is restored and the employee will be entitled to backpay, the extent of which is in the discretion of the court. The only limitation is that the reinstatement cannot be fixed at a date earlier than the date of dismissal. We submit that the respondents' reinstatement was operative from their date of dismissal to the date of their reinstatement.

70 In deciding on the amount payable to the respondents due to their retrospective reinstatement, we submit that this Court should be guided by ***Equity Aviation Services (Pty) Ltd v CCMA*** where it was held that the backpay to which an unfairly dismissed

employee becomes entitled when retrospective reinstatement is ordered is not limited to the maximum periods of compensation as contemplated in section 194. It is competent for a court or CCMA to make a reinstatement order that requires the employer to pay backpay for more than 12 months. The backpay in this case is equivalent to some 32 months. The employer must pay it unless it is reduced by the court or arbitrator is suggested in ***Republican Press***, presumably if the worker is found to have contributed to the matter not being resolved expeditiously as envisaged in the LRA framework.

71 All the above cases show that the order of reinstatement remains suspended while it is subject to appeals and comes into effect on the date on which it is confirmed by the court of appeal or review. Upon being confirmed on appeal the effect of the reinstatement order is to encompass the whole period from date of its retrospectivity (date of dismissal in this case) to date of compliance. The learned judge should have made this finding.

72 The LAC relied heavily on the judgment of ***Coca-Cola***. In **Coca-Cola** the court held that:

72.1 Backpay ordered by the Commissioner can only refer to the period between the date of dismissal and the date of the

order and does not entitle the employee, without more to remuneration between the date of the award and the actual date of implementation of the order. We submit that the court was wrong in its finding[33];

72.2 When the employee, while exhausting appeal or review remedies to exhaustion and offers his or her services and works, he does so in terms of the contract of employment. The claim will have to be one in terms of the contract and the employee would have to, inter alia, prove that the contract of employment is extinct, that she tendered her services in terms of the contract and that the employer refuses or is unwilling to pay him in terms of that contract. The employer would equally have contractual defences[34].

72.3 A reinstatement award or order cannot extend to a date of beyond the date of the order nor can it serve to form the basis of a common law contractual entitlement[35]

72.4 It is only after a contractual claim in the civil court or under section 77 of the Basic Conditions of Employment Act has been instituted and pronounced upon that it can be said that the employer is a judgment debtor against whom a writ may

[33] at para [17]
[34] at para [24]
[35] at para [26]

be issued[36]. The order of reinstatement is not a judgment dealing with the consequent damages for the breach of contract;

72.5 A reinstatement award does not cover the period between the award and its implementation. Should the employer refuse to pay an employee for the said period then the employee has a contractual claim, which is a totally different cause of action against the employer[37]

73 The Court in ***Coca Cola*** relied on the Equity Aviation case[38], but erred in fusing compensation remedy with backpay[39] and characterising both as alternative remedies. The cases referred to above are clear that reinstatement goes hand-in-hand with backpay. The only issue is whether the payment of backpay is automatic or constitutes a new cause of action claimable in tandem with reinstatement of a contract of employment. The alternative remedies to section 193(1)(a) are those set out in subpara (1)(b)(c).

74 The Court in ***Coca Cola*** erred also in holding that an employee claiming backpay has to do it in terms of contract and prove that

[36] at para [28]
[37] 2015] 8 BLLR 774 (LAC) at para [30]
[38] at [42] thereof
[39] at [17]

he/she does so in terms of an extent contract. Backpay is claimed under the reinstated contract whose terms and conditions are common cause between the parties. The court imposed a burden on an employee which is not contemplated in the LRA.

75 It is submitted that the ***Coca Cola*** case was wrongly decided and the LAC a *quo* erred in following it. The quantifying of backpay is a mere practical carrying out of the order of reinstatement for unfair dismissal.

76 The respondent is incorrect where it states that when reinstatement occurs, the contract owes its resumption, but not its continued existence to a reinstatement order.[40]

77 The respondent is further incorrect in stating that the applicants' debt arose from the contract of employment and not from the of the order of Cele AJ in 2007[41]

78 Gabie AJ in the Labour Court correctly found that the reinstatement order arises from the confines of the Labour Relations Act and is reinforced in terms of the order of the Court[42]

79 The respondent has not denied that it reinstated the applicants but it has denied its indebtedness toward the applicants as a result of

[40] Answering Affidavit in these proceedings, Record vol 6, p 530, para 39
[41] Answering Affidavit in these proceedings, Record vol 6, p 531, para 40
[42] Judgment of Gabie AJ dated 5 November 2013, para 20, Record vol 5, p 453

its unfair dismissal for the period 24 April 2007 - 28 September 2009.

80 We submit that the respondent has no basis for denying its indebtedness to the applicants in light of the Labour Court's judgment of 16 April 2007 and that the only issue that was left for court *a quo's* determination is the exact amount that was owed to the applicants.

81 Before Gabie AJ the applicants brought the application setting out the exact amounts that they are owed by the respondent. Gabie AJ correctly found that the applicants are entitled to backpay from date of their unfair dismissal by the respondent up to date of their reinstatement. The LAC's finding to the contrary is incorrect.

INTEREST

82 Section 143(2) of the Labour Relations Act provides as follows:

"If an arbitration award orders a party to pay a sum of money, the amount earns interest from the date of the award at the same rate as the rate prescribed from time to time in respect of a judgment debt in terms of section 2 of the Prescribed Rate of Interest Act (No. 55 of 1975), unless the award provides otherwise".

83 In ***Top v Top Reizen CC***[43] the court held as follows:

[43] (2006) 27 ILJ 1948 (LC)

83.1 A court of law does not have a discretion either to reduce or to refuse an award of interest once the debtor is in *mora*;

83.2 The court does not have inherent power under common law to award *mora* interest when it was not due. Conversely, there is no authority for the proposition that the court had the power to disallow such interest once the debtor's liability for the payment of interest had arisen.

83.3 The provisions of section 143(2) are peremptory and effectively add interest automatically to the sum awarded by the arbitrator.

83.4 A claimant to whom compensation had been awarded is entitled to interest from the date of the award unless the arbitrator specified that the award should not carry interest.

84 We submit that the provisions of section 143(2) apply equally to court orders and therefore on 16 April 2007 the LC ordered reinstatement of the individual applicants retrospectively to the date of their dismissal and that the respondent is indebted to the applicants for wages and employment benefits as well as *mora*

interest calculated from their date of dismissal to 28 February 2009 (as indicated in Mr Douglas' report[44]).

85 The respondent also contended that the amounts claimed in **Schedule "A"** constitute conclusions of facts of law for which no basis has been laid and that they constitute hearsay in the hands of the chartered accountant Mr Douglas[45]. The applicants properly laid the basis of their claim against the respondent in their papers, as we have shown above. We will not repeat it here.

86 The respondent also contended that even if the applicants' claims were otherwise competent, they were not entitled to leave pay or "leave enhancement" pay.[46]

87 In light of case law discussed above as well as ***Top v Top Reizen CC*** the LC per Gabie AJ correctly found that the applicants are entitled to leave pay or "leave enhancement" pay from date of their dismissal as well as interest on the awarded amount (which is set out in Mr Douglas' report) from the date of the award until date of payment by the respondent. The contrary findings from the LAC in this matter as well as the ***Coca-Cola*** judgment are incorrect and should be rejected for the reasons mentioned above.

44

45 Answering Affidavit in the LC, para 36.1, Record vol 4, p 377

46 Answering Affidavit in the LC, para 36.2, Record vol 4, p 377

PRESCRIPTION

88 Should the Court not uphold the applicants' contentions on the proper interpretation of section 193(1)(a) of the LRA, the applicants contend that their claim had not prescribed.

89 The respondent's contention has always been that the applicant's claim for arrear wages for the period 23 April 2007 to 28 September 2009 had prescribed in terms of section 11 of the Prescription Act. This is based on the applicants' reinstatement from 23 April 2007, and not on the judgment orders of Cele AJ[47].

The applicants have always denied that their claims have prescribed[48].

90 We submit that the Gabie AJ correctly found that the claims have not prescribed[49]. On the respondent's own version the applicants' claims relate to payment for wages and benefits sounding in money for the period 1 January 2007 to 28 September 2009[50] (or 24 April 2007 to 28 September 2009[51]) and therefore the claims would have prescribed, at the earliest on 27 September 2012[52]. The respondent had no basis to shift the commencement date for prescription to 15 September 2009 (the date when the SCA

[47] Answering Affidavit in these proceedings, Record vol 6, p 520, para 18
[48] Replying Affidavit in the LC, Record vol 4, p 382
[49] Judgment of Gabie AJ dated 5 November 2013, Record vol 5, p 445
[50] Answering affidavit, Record vol 4,para 15
[51] Answering Affidavit, Record vol 4 para 33.3
[52] Replying Affidavit, Record vol 4, para 18

dismissed its appeal) while the applicants' claim was for unfair dismissal for the period 1 January 2007 to 28 September 2009, particularly because it still proceeded to re-employ the applicants on 28 September 2009 but refused to re-instate their wages or pay them any back pay for the period 1 January 2007 to 28 September 2009[53].

91 The applicants brought the declaratory application in the court *a quo* on 19 September 2012, **prior** to the date on which the claims would have become prescribed (i.e. on 27 September 2012)[54]. We submit that the Gabie AJ was correct in finding that the applicants' claims have not prescribed. The LAC's finding to the contrary is incorrect.

