REPUBLIC OF SOUTH AFRICA

THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

JUDGMENT

Reportable

Case no: J2438/12

In the matter between:

PAMELA SEGAKWENG	**Applicant**
And	
OGILVY (JOHANNESBURG) (PTY) LTD	**First Respondent**
COMMISSION FOR CONCILIATION, MEDIATION AND ARBITRATION	**Second Respondent**
HAROUN DOCRAT N.O	**Third Respondent**
SICELO MTHETHWA N.O	**Fourth Respondent**

Heard: **12 July 2013**

Delivered: **29 May 2014**

Summary: **Application of Prescription Act to LRA – C*ellucity (Pty) Ltd v CWU obo Peters* [2014] 2 BLLR 172 (LC) not followed – arbitration awards, including certified awards, prescribe after 3 years**

JUDGMENT

PONELIS, AJ

Factual background

[1] The applicant, a former employee of the first respondent, seeks twofold relief. In the first instant, that an arbitration award be made and order of Court in terms of section 158(1)(c) of the Labour Relations Act[1] ('LRA'). In the second instant, that the first respondent's application for review of the award be dismissed.

[2] The arbitration award was issued by the fourth respondent, in the capacity of commissioner of the second respondent, pursuant to arbitration of a dismissal dispute under the LRA. The fourth respondent held that the applicant had been constructively dismissed and ordered the first respondent to compensate the applicant in the sum of R499 992,00, within seven days of receipt of the award.

[3] The award was served on the parties on 9 August 2009. On 14 September 2009 the first respondent launched an application for review of the award. The present application was instituted on 12 September 2012.

[4] In its opposition the first respondent contends, amongst others, that its indebtedness arising from the award has been extinguished by the operation of prescription. I proceed to deal with this issue and, to the extent that it becomes necessary, with the remainder.

Application of the Prescription Act[2]

[5] Chapter III of the Prescription Act deals with the extinction of debts by prescription. According to section 16(1), Chapter III applies to any debt, save insofar as the provisions of Chapter III are inconsistent with any specific time periods that may be prescribed for the making of a claim or institution of an action under any other statute. Section 16 of the Prescription Act provides:

> "16 Application of this Chapter

[1] 66 of 1995
[2] 68 of 1969

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

(2) The provisions of any law-

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

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

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

[6] Pursuant to section 210 of the LRA, the provisions of the LRA will prevail if it conflicts with the Prescription Act in relation to any matter dealt with in the LRA. This section provides:

'210 Application of Act when in conflict with other laws

(1) If any conflict, relating to matters dealt with in this Act, arises between this Act and the provisions of any other law save the Constitution or any Act expressly amending this Act, the provisions of this Act will prevail.' (Emphasis added)

[7] In *Cellucity v CWU obo Peters*[3] and *Coetzee v MEC of the Western Cape*[4] the Court held that the LRA is not subject to the provisions of the Prescription Act. In this regard the Court in *Coetzee* held, amongst others:

[3] *Cellucity (Pty) Ltd v CWU obo Peters* [2014] 2 BLLR 172 (LC).
[4] *Coetzee and others v MEC of the Provincial Government of the Western Cape and others* (C751/2008) [2013] ZALCCT 12 (20 March 2013) (unreported).

> '[15] First respondent's case in respect of prescription relies on the submission that 'all claims under the LRA fall under the Prescription Act'. In my judgment the LRA, in its design, is inconsistent with such submission. Instead of any reference to prescription or the inclusion of a prescription clause, the LRA includes specific time periods for the referral of claims and underscores the use of the tool of condonation by this court when such periods are exceeded in the text of the statute, rather than in the court's rules.' (Emphasis added)

[8] The LRA contains several provisions concerning dispute referrals that must be made within specific time periods. For instance, in terms of section 191(1) an employee may, within thirty days of dismissal, refer a dispute about the fairness of the dismissal for conciliation by the CCMA or a bargaining council. Furthermore, where certain disputes could not be conciliated, section 191(11)(a), read with section 191(5)(a), provides that it can be referred for arbitration within ninety days.

[9] However, from the time that a dispute referral has culminated in the issue of an arbitration award, the LRA is silent about time periods. In particular, the LRA does not prescribe any time periods for which arbitration awards remain enforceable, or for the enforcement of arbitration awards by means of proceedings in terms of section 158(1)(c) and certification under section 143(3).