92 Section 11 of the Prescription Act provides as follows:

> *"11 Periods of prescription of debts*
> *The periods of prescription of debts shall be the following:*
> *(a) thirty years in respect of-*
> *(i) any debt secured by mortgage bond;*
> *(ii) any judgment debt;*
> *……..*
>
> *(d) save where an Act of Parliament provides otherwise, three years in respect of any other debt.*

93 We submit that the backpay that became due and payable upon the reinstatement order constitutes a judgment debt.

[53] Judgment of Gabie AJ dated 5 November 2013, para 4, Record vol 5, p 447
[54] Replying affidavit para 8 Record vol 5, p 388

94 The SCA dismissed the respondent's leave to appeal was on 15 September 2009. The respondent contends that was the date upon which Cele AJ's order reinstating the applicants with effect from 1 January 2007 became immediately enforceable and so too did any claim for wages which had fallen due in respect of the period from 1 January 2007 to 15 September 2009[55]

95 The respondent's contention is that the effect of Cele AJ's order was to reinstate the contract of employment and that the applicants' claims for arrear wages, which became due each week following the reinstatement if the contract by the order of Cele AJ, were contractual claims and not judgment debts.

96 The LAC held as follows:

> *"[14] It follows that on 15 September 2009 when the suspension of the execution of the judgment and order of Cele AJ was uplifted, the respondents' arrear wage claims from 23 April 2007 became a "debt due" within the meaning of s11(d) of the Prescription Act, which debt prescribed three years from 15 September 2009. Prescription began to run afresh in terms of s15(4) of the Prescription Act on the day on which the judgment became executable, being 15 September 2009. … The debt did not become owing or payable, as was contended by the respondents, only when the appellant failed or refused to pay the debt; nor from the date of actual reinstatement; nor on the date on which the debt was quantified by the Court*."

[55] Answering Affidavit in these proceedings, Record vol 6, p 522, para 23.5

97 In ***Anglorand Securities Ltd v Mudau and Another***[56] the court held as follows:

> *"[9] Prescription commences to run against the debt on the day it becomes due unless delayed or interrupted. It will continue to run until it has completed its course (Aussenkehr Farms (Pty) Ltd v Trio Transport CC 2002 (4) SA 483 (SCA) at 495). As stated in Umgeni Water v Mshengu (para 5 and 6) [2010] All SA 505 (SCA); 2010 ILJ 88 (SCA):*
>
> *'Section 10 of the Prescription Act 68 of 1969 (the Act), provides for the extinction of a debt after the lapse of periods determined in s 11. The period of prescription applicable to the plaintiff's claim is that provided for in s 11(d) of the Act, namely 3 years. According to s 12(1) of the Act, prescription shall commence to run "as soon as the debt is due". The words "debt is due" must be given their ordinary meaning In its ordinary meaning a debt is due when it is immediately claimable by the creditor and, as its correlative, it is immediately payable by the debtor. Stated another way, the debt must be one in respect of which the debtor is under an obligation to pay immediately.*
> *A debt can only be said to be claimable immediately if a creditor has the right to institute an action for its recovery. In order to be able to institute an action for the recovery of a debt a creditor must have a complete cause of action in respect of it. The expression "cause of action" has been held to mean:*
>
> *" ... every fact which it would be necessary for the plaintiff to prove, . . . in order to support his right to judgment of the Court. It does not comprise every piece of evidence which is necessary to prove each fact, but every fact which is necessary to be proved"; or slightly differently stated "the entire set of facts which give rise to an enforceable claim and includes every fact which is material to be proved to entitle a plaintiff to succeed in his claim. It includes all that a plaintiff must set out in his declaration in order to disclose a cause of action. Such cause of action does not 'arise' or 'accrue' until the occurrence of the last of such facts and consequently the last of such facts is sometimes loosely spoken of as the cause of action."*

98 The respondent is incorrect in asserting that by no later than 15 September 2009 (being the date on which their petition was dismissed) the applicants knew all the material facts on which their claims for arrear wages were based and that at the latest then

[56] (125/10) [2011] ZASCA 76 (26 May 2011) at para [9]

prescription started to run on that date[57]. The applicants did not know what amount was owed to them. That is why when they sent the letter of demand on 4 February 2010, they did not specify the amount that they were owed[58]. The amount that the applicants stated on the writ of execution was not based on any calculation. The first time that the applicants knew exactly or reasonably should have known what amount was owed to them was when they issued the declaratory application in the Labour Court on 19 September 2012. That was because the accountant's report that was attached to the application specified the amount owed to the applicants.

99 We submit that the LAC was wrong in finding that the applicants' claims have prescribed. We also submit that there is no reasonable care that the applicants could have exercised on 15 September 2009 (as provided in terms of section 12(3) of the prescription Act) to know what amount they were owed, particularly because Cele AJ's order did not specify the amount. It was for that reason that the Labour Court instructed them to bring a declaratory application, after the writ of execution was set aside.

[57] Answering Affidavit in these proceedings, Record vol 6, p 524, para 27
[58] Letter of demand from Minaar Niehaus Attorneys dated 4 February 2010, Record vol 3, pp 219 – 221

100 We are uncertain of when the applicants found out about the order of the SCA dismissing the respondent's leave to appeal. We are not certain of when their erstwhile attorneys informed them of the order. What is clear is that it would have been between 15 and 29 September 2009, when they were actually reinstated by the respondent.[59] It could not reasonably be expected that the applicants should have tendered their services on the same day. As in the Cele J judgment and order, the applicants would reasonably he allowed at least a week to return to work, especially in a mining environment where workers travel back home while litigation ensues.

101 We submit that it would be unfair to hold against the applicants that they did not institute the proceedings on or before 15 September 2012, which was three (3) years after the order of the SCA of the SCA dismissing the respondent's leave to appeal on 15 September 2012.

102 This Court in **Makate v Vodacom (Pty) Ltd**[60] the court held as follows:

> *[88] It is apparent from Fraser that section 39(2) introduced to our law a new rule in terms of which statutes must be construed. It also appears from the same statement that this new aid of interpretation is mandatory. This means that courts must at all times bear in mind the provisions of section 39(2) when interpreting legislation. If the provision under construction implicates or affects*

[59] Answering Affidavit in these proceedings, Record vol 6, p 522, para 23.6
[60] (CCT52/15) [2016] ZACC 13 (26 April 2016)

rights in the Bill of Rights, then the obligation in section 39(2) is activated. The court is duty-bound to promote the purport, spirit and objects of the Bill of Rights in the process of interpreting the provision in question.

……..

[91] In Road Accident Fund, this Court, having expressed reservations on whether an obligation may constitute a debt contemplated in the Prescription Act, stated that the failure to meet a prescription deadline set in terms of the Act, denies a litigant access to a court. What this means is that if the Act finds application in a particular case, it must be construed in accordance with section 39(2). On this approach an interpretation of debt which must be preferred, is the one that is least intrusive on the right of access to courts. In SATAWU, 63 this Court affirmed the principle in these terms:

"Constitutional rights conferred without express limitation should not be cut down by reading implicit limitations onto them, and when legislature provisions limits or intrudes upon those rights they should be interpreted in a manner least restrictive of the right if the text is reasonably capable of bearing that meaning." (Footnotes omitted.)

103 We submit that in interpreting the provisions of the Prescription Act, the LAC should have had regard to the purposive interpretation that is advocated for in section 39(2) of the Constitution. The applicants were in a conundrum because what the LAC says was a "due debt" arising on 15 September 2009 was not executable until it had been quantified and made to sound in money.

104 The admission by the respondent that *"the order for retrospective reinstatement from 1 January to 22 April 2007 constituted a judgment debt and this was conceded by Hendor"*[61] and yet that on 23 April 2007 the applicants *"in fact tendered their services. (Hendor did not accept their tender at that stage due to its election*

[61] Answering Affidavit in these proceedings, Record vol 6, p 526, para 33

to seek leave to appeal)"[62]. This, the respondent contends is because the claim for arrear wages was based on the fact of the applicants' reinstatement from 23 April 2007 and not on the judgment or orders of Cele AJ[63]. The LAC was incorrect in finding that the applicants' claim for 24 April 2007 to 28 September 2009 have prescribed.[64] It is significant that the respondent treats the smaller amount owed to the applicants (for the period 1 January 2007 to 23 April 2007) as a judgment debt and the bigger amount (for the period 24 April 2007 to 28 September 2009) as not amounting to a judgment debt while the whole period relates to the same unfair dismissal.

105 The respondent's contention that they possessed all this knowledge by 15 September 2009 is incorrect. The respondent's attempt to make 15 September 2009 relevant for purposes of commencement of prescription is opportunistic and baseless and therefore stands to be rejected.

106 Furthermore, 15 September 2009 (the date when the SCA refused the appellant's petition) cannot be used as the date when prescription started running because the respondent could still have referred the matter to this Court. As correctly pointed out by

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[62] Answering Affidavit in these proceedings, Record vol 6, p 522, para 23.4
[63] Answering Affidavit in these proceedings, Record vol 6, p 520, para 18
[64] Order 2 of the LAC order, part of the judgment of the LAC BY Savage AJ, Record vol 6, p 509

the learned Acting Judge (Gabie AJ) in the Labour Court, the respondent still re-employed the applicants on 29 September 2009 and merely failed to reinstate their wages. It was only at that point that the respondents discovered that the appellant was not prepared to reinstate their wages.

107 We further submit that there was no basis for the LAC to distinguish between the arrear wages due for the between 1 January 2007 and 23 April 2007 on the one hand and those for the period 24 April 2007 and 28 September 2009. Instead it should have found that when an appeal fails in respect of an order for reinstatement the final order is one of reinstatement from the date set in the court of first instance or arbitration to the date of the final order, the effect of which is to extend the period of implementation to the date of the final order.

108 For these reasons it is submitted that prescription started running at the earliest on 29 September 2009 when the applicants were reinstated and the employer refused to acknowledge the debt in backpay.

SUBSTITUTION OF DECEASED APPLICANTS

109 The respondent alleges that it is not competent for the applicants to substitute deceased individuals in the manner that the applicants have done[65]

110 The respondent's contention is that, with respect to the individual applicants who were deceased at the institution of this application on 19 September 2012, the only applicants which have *locus standi* are the executors who would have been cited *nomine officio* from the outset, and that substitution will only be competent in respect of the applicants who passed away after the institution of this application[66].

111 Rule 22(5) of the Rules for the Conduct of Proceedings in the Labour Court ('the Rules") provides as follows:

> *"If in any proceedings it becomes necessary to substitute a person for an existing party, any party to such proceedings may, on application and on notice to every other party, apply to the court for an order substituting that party for an existing party and the court may make such order, including an order as to costs, or give such directions as to the further procedure in the proceedings as it deems it fit.*

112 The applicants brought applications for substitution of the deceased individual respondents on notice to the appellant, as required in terms of Rule 22(5) of the Rules[67]. Rule 22(5) does not

[65] Answering Affidavit inn the LC para 30.3, Record vol 4, p 375; Further Answering Affidavit in the LC para 30.3, Record vol 4, p 375
[66] Answering Affidavit in the LC para 30.4, , Record vol 4, p 375
[67] Rules of the Labour Court

require citation of the substituting party (executor or executrix) to be done *nomine officio.*

113 In ***National Union of Metalworkers of SA obo Maifo & Others v Ulrich Seats (Pty) Ltd***[68] the question arose regarding transmissibility of a claim of the deceased whose heirs were appointed after *litis contestatio*. The court awarded maximum compensation to all applicants including the intestate heirs of the employees who died after *litis contestatio*.

114 The respondent's contention is unsubstantiated and is contrary to the daily practice of the courts. On this basis we also submit that it should be dismissed.

115 The respondent also alleges that the applicants should have sought joinder of executors in terms of Rule 22(1) and not substitution in terms of Rule 22(5) for the deceased applicants. It alleges that since all the substituted applicants predeceased the application, Rule 22(5) does not find application.

116 The respondent seems to confuse the application for reinstatement which was brought by the respondents in 2004 following their unfair dismissal by the appellant on 18 August 2003 with the present declaratory application for quantifying the amounts

[68] (2012) 33 ILJ 2918 (LC)

suffered by the applicants as a result of their unfair dismissal by the respondent.

117 In order for the applicants to have a claim against the respondent they should have been alive at close of pleadings *(litis contestatio)* of the application for reinstatement (which they brought in 2004) and not for the present application, which is indeed the case with all the deceased applicants. The respondent has not provided any contradictory evidence nor has it alleged the contrary.

118 The applicants were always *"existing parties"* in the present application and therefore the substituted parties are entitled to back pay from the date of their unfair dismissal by the respondent until their respective dates of death. Therefore their substitution by their respective executors and executrices was correctly done.

119 Gabie AJ correctly found that the declaratory application emanates from and is directly linked to the original matter and that the employees are entitled to bring this application and to provide for substitution of the deceased applicants ….. they are clearly entitled to their remuneration from the date of reinstatement until the date of their deaths , provided of course that they were party to the original dispute that was heard by the Labour Court.[69]

[69] Judgment dated 5 November 2013, para 26; National Union of Metalworkers of SA obo Maifo and Others v Ulrich Seats (Pty) Limited (2012) 33 ILJ 2918 (LC)

120 Even though the LAC chose not to deal with the issue of substitution in light of its finding that the applicants' claims have prescribed, it went a step further and stated that found that the deceased [applicants] could not have sought the substitution relief that they did and the Labour Court erred in failing to dismiss such applications on this basis[70]. It is on this basis that we have dealt with the issue of substitution above.

121 We therefore submit that the issue of transmissibility of claims at *litis contestatio* (close of pleadings) is trite, in terms of common law, Rule 15 of the Uniform Rules of Court and Rule 22(5) of the Labour Court Rules. Nothing is contentious about these provisions.

122 We submit that this is not the matter that needs to be remitted to the Labour Court to deal with the issue of substitution of the employees who are now deceased but were still alive at *litis contestatio*. For this reason we submit that the substitution of the applicants should be allowed.

RELIEF SOUGHT

123 The applicants seek the following relief

[70] Judgment – Savage AJA, dated 26 November 2015 (Annexure A), Record vol 6, pp 502 – 510, para [17]

1. The judgment and order of the Labour Appeal Court is set aside.

2. The order of the Labour Appeal Court is substituted by the following order:

    1. The respondent is ordered to pay the employees, excluding the deceased employees –

        1.1. back pay for the period 1 January 2007 to 28 September 2009, as indicated in the first part of the schedule attached hereto;

        1.2. interest thereon at the prescribed rate from 16 April 2007.

    2. The respondent is ordered to pay the estates of the deceased employees – upon production of letters from the administrator or the Master of the High Court and provided that they were party to the Labour Court proceedings –

        2.1 back pay for the period 1 January 2007 to 28 September 2009, in the case of employees who

were deceased after this date, as indicated in the first part of the schedule attached hereto;

2.2 back pay for the period 1 January 2007 to the date of their deaths, in the case of employees who were deceased prior to 28 September 2009, calculated on the basis of the information provided by the applicants (in annexure A to the founding papers), in relation to those employees who are indicated in the second part of the schedule attached hereto;

2.3 interest thereon at the prescribed rate from 16 April 2007.

3. The respondent is to pay the costs of this application and appeal including the costs of two counsel.

COSTS

124 It is submitted that the respondent pay the applicants' costs in respect of both the application for leave to appeal and the appeal, including the costs of two counsel, should the applicants succeed. It is submitted that no order as to costs should be made against the applicants should the respondent succeed.

125 The respondent protracted these proceedings and engaged in a stratagem to fight a war of attrition against the applicants On the other hand the applicants could only wish that the process be resolved expeditiously in order to return to work and earn a living.

CONCLUSION

126 Having regard to the respondent's indebtedness towards the applicants, its unsubstantiated dispute of its indebtedness, and the length of time that has passed since the reinstatement order of Cele AJ of 16 April 2007, we pray that the application for leave to appeal and the appeal be granted.

GCINA MALINDI SC
BUHLE LEKOKOTLA
Counsel for applicants
Chambers,
Johannesburg
24 May 2016

LIST OF AUTHORITIES

Legislation

1. Constitution of the Republic of South Africa
2. Labour Relations Act, 66 of 1995
3. Prescription Act, 68 of 1969

Case Law

1. Coca-Cola Sabco v Van Wyk [2015] 8 BLLR 774 (LAC)
2. Frazer v Absa Bank Limited 2007 (3) SA 484 (CC) at [44]
3. Minister of Justice and Constitutional Development and Others v Southern African Litigation Centre and Others 2016 (4) BCLR 487 (SCA); [2016] 2 All SA 365 (SCA) (15 March 2016) at para [24]
4. Van Rensburg v Van Rensburg & andere 1963 (1) SA 505 (A) at 510 A-C.
5. CUSA v Tao Ying Metal Industries & others (CCT 40/07) [2008] ZACC 15; 2009 (2) SA 204 (CC) para 68.
6. Phumelela Gaming and Leisure Ltd v Gründlingh 2007 (6) SA 350 (CC) at [26] –[27] at [43]
7. Whall v Brand Add Marketing (Pty) Ltd [1999] 6 BLLR 626 (LC) at para 28
8. NUMSA v Fibre Flair CC[1] [2000] 6 BLLR 631 (LAC) [2005] 12 BLLR 1172 (LAC) at paras 61 - 64
9. Kroukam v RSA Airlink (Pty) Ltd [2005] 12 BLLR 1172 (LAC) at paras 61 - 64

10. Republican Press (Pty) Ltd v Chemical Energy Printing Paper Wood & Allied Workers Union (2007) 28 ILJ 2503 (SCA), paras 19 and 20
11. Equity Aviation Services (Pty) Ltd v CCMA 2009 (1) SA 390 (CC); (2008) 29 ILJ 2507 (CC)
12. Billiton Alluminium SA Ltd v Khanyile [2010] 5 BLLR 465 (CC)
13. National Union of Metalworkers of SA on behalf of Maifo & others v Ulrich Seats (Pty) Ltd (2012) 33 ILJ 2918 (LC) at para 39
14. 'Kylie' v Commission for Conciliation, Mediation & Arbitration & others
15. Top v Top Reizen CC (2006) 27 ILJ 1948 (LC)
16. Anglorand Securities Ltd v Mudau and Another125/10) [2011] ZASCA 76 (26 May 2011) at para [9]
17. Aussenkehr Farms (Pty) Ltd v Trio Transport CC 2002 (4) SA 483 (SCA) at 495).
18. Umgeni Water v Mshengu (para 5 and 6) [2010] All SA 505 (SCA); 2010 ILJ 88 (SCA)
19. Makate v Vodacom (Pty) Ltd (CCT52/15) [2016] ZACC 13 (26 April 2016)
20. National Union of Metalworkers of SA obo Maifo & Others v Ulrich Seats (Pty) Ltd (2012) 33 ILJ 2918 (LC)

IN THE CONSTITUTIONAL COURT OF SOUTH AFRICA

CC CASE NO: 04/16
LAC CASE NO: JA55/2014
LC CASE NO: JS794/03

In the matter between:

NATIONAL UNION OF METAL WORKERS OF SOUTH AFRICA	**First Applicant**
ON BEHALF OF	
MOSES FOHLISA & 41 OTHERS	**Second to Further Applicants**
and	
HENDOR MINING SUPPLIES (A DIVISION OF MARSCHALK BELEGGINGS (PTY) LTD)	**Respondent**

RESPONDENT'S HEADS OF ARGUMENT

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INTRODUCTION

1 This is an appeal against the judgment of the Labour Appeal Court in **Hendor Mining Supplies (A Division of Marschalk Beleggings (Pty) Ltd) v National Union of Metal Workers of South Africa and Others** ("***the LAC judgment***").[1]

2 The LAC judgment was handed down in an appeal from a judgment of the Labour Court, in the matter of **National Union of Metalworkers of SA on behalf of Fohlisa and Others v Hendor Mining Supplies – A Division of Marschalk Beleggings (Pty) Ltd** ("***the LC judgment***").[2]

3 The first applicant is the National Union of Metalworkers of South Africa ("***NUMSA***") and the second and further applicants are all members of NUMSA. We refer to the first, second and further applicants as "***the applicants***".