[10] By virtue of section 16 of the Prescription Act, the provisions of the Prescription Act apply in these respects[5] because, for purposes of section 210 of the LRA, they do not conflict with any matters dealt with in the LRA. I am therefore not enjoined to follow the Court in *Cellucity* and *Coetzee*.

[11] The application of the Prescription Act to the enforcement of arbitration awards under the LRA may in some cases result in unfairness to parties seeking to enforce awards. For example, where an employee in whose favour an arbitration award has been made does not attempt execution while

[5] *Mpanzama v Fidelity Guards Holdings (Pty) Ltd* [2000] 12 BLLR 1455 (LC) at paras 6-7. See also: *Police & Prison Civil Rights Union on behalf of Sifuba v Commissioner of the SA Police Service & others* (2009) 30 ILJ 1309 (LC) at para 34; *Fredericks v Grobler NO & others* [2010] 6 BLLR 644 (LC) at paras 22-23; *Magengenene v PPC Cement (Pty) Ltd & others* (2011) 32 ILJ 2518 (LC) at para 6; *SA Transport & Allied Workers Union on behalf of Hani v Fidelity Cash Management Services (Pty) Ltd* (2012) 33 ILJ 2452 (LC) at para 22; *Sampla Belting SA (Pty) Ltd v Commission for Conciliation, Mediation & Arbitration & others* (2012) 33 ILJ 2465 (LC) at para 14.

awaiting the finalisation of pending review proceedings; only to be met by a stale claim when the review application is dismissed.[6] As was pointed out by Gush J in *Sampla Belting,*[7] it is expected that this will in due course be resolved through impending amendments to the LRA by which the filing of review applications will interrupt the running of prescription of arbitration awards.

[12] In the present context, considerations of fairness are however subject to the overriding objectives of certainty and finality in the relationship between employers and employees, in their capacities as creditors and debtors under arbitration awards. This may be gleaned from the respective objectives of the Prescription Act[8] and the objectives of speedy and effective resolution of labour disputes, as envisaged under section 1(d)(iv) of the LRA.[9] But for operation of the Prescription Act, arbitration awards would remain enforceable indefinitely, or at least for such period as a Court may find reasonable in the circumstances of a particular case, which would defeat the objectives mentioned.

[13] As a general proposition, equity considerations do therefore not enter the deliberation when a Court applies the Prescription Act. See for instance *Gopaul v Subbamah,*[10] where it was held:

> '…[O]nce the debt has become 'due' in terms of s12(1) of the Prescription Act, 1969, the rest is an arithmetical calculation. As was stated by Miller J (as he then was) in *Mahomed v Yssel* 1963 (1) SA 866 (D) at 817A 'prescription laws are absolute and permit of no benevolent exceptions to the clear terms of the statute.''[11] (Parenthesis added)

[14] In the premises, this Court is compelled to give effect to the Prescription Act, despite unfair consequences that may result from the prescription of arbitration awards.[12] Therefore, the exercise of this Court's powers under

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[6] *Robor (Pty) Ltd (Tube Division) v Joubert & others* [2009] 8 BLLR *785* (LC) at 789G-790B.
[7] at para 24.
[8] *Police & Prison Civil Rights Union* at para 29; *Uitenhage Municipality v Molloy* 1998 (2) SA 735 (SCA).
[9] *National Education Health & Allied Workers Union v University of Cape Town & others* (2003) (3) SA 1 (CC) at para 31; *Mpanzama* at paras 9-10.
[10] 2002 (6) SA 551 (D).
[11] at 561E-F.
[12] *Sampla Belting* at para 23.

section 158(1)(c), by leaning in favour of lending enforceability to an arbitration award,[13] does not extend to lending enforceability to an award beyond the prescription period. As has been held in *Police & Prison Civil Rights Union on behalf of Sifuba*:[14]

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

Further provisions of the Prescription Act

[15] In the further salient provisions of Chapter III of the Prescription Act, prescription commence to run as soon as a debt is due[15] and becomes extinguished, in the case of a judgment debt, after thirty years[16] and in the case of another debt, not specifically listed in the Prescription Act or dealt with by another statute, after three years.[17] The running of prescription is interrupted where a debtor is served with any process, such as a notice of motion or a summons,[18] whereby a creditor commences proceedings for recovery of the debt;[19] as well as where a debtor either expressly or tacitly acknowledges liability.[20] Should the proceedings for recovery of the debt not be prosecuted to final judgment, the interruption of prescription shall lapse.[21]