4 The respondent is Hendor Mining Supplies, a division of Marschalk Beleggings (Pty) Ltd ("***Hendor***"). All of the applicants were

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[1] The LAC Judgment is reported as **Hendor Mining Supplies (A Division of Marschalk Beleggings (Pty) Ltd v National Union of Metalworkers of South Africa and Others** (2016) 37 ILJ 394 (LAC); [2016] 2 BLLR 115 (LAC). An unreported version is included in the Record, vol 6, pp 502-510.

[2] **National Union of Metalworkers of SA on behalf of Fohlisa and Others v Hendor Mining Supplies – A Division of Marschalk Beleggings (Pty) Ltd** (2014) 35 ILJ 1347 (LC); [2014] 2 BLLR 185.

formerly employed by Hendor, and were reinstated to that employment after the Labour Court found they had been unfairly dismissed after participating in an unprotected strike.

5 The crisp issue in this appeal is whether claims of the applicants for arrear wages, for the period 23 April 2007 to 18 September 2009, have prescribed. These claims arise from the non-payment of arrear wages after the date on which the applicants were reinstated in terms of a Court order finding in their favour for unfair dismissal. Hendor asserts that the claims have prescribed because they arise from the applicants' contract of employment, and claims were instituted more than three years after the debt became due. The applicants, however, dispute this and claim that because the applicants were reinstated pursuant to an order of court, all claims for wages after reinstatement amount to a judgment debt.

6 A secondary issue in this appeal is whether the applicants were permitted to substitute certain individual applicants in the Court *a quo* who died prior to the institution of the proceedings, and who were purportedly represented by the executors of their deceased estates in terms of Rule 22(5) of the Labour Court Rules. Although the LAC found that it was not necessary to determine this point (as it had found for Hendor on the main prescription point), it expressed

the view that "*quite clearly, deceased [applicants] could not have sought the substitution relief that they did*".[3] The applicants appeal on this ground too.[4]

7 The third and final defense raised by Hendor to the applicants' claim is that the applicants have failed to make out a proper case for the relief sought by them.[5]

8 These heads of argument are structured as follows:

8.1 we begin with a summary of the material facts;

8.2 second we deal with the heart of the appeal, which is whether the claim for wages for the period 23 April 2007 to 28 September 2009 has prescribed;

8.3 third, we consider whether the substitution of a number of the applicants who predeceased the institution of the claim was permissible;

8.4 fourth, we discuss whether the applicants have made out a case for the relief sought; and

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3 **LAC Judgment** at para 17, p 509.

4 **Application for leave to appeal**, Record, vol 6, para 12, p 500.

5 **Answering affidavit**, Record, vol 4, para 7.1, p 416.

8.5 finally, we set out Hendor's submissions on why it is not in the interests of justice to grant the applicants leave to appeal. Notably, the question of prescription of claims for arrear wages neither raises a constitutional issue; nor does it raise an issue of general public importance.

SUMMARY OF THE FACTS

9 The facts are set out in detail in the papers and in the LAC judgment.[6] We therefore do not repeat the facts in any detail here, but set out the material events which are relevant to the determination of this application.

10 The applicants were all employees of Hendor who were dismissed because of their participation in an unprotected strike, on 18 August 2003.

11 On application to the Labour Court, the applicants were found to have been unfairly dismissed and were reinstated with effect from 1 January 2007 by an order granted by Cele AJ on 16 April 2007 ("***the reinstatement order***").[7] The applicants were ordered to

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[6] **LAC Judgment**, paras 1-7, pp 503-505.

[7] **Founding affidavit**, Record, vol 1, para 10, p 7; **answering affidavit**, Record, vol 4, para 33.1, p 375. A copy of the order is attached as "JVD1" to the **further answering affidavit**, Record, vol 5, p 425. The judgment is report as **National Union of Metalworkers of SA & Others v Hendor Mining Supplies (A Division of Marschalk Beleggings (Pty) Ltd)** (2007) 28 ILJ

report for duty on 23 April 2007. It is common cause that the reinstatement order was of retrospective effect for the period from 1 January 2007 to 23 April 2007. Any claim for wages thereafter by the applicants would be based on their contracts of employment. (It is important to note, for instance, that had the applicants begun work on 23 April 2007, Hendor would not have been precluded from dismissing the applicants in accordance with any of the grounds permitted under the Labour Relations Act 66 of 1996 ("***the LRA***"). The order of Cele AJ reinstating the applicants did not make their continued employment an order of court: the applicants continued with their employment by virtue of their contracts of employment. If the applicants had been unfairly dismissed their claim would be for unfair dismissal under the LRA and not for contempt of Court.)

12 The reinstatement order was then suspended by operation of law when Hendor made its first application for leave to appeal to Cele AJ. Following an unsuccessful appeal to the LAC, Hendor petitioned the Supreme Court of Appeal ("***SCA***") for leave to appeal to that Court. The application to the SCA was dismissed on 15 September 2009[8] and the reinstatement order accordingly became

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1278 (LC).

[8] **Founding affidavit**, Record, vol 1, para 14, pp 7-9; **answering affidavit**, Record, vol 4, para

operative immediately upon the SCA's refusal to grant leave to appeal.

13 Hendor duly reinstated the applicants with effect from 29 September 2009, but failed to pay their wages for the period between the date of their reinstatement by order of the Labour Court and the date of their actual, physical reinstatement, that is, 1 January 2007 to 28 September 2009.[9] No reason is provided for this failure in the papers; nor is it relevant to the defences raised by Hendor.

14 The applicants were legally represented and on 4 February 2010, sent a letter of demand to Hendor for arrear wages.

15 The applicants thereafter sought to serve a writ on Hendor for their arrear remuneration, but the writ was set aside by the Labour Court on 23 July 2011, on the basis that there was no judgment sounding in money capable of sustaining a writ of execution. The applicants were directed to file a declaration (statement of case) setting out the grounds and amounts claimed as arrear wages.[10]

16 The Labour Court accordingly correctly directed the applicants to institute trial proceedings for the recovery of arrear wages which

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33.1, p 375.

[9] **Founding affidavit**, Record, vol 1, paras 15-16, p 8; **answering affidavit**, Record, vol 4, paragraphs 33.1 and 35, pp 375 and 377.

[10] A copy of the order is attached as annexure "JVD3" to the **further answering affidavit**, Record, vol 5, pp 428-429.

they claimed were due to them. The applicants failed to do so. Instead, after a further lengthy delay, on 19 September 2012,[11] they instituted new proceedings on notice of motion to the Labour Court for payment of amounts alleged to be equal to their arrear wages. That is the matter to which this application relates.

17 In the Labour Court, Hendor raised the following defences:

17.1 that the greater portion of the debts sought to be claimed by way of a declaratory order had prescribed in terms of section 11 of the Prescription Act 68 of 1969 ("***the Prescription Act***"). This is because the claim for arrear wages was based on the fact of the applicants' reinstatement from 23 April 2007, and not on the judgment or orders of Cele AJ. The effect of the reinstatement order was to reinstate the contract of employment. The applicants' claims for arrear wages, which became due each week following the reinstatement of the contract by order of Cele AJ, were contractual claims and not judgment debts;[12]

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[11] The date on which this application was launched is not 19 September 2009 as contended in the applicants' heads of argument at para 4. We assume this is a typographical error.

[12] **Answering affidavit**, Record, vol 4, paras 15-19, pp 371-372.

17.2 that most of the substitution applications were fatally flawed and that no relief was competent in respect thereof;[13] and

17.3 that the applicants had in any event failed to make out a case for the relief sought, because they failed to plead and prove the bases of their claims. The evidence they relied upon is unreliable and some of it, in material respects, patently false.[14]

18 We turn now to deal with these three defences in turn.

PRESCRIPTION

When is the Debt Due?

19 Section 11 of the Prescription Act provides that save for the exceptions listed in sub-sections (a) to (c) and save when an Act of Parliament provides otherwise, the period of prescription of debts shall be three years.

20 Section 12(1) of the Prescription Act provides that prescription shall commence to run as soon as the debt is due.

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[13] **Answering affidavit**, Record, vol 4, para 30.3-30.4, pp 374-375.

[14] **Answering affidavit**, Record, vol 4, paras 20-25, pp 372-373.

21 Section 13(1)(a) of the Prescription Act provides, *inter alia*, that if the creditor is prevented by superior force including any law or any order of court from interrupting the running of prescription as contemplated in section 15(1), the period of prescription shall not be completed before a year has elapsed after the day referred to in paragraph (i). Section 15(1) provides that the running of prescription shall be interrupted by the service on the debtor of any process whereby the creditor claims payment of the debt.

22 We submit that on a proper application of the Prescription Act, the claim for arrear wages relating to the period 23 April 2007 to 18 September 2009 has prescribed. (Hendor has already accepted that the claim for wages for the period 19 September 2009 to 28 September 2009 had not prescribed when the application in the Labour Court was instituted and this was recognised in the LAC Judgment.[15])

23 It is useful at this juncture, to re-examine the critical dates from the chronology set out above:

23.1 **18 August 2003** – The applicants were dismissed by Hendor.

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[15] **LAC Judgment** at para 5, p 504.

23.2 **1 January 2007** – The effective date of the applicants' retrospective reinstatement by the Labour Court, referred to below.

23.3 **16 April 2007** – Judgment and order of Cele AJ[16] handed down, reinstating the applicants with effect from 1 January 2007 and requiring them to report for duty if they sought prospective reinstatement, on 23 April 2007.

23.4 **23 April 2007** – The date on which applicants were required to report for duty in terms of the reinstatement order and on which they in fact tendered their services. (Hendor did not accept their tender at that stage due to its election to seek leave to appeal.)

23.5 **19 June 2009** – The date on which the LAC dismissed Hendor's appeal against the judgment of Cele AJ.[17]

23.6 **15 September 2009** – Dismissal of application for leave to appeal to the SCA.[18] (On this day the order of Cele AJ, reinstating the applicants with effect from 1 January 2007, became immediately enforceable and so too did any claim for

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16 As he then was.

17 **LAC judgement** in respect of the judgement of Cele AJ, Record, vol 3, pp 198-217.

18 **Order of the SCA**, Record, vol 3, p 218.

wages which had fallen due in respect of the period from 1 January 2007 to 15 September 2009.)

23.7 **19 September 2009** – Date three years prior to institution of the application in the Court below.

23.8 **29 September 2009** – Actual reinstatement of applicants, save for those who were by then deceased.

23.9 **4 February 2010** – Demand for back-pay made by attorney Niehaus on behalf of the applicants.[19]

23.10 **23 June 2011** – Date on which the writ issued by the applicants against Hendor was set aside by the Labour Court and the applicants "*directed*" to institute trial proceedings.

23.11 **15 September 2012** – Three years (first day excluded, last day included) since the petition for leave to appeal to the SCA was dismissed.

23.12 **19 September 2012** – The application to the Court *a quo* for arrear wages over the period from 1 January 2007 to 28 September 2009 launched.

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[19] **Letter of Demand**, Annexure "NJX4" to the founding affidavit, Record, vol 3, pp 219-220.

24 On account of the fact that the applicants' wages accrued weekly, the period of prescription for each week's wages commenced on such dates of accrual. However, by virtue of section 13(1)(a), the earliest date on which prescription could occur was 15 September 2010, being one year after the impediment to the applicants being able to interrupt prescription by the institution of legal proceedings for their recovery, had lapsed.[20]

25 That prescription date therefore applies to all arrear wages which accrued over the period 23 April 2007 to 15 September 2007 as that is three years prior to 15 September 2010.

26 By 19 September 2012 when the application in the Court below was instituted and thus served to interrupt prescription, all accrued wages up to and including 18 September 2009 had prescribed on various dates, because at least three years had elapsed since those wages had accrued and "*the debt was due*", in the parlance of the Prescription Act. That date was well outside of the twelve-month grace period of 15 September 2009 to 15 September 2010 allowed by section 13(1)(a) of the Prescription Act.

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[20] **ABP 4x4 Motor Dealers (Pty) Ltd v IGI Insurance Co Ltd** 1999 (3) SA 924 (SCA) at paras 5-12.

27 By no later than 15 September 2009 (being the date on which their petition to the SCA was dismissed) the applicants knew all the material facts on which their claims for arrear wages were based. At the latest, therefore, prescription started to run on that date.

28 The applicants were legally represented and on 4 February 2010, sent a letter of demand to Hendor for arrear wages.[21] This was well before any of the applicants' claims had prescribed. The applicants were hardly ignorant of their claim. Despite this, they failed to institute proper proceedings for recovery of the arrear wages until after their claims had prescribed. There is no explanation from the applicants as to why this is so.

29 In their heads of argument, the applicants raise a new argument (for the first time), that there are "*other periods later than 15 September 2009 on which prescription could be regarded as having started running*" and suggest this could be "*when the employer failed or refused to pay the debt*", "*the date of actual reinstatement*" or "*on the date on which the debt is quantified by the Court*".[22]

30 There is no basis for any of these suggestions. Our Courts have reiterated in numerous cases that prescription commences to run

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[21] **Letter of Demand**, Annexure "NJX4" to the founding affidavit, Record, vol 3, pp 219-220.

[22] **Applicants' heads of argument**, para 6, p 4.

from the time when the "*creditor has knowledge of the identity of the debtor and of the facts from which the debt arises: Provided that a creditor shall be deemed to have such knowledge if he could have acquired it by exercising reasonable care.*"[23] This date was 15 September 2009, subject to the one-year grace period provided for in section 13(1)(a) of the Prescription Act.

The Debt is Not a Judgment Debt

31 In an attempt to circumvent the operation of section 11 of the Prescription Act, the applicants contend that the claim for arrear wages constitutes a judgment debt. Notably, this contention was not the understanding of the applicants at the time that the application was brought in the Labour Court: the applicants in their replying affidavit correctly concede that the prescription period applicable to arrear wages is three years. They do so in the context of seeking to explain their failure to file a completed application on the basis that the claim for arrear wages was about to prescribe. They therefore took 28 September 2012 as the prescription date and three years as the prescription period.[24]

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[23] Section 12(3) of the Prescription Act.

[24] **Replying affidavit**, Record, vol 4, para 13.1, p 386.

32 In any event, the case law of our Courts is clear that a claim for arrear wages is not a judgment debt.

33 In **Kilroe-Daly v Barclays National Bank Ltd**, Galgut AJA defined a judgment debt as follows: "*[a] judgment debt is the amount or subject-matter of the award in the judgment. Execution can be levied to recover the judgment debt.*"[25] Emphasis is therefore placed on the ability of the successful party immediately to execute on the strength of the judgment itself. It is this feature which defines a judgment debt. As the applicants concede, the amount owing to the applicants was not quantified; nor could have been at that stage:[26] it was therefore not possible for the applicants to execute on the judgment debt.

34 In **EA Gani (Pty) Ltd v Francis**, the Court held that a final judgment or judgment debt creates an independent cause of action enforceable in a court of law.[27] It is for this reason that a foreign judgment is not a judgment debt as it is not, without more, enforceable in South Africa.[28]

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25 **Kilroe-Daly v Barclays National Bank Ltd** 1984 (4) SA 609 (A) at 626C.

26 **Applicants' heads of argument**, para 10, p 5.

27 **EA Gani (Pty) Ltd v Francis** 1984 (1) A 462 (T) at 466E-H. See also **Jordan and Co Ltd v Bulsara** 1992 (4) SA 457 (E) at 464F-G.

28 **Society of Lloyd's v Price; Society of Lloyd's v Lee** 2005 (3) SA 549 (T) at 565G-I.

35 On this understanding, it is clear that the order for retrospective reinstatement, from 1 January 2007 to 22 April 2007 constituted a judgment debt and this was conceded by Hendor. It created an independent cause of action on which the applicants could sue once the avenues of appeal were exhausted by Hendor.[29] This much is common cause.

36 The "*prospective*" aspects of Cele AJ's order, however, merely reinstated the contractual relationship of employer-employee between Hendor and the applicants.

37 This Court has already affirmed the legal nature of a reinstatement order in **Equity Aviation Services (Pty) Ltd v Commission for Conciliation, Mediation and Arbitration & Others** as follows:

> "*The ordinary meaning of the word 'reinstate' is to put the employee back into the same job or position he or she occupied before the dismissal, on the same terms and conditions. Reinstatement is the primary statutory remedy in unfair dismissal disputes. It is aimed at placing an employee in the position he or she would have been but for the unfair dismissal. It safeguards workers' employment by restoring the employment contract. Differently put, if employees are reinstated they resume employment on the same terms and conditions that prevail at the time of their dismissal.*"[30]

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[29] See also **Primavera Construction SA v Government, North-West Province, and Another** 2003 SA 579 (B) at paras 13-14.

[30] **Equity Aviation Services (Pty) Ltd v Commission for Conciliation, Mediation and Arbitration & Others** 2009 (1) SA 390 (CC) at para 36 (emphasis added).

38 This was not new law. The Appellate Division (as it was then called), per Nicholas AJA, had in 1986 explained *"that the natural and ordinary meaning of 'reinstate', as applied to a person who has been dismissed, is to put him back into the same job or position which he occupied before the dismissal, on the same terms and conditions.*"[31]

39 Recently the LAC affirmed this reasoning in **Coca Cola Sabco (Pty) Ltd v Van Wyk**[32] – as well as in the LAC judgment sought to be appealed here.[33]

40 The applicants assert that the reasoning in **Coca Cola Sabco** as well as in the LAC judgment "*created a window for unscrupulous employers to delay matters while they 'exhaust appeal and review options' and not pay the employees their wages because they are aware that the matter will be hit by prescription.*"[34] With respect, this is incorrect. Prescription only commences to run once appeal and review procedures are exhausted and employers (unscrupulous or not) cannot use their rights to appeal or review in order to thwart

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31 **Consolidated Frame Cotton Corporation Ltd v President of the Industrial Court and Others; Consolidated Woolwashing and Processing Mills Ltd v President of the Industrial Court and Others** 1986 (3) SA 786 (A) at 798B-D.

32 **Coca Cola Sabco (Pty) Ltd v Van Wyk** [2015] 8 BLLR 774 (LAC) ("***Coca Cola Sabco***") at paragraphs 16-24. The Court also expressly rejected the reasoning of the Labour Court on this point: see para 20.

33 The LAC Judgment expressly endorsed the reasoning in **Coca Cola Sabco**: at para 10, p 506.

34 **Applicants' heads of argument**, para 29, p 11. See also para 34, p 13.

an employees' claim. The applicants' claims prescribed because they took more than three years to institute proceedings for their claim for arrear wages by virtue of the operation of the Prescription Act (which the applicants have never sought to explain), despite sending a letter of demand well before any of the claims had prescribed. The **Coca Cola Sabco** judgment as well as the LAC judgment did not make new law in this regard: they simply applied the Prescription Act. The applicants' real complaint lies with the Prescription Act, which the applicants have failed to challenge as unconstitutional.

41 As the LAC has pointed out, section 193 of the LRA does not empower the Court to make an order for back pay subsequent to the date of reinstatement (only prior to reinstatement) but prior to implementation.[35]

42 The applicants assert that purposively construed, section 193 of the LRA must be interpreted to mean that when an appeal is dismissed, the period until implementation of the reinstatement order must be understood to be part of the judgment.[36] With respect, this again is incorrect. When a party seeks to appeal, the order of the Court *a*

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35 **Coca Cola Sabco** at para 17.