[16] Although the term 'debt' is not defined in the Prescription Act, it can be denoted a wide and general meaning, which includes an obligation to do something or to refrain from doing something.[22] An arbitration award for

[13] *Deutsch v Pinto & another* (1997) 18 ILJ 1008 (LC); *Ntshangane v Speciality Metals* (CC) [1998] 3 BLLR 305 (LC) at paras 8-9; *Professional Security Enforcement v Namusi* [1999] 6 BLLR 610 (LC); *Olivier v University of Venda* [2003] 5 BLLR 471 (LC).
[14] n 3.
[15] section 12(1).
[16] section 10(1), read with section 11(a)(iii).
[17] section 10(1), read with section 11(d).
[18] section 15(6).
[19] section 15(1).
[20] section 14(1).
[21] section 15(2).
[22] *Desai NO v Desai and others* 1996 (1) SA 141 (A) at 146I.

payment of money under the LRA accordingly constitutes a 'debt' for purposes of the Prescription Act.[23]

[17] Prescription starts to run when a debt becomes due;[24] i.e. as soon as the creditor is able to pursue its claim.[25] With reference to section 138(7), read with section 143(1) of the LRA, a party in whose favour an award has been issued can pursue its claim when the award has been issued, signed and served by the commissioner.[26]

[18] If a debtor out of own accord fulfills its obligations under the award, it will be the end of the matter. If the debtor however fails to do so, the creditor will need to secure compliance by the debtor, within the applicable period of prescription imposed by the Prescription Act. In order to obtain a judicial sanction to this effect, the creditor can bring an application to make the award and order of Court, in terms of section 158(1)(c) of the LRA. It can also have the award certified in terms of section 143(3). A certified award does not constitute a court order, even though for execution purposes, it may be enforced 'as if it were an order of the Labour Court'.[27]

[19] An application in terms of section 158(1)(c) of the LRA constitutes 'process whereby the creditor claims payment of the debt', for purposes of section 15(1), read with section 15(6), of the Prescription Act.[28] Accordingly, if such an application is launched before expiry of the prescription period, the running of prescription will be interrupted.[29] It will thereafter be incompetent for a debtor to claim that there has been an unreasonable delay in the institution of the application.[30] Should the creditor however fail to diligently prosecute the application, the debtor may react by invoking the applicable rules and procedures of this Court.[31] If the section 158(1)(c) application is dismissed on

[23] *Mpanzama* at para 18.
[24] section 12(1).
[25] *Deloitte Haskins & Shells Consultants (Pty) Ltd v Bowthorpe Hellerman Deutsch (Pty) Ltd* 1991 (1) SA 525 (A) at 532H-I.
[26] *SA Transport & Allied Workers Union v Fidelity Cash* at para 22.
[27] LRA: section 143(1).
[28] *Sampla Belting* at paras 20-22.
[29] Prescription Act: section 15(1) and section 15(6).
[30] *Solidarity* at para 15; *CEPPWAWU & another v Le-Sel Research (Pty) Ltd* [2009] 5 BLLR 421 (LC) at paras 22-24.
[31] *Basson & another v Walters and others* 1981 (4) SA 42 (C) at 49G-Y; *Fredericks* at para 28; *Kuhn v Kerbel and another* 1957 (3) SA at 534A.

that basis, the interruption of prescription will lapse, by virtue of section 15(2) of the Prescription Act.

[20] Unlike proceedings initiated in terms of section 158(1)(c) of the LRA, a review application does not constitute a process for recovery of a debt. It is settled law that review proceedings under the LRA do not automatically suspend the operation of prescription.[32]

[21] If a Court order in terms of section 158(1)(c) is granted, prescription shall run afresh[33] and, because an order in terms of section 158(1)(c) constitutes a judgment debt for purposes of section 11(a)(ii) of the Prescription Act, the debt will thereafter prescribe after thirty years.

First respondent's plea of prescription

[22] The first respondent submits that the fourth respondent's award prescribed on 16 August 2012, being three years after it became due.[34] Because the present application was launched after this date, and there has been no interruption of prescription, the first respondent prays that the application be dismissed.

[23] The key question is what is the period of prescription applicable to the fourth respondent's award? Insofar as the fourth respondent's award constitutes a judgment debt, as contemplated in section 11(a)(ii) of the Prescription Act, it prescribes after thirty years, but if it constitutes a debt, as contemplated in section 11(d), it prescribes after three years.