36 **Applicants' heads of argument**, paras 41-42 and 71, pp 15-17 and 28.

quo is suspended under the common law. If that appeal (or application for leave to appeal) is dismissed the suspension is lifted and the orders of the Court of first instance must be implemented. There is no basis in law (or as a matter of interpretation) to suggest that the dismissal of an appeal somehow deems the intervening period as part of the order of the Court *a quo*. The lapse of time cannot change the nature of the order. The effect of the reinstatement order is nothing more and nothing less than an order to reinstate the contract with effect from a certain date. The contract owes its resumption, but crucially for present purposes, not its continued existence, to the reinstatement order. This is illustrated by the fact, for instance, that the applicants would then not be able to claim a right to be employed indefinitely in terms of the order of Cele AJ. Instead, Hendor would be permitted to retrench or dismiss any of the applicants at any point after they were reinstated in accordance with the LRA. If Hendor did so in a manner which was unlawful or unfair, the employees concerned would have a new cause of action or remedy based on the dismissal, but could not assert Cele AJ's order as their cause of action. Hendor would also not be in breach of Cele AJ's order provided it had in fact reinstated the employees as required by the order in the first place.

43 Similarly, when certain of the original applicants passed away, their entitlement to wages for the benefit of their estates ceased with effect from the date of death for no other reason that contractually they were no longer entitled to wages. The same would have resulted in the event that any of them had notified Hendor that the tender they had made to resume employment was withdrawn, on the basis that he or she had secured other employment, or had decided to emigrate, for example.

44 This illustrates that the claims are contractual in nature and that compliance by each of the applicants with their obligations in terms of the employment contract was required for them to be entitled to claim wages subsequent to their reinstatement in April 2007.

45 If Hendor had not sought to appeal the order of Cele AJ, the applicants would have been able to claim physical reinstatement from 23 April 2007 on the same terms and conditions. The cause of action arising from the order of Cele AJ would be reinstatement from that date. The applicants complied with their obligations by tendering their services.[37] Their claim to remuneration arose each week, but was not enforceable due to the suspension of Hendor's obligation to reinstate pending appeal. The "*debt*", therefore, arose

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[37] Save, of course, for those who predeceased 23 April 2007.

from the contract of employment, and not the order of Cele AJ. For these reasons, it was not a judgment debt.

46 Finally, we point out that while it may appear to be iniquitous to non-suit the applicants because their claim has prescribed, there are two responses to this:

46.1 first, prescription invariably has harsh consequences for the unwary plaintiff: the period of three years within which a party must institute a civil claim for a debt will mean that many plaintiffs will be left without a remedy. But the reasons for the rules of prescription are trite: they draw to a close the threat of litigation and force potential plaintiffs to institute claims timeously – before witnesses pass on and so on; and

46.2 second, where a party is legally represented (as is the case here) and a claim has prescribed, that party may well have a remedy against his or her legal advisor, where that person is at fault for not having timeously instituted proceedings.

47 In any event, the question is not whether it would be equitable or fair to uphold Hendor's defence: the question is whether, as a matter of law, the claim against Hendor for arrear wages has prescribed. The answer to that question must in our submission be in the

affirmative. Importantly, the applicants have not sought to challenge the constitutionality of the Prescription Act.

Knowledge of the Amount Due

48 The applicants claim that it was only after receiving the report of Mr Douglas (the chartered accountant) that they knew of the amount owed to them by Hendor.[38] The date of the report is not stated in any of the affidavits and the report itself is not dated. In any event, this is irrelevant: prescription commences to run from the time when the "*creditor has knowledge of the identity of the debtor and of the facts from which the debt arises: Provided that a creditor shall be deemed to have such knowledge if he could have acquired it by exercising reasonable care.*"[39]

49 In **Truter and Another v Deysel**,[40] the SCA held that for purposes of the Prescription Act, the term "*debt due*" means a debt which is "*owing and payable*". 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.

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38 **Further replying affidavit**, Record, vol 5, para 12.1, p 437. **Applicants' heads of argument**, paras 98-1§08, pp 38-43.

39 Section 12(3) of the Prescription Act.

40 **Truter and Another v Deysel** 2006 (4) SA 168 (SCA) at para 16.

In other words, "*when everything has happened which would entitle the creditor to institute action and to pursue his or her claim*".[41]

50 In **Truter's** case, the SCA held, at paragraph 20, that it was not necessary for the plaintiff to have obtained an expert opinion which indicated that a conclusion of negligence could be drawn from a particular set of facts. The conclusion of the Court was that this was not a fact and that the presence of negligence was a conclusion of law to be drawn by a court in all the circumstances of each specific case. Section 12(3) of the Prescription Act requires knowledge only of the facts from which the debt arose and not knowledge of the relevant legal conclusions (that is, that the facts constitute negligence) or of the existence of an expert opinion which supports such conclusions.[42]

51 We submit that *a fortiori* the applicants' reliance on the report of Mr Douglas is misplaced. Mr Douglas did not disclose information not known to the applicants. He simply purported to calculate the amounts due based on information which he would have obtained from the applicants themselves. Mr Douglas's report did not

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41 See also **Evins v Shield Insurance Co Ltd** 1980 (2) SA 814 (A) at 838 D-H; **Deloitte Haskins & Sells Consultants (Pty) Ltd v Bowthorpe Hellerman Deutsh (Pty) Ltd** 1991 (1) SA 525 (A) at 532 H-I; MM Loubser *Extinctive Prescription* (1996) para 4.6.2 at 80-81.

42 See also **Mkhatshwa v Minister of Defence** 2000 (1) SA 1104 (SCA) at para 23.

contain any additional facts, and was not necessary for the institution of the application in the Court *a quo*.

52 It follows that by no later than 15 September 2009, the applicants had knowledge of all of the facts necessary for their cause of action. The fact that they may have only quantified their claim at a later date (assuming that is the case) is a result of their failure to exercise reasonable care.

53 The applicants then attempt a sleight of hand: they assert that because their claim is for wages from 1 January 2007 to 28 September 2009, their claim only prescribes on 27 September 2012 (three years after 28 September 2009).[43] This assertion, however, incorrectly assumes that the entire claim for arrear wages accrued on the same date as the last date of such accrual. As noted above, that approach is obviously incorrect. Wages accrued weekly with effect from 23 April 2007, but only became claimable after 15 September 2009.

54 The material facts relevant to the defence of prescription are, to summarise, the following:

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[43] **Further replying affidavit**, Record, vol 5, para 12.3, p 437.

54.1 On 23 April 2007 the applicants (save for those already deceased) tendered their services to Hendor.

54.2 Hendor did not reinstate them because it elected to take the matter on appeal to the LAC.

54.3 The noting of an application for leave to appeal has the effect of suspending execution of the judgment and order of the court. By operation of law, the pending appeal suspended the operation of the order of Cele AJ.[44]

54.4 The dismissal of Hendor's petition for leave to appeal to the SCA on 15 September 2009 had the result that the reinstatement of the applicants with effect from 1 January 2007 was immediately effective and enforceable. More importantly for present purposes, the basis on which Hendor had refused to allow the applicants to resume their employment in accordance with their tender to do so on 23 April 2007 fell away.

54.5 In the Court *a quo*, the applicants claimed an order declaring that Hendor is liable to pay them their wages in the amounts

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[44] **South Cape Corporation v Engineering Management Services** 1977 (3) SA 534 (A) at 542E and 545A; and **United Reflective Converters (Pty) Ltd v Levine** 1988 (4) SA 460 (W) at 463F-G.

set out in Schedule A, which invariably covers the period 1 January 2007 to 28 September 2009, the applicants having been physically reinstated in their jobs with effect from 29 September 2009.

54.6 The judgment of Cele AJ was at no stage set aside by any court of appeal. On the applicants' case, the wages due to the applicants from the date on which they originally tendered their services on 23 April 2007 accrued every week, as their wages fell due. But their wages were not claimable because their reinstatement with effect from 23 April 2007 was suspended in accordance with the substantive common law rule referred to above.

54.7 Once all avenues of appeal fell away, the *status quo ante* was restored and the applicants were entitled to take steps to claim their arrear wages

SUBSTITUTION OF CERTAIN OF THE APPLICANTS

55 The applicants also seek to appeal the finding of the LAC that "*quite clearly, deceased [applicants] could not have sought the*

substitution relief that they did".[45] The applicants wish to claim substitution of (at least) thirteen former employees reinstated by order of Cele AJ, who passed away before the claim for arrear wages was instituted in the Labour Court, by the executors of their estates, pursuant to Rule 22(5) of the Labour Court Rules ("***the deceased applicants***").

56 The applicants sought the substitutions by including a number of applicants in the founding affidavit who were already deceased and by filing notices of substitution in an attempt to "*substitute*" the deceased applicants with the executor of their estate. Rule 22(5) of the Labour Court Rules was invoked by the applicants in support of this application.

57 Rule 22(5) provides for the substitution of an "*existing party*" for another person, when this "*becomes necessary*". The relevant part of the Rule reads:

> ***"22 Joinder of parties, intervention as applicant or respondent, amendment of citation and substitution of parties***
>
> *[…]*
>
> *(5) If in any proceedings it becomes necessary to substitute a person for an existing party, any party to such proceedings may, on application and on notice to every other party, apply to the court for an order*

[45] **LAC Judgment** at para 17.

> *substituting that party for an existing party and the court may make such order, including an order as to costs, or give such directions as to the further procedure in the proceedings as it deems fit.*"[46]

58 It is trite law that substitution of a party is acceptable provided the applicants in question were already existing parties on the date on which the application was launched in their name. Rose Innes J explains the principles behind substitution in the High Court[47] (which is of equal application in the Labour Court) as follows:

> "*A material amendment such as the alteration or correction of the name of the applicant, or the substitution of a new applicant, should in my view usually be granted subject to the considerations mentioned of prejudice to the respondent.* Compare Trustees African Explosives Pension Fund v New Hotel Properties (Pty) Ltd; Trustees African Explosives Pension Fund v Nestel *1961 (3) SA 245 (W) at 247A-E. The risk of prejudice will usually be less in the case where the correct applicant has been incorrectly named and the*

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[46] Emphasis added.

[47] Rule 15(2) of the Uniform Rules of Court provides that: "*Whenever by reason of an event referred to in subrule (1) it becomes necessary or proper to introduce a further person as a party in such proceedings (whether in addition to or in substitution for the party to whom such proceedings relate) any party thereto may forthwith by notice to such further person, to every other party and to the registrar, add or substitute such further person as a party thereto, and subject to any order made under subrule (4) hereof, such proceedings shall thereupon continue in respect of the person thus added or substituted as if he had been a party from the commencement thereof and all steps validly taken before such addition or substitution shall continue of full force and effect: Provided that save with the leave of the court granted on such terms (as to adjournment or otherwise) as to it may seem meet, no such notice shall be given after the commencement of the hearing of any opposed matter; and provided further that the copy of the notice served on any person joined thereby as a party to the proceedings shall (unless such party is represented by an attorney who is already in possession thereof), be accompanied in application proceedings by copies of all notices, affidavits and material documents previously delivered, and in trial matters by copies of all pleadings and like documents already filed of record, such notice, other than a notice to the registrar, shall be served by the sheriff*." And Rule 15(3) provides: "*Whenever a party to any proceedings dies or ceases to be capable of acting as such, his executor, curator, trustee or similar legal representative, may by notice to all other parties and to the registrar intimate that he desires in his capacity as such thereby to be substituted for such party, and unless the court otherwise orders, he shall thereafter for all purposes be deemed to have been so substituted*."

> *amendment is sought to correct the misnomer than in the case where it is sought to substitute a different applicant. The criterion in both cases, however, is prejudice which cannot be remedied by an order as to costs and there is no difference in principle between the two cases. See* Mutsi v Santam Versekeringsmaatskappy Bpk en 'n Ander *1963 (3) SA 11 (O), distinguishing* L & G Cantamessa v Reef Plumbers; L & G Cantamessa (Pty) Ltd v Reef Plumbers *1935 TPD 56, which was also distinguished in* Gihwala v Gihwala *1946 CPD 486. The correction of a misdescription of an applicant differs also from the cases where the Courts have regarded a summons or notice of motion as* ab initio *invalid because the plaintiff or applicant was a non-existent person*."[48]

59 Since in this case, all of the parties in question predeceased the application, the Rule does not find application at all. The proceedings are therefore a nullity in respect of those applicants.

60 An analysis of the Record demonstrates that the following former employees of Hendor who were originally applicants in the matter which was decided by Cele AJ, had passed away on the dates mentioned below:

Number of applicant	**Name**	**Date of death**	**Annexure A Page No. (Vol 1)**	**Annexure C Page No. (Vol 2)**
31	Vilakazi	14/06/2012	39	101
32	Molefe	29/06/2004	67	107
33	Rantho	18/03/2012	33	112

[48] **Devonia Shipping Ltd v MV Luis (Yeoman Shipping Co Ltd Intervening)** 1994 (2) SA 363 (C) at 369G-370A (emphasis added). See also **Van Heerden v Du Plessis** 1969 (3) SA 298 (O) at 304A dealing with the Magistrates' Court rules for substitution; and **Friends of the Sick Association v Commercial Properties (Pty) Ltd and Another** 1996 (4) SA 154 (D) at 157D-158A.

34	Madlopha	04/05/2009	81	119
35	Dubazana	05/02/2005	65	125
36	Khumalo	02/02/2006	71	131
37	Mlangeni	21/08/2009	77	137
38	Thango	27/12/2010	59	143
39	Maloka	24/02/2007	79	149
40	Dlamini	13/02/2007	85	155
41	Khumalo	See below		
42	Godi	23/10/2009	75	160
43	Sibuyi	21/02/2009	69	164

61 Applicant number 41 was said to be one of those to be substituted, but a confirmatory affidavit bearing his name was filed by the applicants. It is therefore unclear on what basis NUMSA sought his substitution.[49]

62 As appears from the table above, all of the "*applicants*" in respect of whom Rule 22 notices were given, predeceased the institution of the application on 19 September 2012. Accordingly, they were not and could not have been applicants in that application. Their substitutions by notice in terms of Rule 22(5) was therefore of no force and effect.

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[49] **Confirmatory affidavit of Veli Kumalo**, Record, vol 3, pp 310-311.

63 For the reasons set out above, we submit that it is clear that where the applicants predeceased the institution of the present application, their substitution is a nullity.

THE APPLICANTS' FAILURE TO MAKE OUT A CASE FOR THE RELIEF SOUGHT

64 The third defence raised by Hendor is that the applicants have failed to make out a case for the relief sought by them on the papers.

65 It is trite law that in motion proceedings, the affidavits represent both the pleadings and the evidence.[50]

66 The applicants claimed an order establishing Hendor's liability to pay wages in specified amounts. In order to do so, they were required to plead and prove the following:

66.1 the essential terms of their contracts of employment, more particularly disclosing their agreed wages and any other benefits claimed; and

66.2 that they tendered their services and were at all material times willing and able to perform in terms of their contracts of

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[50] **Anglo Operations Ltd v Sandhurst Ests (Pty) Ltd** 2006 (1) SA 350 (T) at 383 D-G and the authorities there referred to.

employment over the period in question. This was not common cause since, *inter alia*, several of the original applicants for reinstatement had passed away over the period between 23 April 2007 and 29 September 2009.

67 To substantiate their claim, the applicants sought to rely on the order of Cele AJ. This is not, however, a judgment sounding in money.[51]

68 In addition, the deponent to the founding affidavit did not have personal knowledge of the abovementioned matters and essentially relied on the report of an accountant who had tabulated the wages and leave pay allegedly due to each of the applicants. It is, however, clear that neither the deponent to the founding affidavit, nor the accountant, Mr Douglas, had personal knowledge of the matters to which they testified. There were a myriad obvious inaccuracies in their evidence which cast serious doubt on their evidence as a whole. For example, without exception, each of the schedules annexed in respect of each of the applicants in Annexure A to the founding affidavit claims payment for the full period from 1 January 2007 to 28 September 2009, notwithstanding the fact that

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[51] **Further answering affidavit**, Record, vol 5, para 4.2, p 412.

several of the applicants had, on the applicants' own version, passed away at different stages, some even preceding that entire period.

69 The applicants were "*directed*" by the Labour Court[52] to deliver a declaration setting out the grounds on which they claimed various amounts. They ought to have issued summons (under a new case number) and adduced the evidence necessary to prove their claim.[53] Instead of doing so, the applicants incorrectly issued this application under the same case number as the unfair dismissal proceedings which had been finally concluded.

70 The applicants claim that the Labour Court merely ordered them to bring a declaratory application, and this is what they have done.[54] Apart from the fact that this is inconsistent with the express wording of the order,[55] it is apparent that in order to prove their claim, the applicants would have to lead evidence and could not simply institute proceedings on application.

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52 A copy of the order is attached as annexure "JVD3" to the **further answering affidavit**, Record, vol 5, pp 428-429.

53 **Further answering affidavit**, Record, vol 5, para 6.1 and 6.4, pp 413 and 415.

54 **Further replying affidavit**, Record, vol 5, para 10.1, p 434. The Court *a quo* also held that this was the effect of the order of Van Voore, **Judgment of Gaibie AJ**, Record, vol 5, para 6, p 447.

55 **Order of van Voore AJ**, annexure "JVD3" to the **further answering affidavit**, Record, vol 5, para 4, p 429.

71 As a consequence, the applicants failed to put up adequate evidence on the basis of which a court could properly determine the quantum of each applicant's entitlement to wages and leave pay.[56]

72 We submit that such an approach is clearly incorrect. Where the applicants have failed to adduce evidence to support their claim (brought on motion proceedings), the proper course is to dismiss the application.[57] The order of Cele AJ is not a judgment sounding in money. It was therefore incumbent upon the applicants to establish their cause of action and to lead evidence regarding the quantum of the sums claimed.[58]

73 As with the case of the prescription defence, the applicants have only themselves to blame for their failure to seek to vindicate their claim through appropriate proceedings.

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[56] **Further answering affidavit**, Record, vol 5, para 6.3, pp 414-415.

[57] **Director of Hospital Services v Mistry** 1979 (1) SA 626 (A) at 635H–636F; **Absa Bank Ltd v Kernsig 17 (Pty) Ltd** 2011 (4) SA 492 (SCA) at paras 23-24; **MEC for Health, Gauteng v 3P Consulting (Pty) Ltd** 2012 (2) SA 542 (SCA) at para 28; **Foize Africa (Pty) Ltd v Foize Beheer BV** 2013 (3) SA 91 (SCA) at para 30.

[58] **Further answering affidavit**, Record, vol 5, para 7.1, p 416.

IS IT IN THE INTERESTS OF JUSTICE TO GRANT LEAVE TO APPEAL?

74 Finally, we deal with the question of whether it is in the interests of justice to grant leave to appeal. We begin by considering whether any of the three issues on appeal raise constitutional issues; and then we deal with the contention that the applicants seek to raise new issues on appeal to this Court for the first time.

No Constitutional Issues or Points of Law of General Public Importance Are Raised

75 The issues before this Court, should leave to appeal be granted, would be:

75.1 whether the applicants' claim for arrear wages after a reinstatement order have prescribed;

75.2 the circumstances in which a party may be substituted after he or she dies; and

75.3 whether the applicants have made out a cause of action to sustain their claim.