Applicable prescription period

[24] In *Blaas v Athanassiou*[35] the applicant sought to have a private arbitration award made an order of Court, pursuant to the provisions of section 31 of the Arbitration Act.[36] In terms of the arbitration agreement, the parties had agreed that the award would have the status of a Court order. In its opposition to the

[32] *Olivier*; *Police & Prison Civil Rights Union* at paras 35-37; *National Union of Metalworkers of SA & another v Espach Engineering* (2010) 31 ILJ 987 (LC) at paras 10-12; *SA Transport & Allied Workers Union v Fidelity Cash* at para 22; *Sampla Belting* at para 14.
[33] Prescription Act: section 15(4).
[34] Prescription Act: section 15(2).
[35] 1991 (1) SA 723 (W).
[36] 42 of 1965.

application the respondent contended, amongst others, that the award had prescribed because more than three years have lapsed since it was issued. Hartzenberg J dismissed this argument on the basis that, as a consequence of the agreement between the parties, the prescription period was thirty years. Because this decision is based on the specific agreement between the parties, it cannot be elevated to a general principle that the prescription period applicable to private arbitration awards is thirty years.

[25] In *Primavera Construction v Government, North-West Province*[37] the Court concluded, also in the context of a private arbitration award, that a party's right to enforce an arbitration award prescribes after three years from the date of its publication. When the award is however made an order of Court, it becomes a judgment debt that prescribes after thirty years. In this instance Friedman JA held:

> 'The effect of a valid award by an arbitrator will usually be to create new rights and obligations between the parties, and it will either dissolve existing rights or bring an end to a dispute as to whether certain rights existed or not. It is clear that in the absence of voluntary compliance, the award can be enforced only with the approval of the Court. The party therefore wishing to enforce the award will sue on the award and not on the original contract from which the dispute arose. It is clear that a judgment debt lapses through prescription after 30 years, an arbitrators' award will acquire the status of a judgment debt only once it has been made an order of Court…
>
> I reiterate that once the award has been made an order of Court, it becomes a judgment debt which prescribes after 30 years. See s 11(a)(ii) of the Act. Until it is made an order of Court, it appears that a party's right to enforce the award would ordinarily prescribe within three years from the date of publication of the award. See *Cape Town Municipality (supra).*'[38] (Emphasis added)

[26] Similar considerations apply to an arbitration award issued under the LRA. It does not by mere issue constitute an order of Court,[39] and it is only when this Court grants an order in terms of section 158(1)(c) that an arbitration award is

[37] *Primavera Construction SA v Government, North West Province and another* (2003) 3 (SA) 579 (B).
[38] at 604A-E.
[39] *Deutsch; Gois v t/a Shakespeare's Pub v Van Zyl & others* (2003) 24 ILJ 2302 (LC).

transformed into a judgment debt, for purposes of section 11(a)(ii) of the Prescription Act. Before that happens the award constitutes a debt, as contemplated in section 11(d) of the Prescription Act, which means that it prescribes after three years.[40]

The facts

[27] In the present matter there has been no interruption of prescription for purposes of section 14(1) of the Prescription Act. In order to be eligible for relief in terms of section 158(1)(c) of the LRA, the applicant was therefore required to institute the present application within three years of the date when the fourth respondent's award became due.

[28] The fourth respondent's award was signed on 19 May 2009. In terms thereof the first respondent was ordered to pay the applicant R499 992,00, within seven days of service of the award on the first respondent.

[29] On 9 August 2009 the award was served on the parties. For present purposes I accept that the award became due; i.e. that prescription started to run; seven days after 9 August 2009. The fourth respondent's award accordingly prescribed on 16 August 2012.

[30] The present application was delivered on 12 September 2012.

Conclusion

[31] By the time that the applicant launched the present application, the first respondent's indebtedness arising from the fourth respondent's award had prescribed. The award can therefore not be made an order of this Court.

[32] Save for the issue of costs, this disposes of the present application in its entirety and I will therefore not consider the applicant's remaining prayer for dismissal of the review application.[41]

Costs

[40] *Mpanzama* at para 17; *Police & Prison Civil Rights Union* at para 34; *Fredericks* at paras 22-23; *Magengenene* at para 6; *SA Transport & Allied Workers Union v Fidelity Cash* at para 22; *Sampla Belting* at para 14.

[41] *Sampla Belting* at paras 4-5.

[33] In order to decide whether it will be fair for a costs order to follow the result in this matter, I proceed to analyse the first respondent's conduct in relation to the prosecution of its review application.