76 None of these issues is a constitutional issue.

77 The applicants attempt to circumvent this conclusion by seeking to characterise the appeal as involving the interpretation of section 193(1) of the LRA. This is, however, a mischaracterisation of the issues in dispute.

78 Section 193(1) of the LRA states that one of the remedies given to the Labour Court when adjudicating a claim for unfair dismissal is an order reinstating the applicant.

79 Section 193 provides as follows:

> "***193 Remedies for unfair dismissal and unfair labour practice***
>
> *(1) If the Labour Court or an arbitrator appointed in terms of this Act finds that a dismissal is unfair, the Court or the arbitrator may—*
>
> *(a) order the employer to reinstate the employee from any date not earlier than the date of dismissal;*
>
> *(b) order the employer to re-employ the employee, either in the work in which the employee was employed before the dismissal or in other reasonably suitable work on any terms and from any date not earlier than the date of dismissal; or*
>
> *(c) order the employer to pay compensation to the employee.*
>
> *(2) The Labour Court or the arbitrator must require the employer to reinstate or re-employ the employee unless—*
>
> *(a) the employee does not wish to be reinstated or re-employed;*

> *(b) the circumstances surrounding the dismissal are such that a continued employment relationship would be intolerable;*
>
> *(c) it is not reasonably practicable for the employer to reinstate or re-employ the employee; or*
>
> *(d) the dismissal is unfair only because the employer did not follow a fair procedure.*
>
> *(3) If a dismissal is automatically unfair or, if a dismissal based on the employer's operational requirements is found to be unfair, the Labour Court in addition may make any other order that it considers appropriate in the circumstances.*
>
> *(4) An arbitrator appointed in terms of this Act 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.*"[59]

80 The applicants contend (for the first time – a point which is dealt with further below), that section 193 must be interpreted "*purposively*" to include the arrear wages that would accrue to an employee after the date on which he or she was reinstated, but prior to the date on which the reinstatement order was implemented.

81 In their heads of argument, the applicants assert that section 193 of the LRA and the Prescription Act are in conflict with one another because the Prescription Act is "*unfair*" and that the LRA should prevail in terms of section 210 of the LRA.[60] The applicants do not

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[59] Emphasis added.

[60] **Applicants' heads of argument**, para 35, pp 13-14.

explain why the Prescription Act is said to be in conflict with any provision of the LRA or why it is said to be unfair.

82 We submit that the applicants' inability to identify any provision in the LRA which is in conflict with the Prescription Act is because there is no such conflict.

83 Nor does the dispute raise an arguable point of law of general public importance which ought to be considered by this Court. It concerns a claim by specific applicants for arrear wages which has prescribed.

84 Hendor accepts that should this Court find that the dispute does centre on the proper interpretation of section 193 of the LRA, then the appeal could raise a constitutional issue.[61]

85 We submit however that the applicants have failed to articulate any argument for an interpretation of section 193(1) of the LRA pursuant to which the Labour Court is empowered to grant an order of prospective reinstatement which would renders prospective wages earned pursuant to the employee's tender of services as part of a judgement debt.

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[61] **South African National Defence Union v Minister of Defence and Others** 2007 (5) SA 400 (CC) at para 52; **respondent's opposing affidavit to the application for leave to appeal**, Record, vol 6, para 58, p 540.

86 As the LAC has pointed out, section 193 of the LRA does not empower the Court to make an order for back pay subsequent to the date of reinstatement (only prior to reinstatement) but prior to implementation.[62]

87 The applicants' true complaint therefore is that section 193 of the LRA ought to have given the Labour Court this power, but failed to do so. This, the applicants ought to have contended, is a lacunae in the LRA, which renders section 193 of the LRA unconstitutional for failing to give proper effect to the right to fair labour practices protected in section 23(1) of the Constitution of the Republic of South Africa, 1996 ("***the Constitution***").

88 This Court has repeatedly emphasised that although courts must seek to give effect to the purport and object of the Constitution, courts are limited by the language in the Constitutional text or legislation. In other words, a court may not impose a meaning on the text that it is not reasonably capable of bearing.[63] Another way of stating this limitation is that the interpretation may not be "*unduly strained*".[64]

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62 **Coca Cola Sabco** at para 17.

63 **South African Airways (Pty) Ltd v Aviation Union of South Africa and others** 2011 (3) SA 148 (SCA) at para 29.

64 **Investigating Directorate, Serious Economic Offences v Hyundai Motor Distributors (Pty)**

89 The applicants contend that the power to reinstate an employee must be interpreted to mean that wages that accrue after reinstatement (presumably indefinitely) form part of the judgment debt. This interpretation unduly strains the language of section 193 of the LRA, which is not reasonably capable of bearing this meaning. It would also lead to the absurdity that a prospective reinstatement order would prevent an employer from dismissing an employee for cause, or from refusing to pay an employee who fails without leave to attend work.

90 The applicants' interpretive argument therefore goes far beyond what a Court is permitted to do as part of its interpretive exercise. Rather, it would require a wholesale rewriting of the powers of the Labour Court in section 193.

91 Finally, the applicants assert that the issues in this appeal are of public importance as they require resolution and clarity to both employers and employees.[65] With respect, the matter is already clear and has been pronounced upon in two decisions of the Labour Appeal Court, in the **Coca Cola Sabco** decision as well as the LAC

Ltd, In re Hyundai Motor Distributors (Pty) Ltd v Smit NO 2001 (1) SA 545 (CC) at para 24.

[65] **Applicants' heads of argument**, para 30, p 12.

judgment, based on this Court's prior pronouncement as to the legal effect of a prospective order of reinstatement.

92 For all these reasons, we submit that the issues on appeal neither raise a constitutional issue; nor do they raise an arguable point of law of general public importance and which ought to be considered by this Court.

New Arguments Raised on Appeal

93 In addition, the interpretive argument based on section 193 of the LRA is raised for the first time on appeal.[66] Although it was touched upon in supplementary heads of argument dated 16 September 2015 (the day before the appeal hearing before the LAC on 17 September 2015), it was not canvassed in any of the papers before the Labour Court or Labour Appeal Court, or in the original heads of argument filed before the Labour Appeal Court dated 30 January 2015. Hendor therefore did not have a proper opportunity to respond to this argument before the LAC and it was not considered by the LAC.

94 This Court has repeatedly affirmed the principle that parties must make out their case in their founding papers and will not ordinarily

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[66] **Respondent's opposing affidavit to the application for leave to appeal**, Record, vol 6, para 67, p 543.

be allowed to supplement and make out their case on appeal.[67] In **Phillips and Others v National Director of Public Prosecutions**, Skweyiya J put it bluntly when he stated: "*It is impermissible for a party to rely on a constitutional complaint that was not pleaded.*"[68]

95 In **Shaik v Minister of Justice and Constitutional Development and Others**,[69] Ackermann J explained the rationale for this principle with reference to Rule 16A of the Uniform Rules, which requires a party raising a constitutional issue.

> "*The minds of litigants (and in particular practitioners) in the High Courts are focused on the need for specificity by the provisions of Uniform Rule 16A(1). The purpose of the Rule is to bring to the attention of persons (who may be affected by or have a legitimate interest in the case) the particularity of the constitutional challenge, in order that they may take steps to protect their interests. This is especially important in those cases where a party may wish to justify a limitation of a chap 2 right and adduce evidence in support thereof.*
>
> *It constitutes sound discipline in constitutional litigation to require accuracy in the identification of statutory provisions that are attacked on the ground of their constitutional invalidity. This is not an inflexible approach. The circumstances of a particular case might dictate otherwise. It*

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67 **National Coalition for Gay and Lesbian Equality and Others v Minister of Home Affairs and Others** 2000 (2) SA 1 (CC) at para 7; **Prince v President, Cape Law Society, and Others** 2001 (2) SA 388 (CC) at para 22; **Bel Porto School Governing Body and Others v Premier, Western Cape, and Another** 2002 (3) SA 265 (CC) at para 119.

68 **Phillips and Others v National Director of Public Prosecutions** 2006 (1) SA 505 (CC) at para 7.

69 **Shaik v Minister of Justice and Constitutional Development and Others** 2004 (3) SA 599 (CC) at paras 24-25.

is, however, an important consideration in deciding where the interests of justice lie."

96 In this matter, the constitutional issue has not been timeously raised in the papers and there has not been an accurate identification of the nature of the constitutional attack, or notice to the public. It follows that it would not be in the interests of justice to grant the applicants leave to appeal.[70]

97 For the reasons set out above, we submit that:

97.1 the applicants' assertion that their claim for arrear wages did not prescribe has no prospects of success;

97.2 the applicants claim that the substitution of the thirteen deceased applicants with their executors is fatally flawed and has no prospects of success;

97.3 the applicants have not made out a proper case for the relief sought in this appeal and for this reason, too, the application has no prospects of success;

97.4 none of these issues raises a constitutional issue; and none raise an arguable point of law of general public importance

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[70] **Everfresh Market Virginia (Pty) Ltd v Shoprite Checkers (Pty) Ltd** 2012 (1) SA 256 (CC) at paras 63-67.

which ought to be considered by this Court as the matter has already been decided by the LAC; and

97.5 the appeal would involve issues which are raised for the first time before this Court.

98 For these reasons, we submit that it would not be in the interests of justice for this Court to grant the applicants leave to appeal.

CONCLUSION

99 For the reasons set out above, we submit that:

99.1 the greater portion of the debts sought to be claimed by way of a declaratory order have prescribed;

99.2 most of the joinder applications are fatally flawed and no relief is competent in respect thereof; and

99.3 the applicants have in any event failed to make out a case for the relief sought, because they failed to plead and prove the bases of their claims.

100 For the reasons set out above, we submit that the appeal should be dismissed with costs, including the costs of two counsel.

CE WATT-PRINGLE SC
KS McLEAN

Sandton Chambers
Counsel for the Respondent
30 May 2016

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