[34] The first respondent instituted the review application on 14 September 2009. On 14 October 2009 the second respondent filed eleven audio cassette recordings of the arbitration proceedings, under cover of a notice in terms of Rule 7(A)(3) of this Court's rules. In the course of subsequent transcribing of the recordings it became apparent that six of the cassettes were blank.

[35] On 8 February 2010 the first respondent's attorneys dispatched a letter to the second respondent in which it pointed out these shortcomings in the audio recordings. They further enquired whether the whole of the arbitration proceedings were recorded and, if so, requested the second respondent to produce the balance of the recordings. Since no response was received, the first respondent's attorney's repeated these enquiries in a letter dated 24 March 2010. It is apparent from the relevant facsimile report that this letter was not sent to the second respondent. On 14 June 2011 the first respondent's attorneys reiterated the said enquires to the second respondent.

[36] On 20 June 2011 the second respondent informed the first respondent's attorneys that the missing tapes could, despite a diligent search, not be located. The second respondent further pointed out that it would be difficult to reconstruct the record because the fourth respondent was no longer appointed as a commissioner. It was therefore suggested that the parties abandon the award, upon which arbitration could proceed afresh before another commissioner.

[37] By letter dated 21 June 2011 the first respondent's attorneys invited the applicant to agree to the second respondent's proposal, failing which the first respondent would approach this Court for an order in terms of the second respondent's 20 June 2011 letter. Since no response was forthcoming, the first respondent's attorneys repeated the request on 5 July 2011.

[38] An applicant for review in this Court is duty bound to prosecute the application without undue delay.[42] I am not satisfied that the first respondent acted in accordance with this obligation. In the first instant, it is unclear why it took the first respondent some four months, between 14 October 2009 and 8 February 2010, to realise that some of the tape recordings were missing. If the first respondent had acted diligently, this ought to have come to its knowledge sooner.

[39] Once the first respondent became aware of the missing recordings, it was required to make sufficient endeavours to locate the tapes.[43] The applicant however merely dispatched a letter to the second respondent, on 8 February 2010, and thereafter effectively left the matter in abeyance, for approximately sixteen months, until 14 June 2011. Though the first respondent obliquely refers to attendance at the fourth respondent's premises to search for the tapes, is it is unclear when the attendance or attendances occurred and what steps were taken in the course thereof. Ultimately, the first respondent fails to tender a plausible explanation why it took some sixteen months to get confirmation that the missing tapes could not be located. Clearly, if the first respondent acted conscientiously, it would have realised this well in advance of 20 June 2011.

[40] After it became apparent to the first respondent that no response to its 21 June 2011 and 5 July 2011 letters would be forthcoming from the applicant's attorneys, it was incumbent upon the first respondent to initiate a process aimed at reconstructing the arbitration record, with the assistance of the applicant and the fourth respondent.[44] The applicant however failed to do so. Insofar as it was because of the fourth respondent's unavailability, this was not an insurmountable obstacle to the conduct of a reconstruction process. The first respondent could have entered into such process with the applicant, either with or without the assistance of another commissioner, by using extant notes and other relevant documents as a starting point.

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[42] *Khoza v Sasol Ltd* [2002] 9 BLLR 868 (LC); *Bezuidenhout v Johnston NO & others* (2006) 27 ILJ 2337 (LC); *Autopax Passenger Services (Pty) Ltd v Transnet Bargaining Council & others* (2006) 27 ILJ 2574 (LC).

[43] *Lifecare Special Health Services (Pty) Ltd t/a Ekuhlengeni Care Centre v Commission for Conciliation, Mediation and Arbitration & others* (2003) 24 ILJ 931 (LAC).

[44] *Lifecare* at para 17.

[41] The first respondent also did not launch the Court proceedings mentioned in its last two letters to the applicant. In fact, after 5 July 2011 it has failed to take any steps to advance its review application.

[42] In the premises, a costs order in the first respondent's favour would be unfair in view of its failure to meet the level of diligence and care that is expected in the prosecution of a review application. I therefore make no order in relation to costs.

Order

[43] In the premises, I make the following order:

(i) The application is dismissed.

(ii) There is no order as to costs.

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PONELIS AJ

Acting Judge of the Labour Court

APPEARANCES:

For the Applicant: Adv K Iles

Instructed by: Dockrat Inc.

For the First Respondent: Adv N Basson

Instructed by: Cheadle Thompson & Haysom Inc.