THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not Reportable

Case no: J203/16

In the matter between:

DENNIS BALOI **First Applicant**

CASWELL MOZOMANE BALOYI **Second Applicant**

and

MADDOX ADAMS INTERNATIONAL SOUTH AFRICA (PTY) LTD **Respondent**

Heard: **29 March 2018**

Delivered: **15 August 2018**

Summary: **Declaratory order that the respondent's takeover of the business in accordance with section 197A of the LRA – the arbitration award sought to be enforced has since prescribed.**

JUDGMENT

NKUTHA-NKONTWANA. J

Introduction

[1] In this matter, the applicants seek a declaratory order to the effect that the takeover of the business of Rofo Equipment CC (Rofo) by the respondent after it was liquidated was a transfer of a business as a going concern in terms of section 197 and 197A of the Labour Relations Act[1] (LRA). The applicants also seek reinstatement and compensation in respect of the arbitration award dated 4 August 2003 with interest. Alternatively, 12 months' compensation in *lieu* of reinstatement with interest.

[2] The application is vigorously opposed by the respondent and it raises two points *in limine*; firstly, that the arbitration award dated 4 August 2003 has prescribed and secondly, that the application amounts to *res judicata.*

Factual background

[3] The applicants were employed by Rofo. They were dismissed on or about 21 January 2000. They successfully challenged their dismissal and the arbitration award dated 4 August 2003 granted in their favour ordered that they be reinstated with compensation equivalent to 12 months' salary.

[4] On 1 March 2004, the applicants launched a joinder application seeking to join the respondent as a party to the writ issued on the strength of the award and enforce the writ against the respondent. The joinder application was dismissed on 14 August 2005.

[5] The applicants were informed on 8 June 2006 that Rofo had been liquidated as of 19 June 2001.

[6] On 14 December 2006, the applicants referred an unfair dismissal dispute against the respondent and sought condonation. The Metal and Engineering Industries Bargaining Council (MEIBC) dismissed the condonation application on 7 February 2007.

[7] On 27 September 2010, the applicants launched a review application challenging the ruling on condonation which is still pending before this Court. It would seem that there were no further steps taken by the applicants in that

[1] Act 66 of 1995 as amended.

matter and the respondent has since filed an application to have that matter dismissed.

[8] At the heart of this application is the question whether Rofo had been transferred as going concern as contended by the applicants. The respondent concedes that it operates the same business as Rofo, using the same premises and similar equipment and had offered employment to Rofo's employees. However, the respondent denies that the business was a going concern as it did not purchase Rofo. Alternatively, that there were no existing contracts of employment at the date of Rofo's liquidation and as such, the respondent cannot be held liable in terms of section 197(2)(C).

Prescription

[9] In *Food and Allied Workers' Union obo Gaoshubelwe v Pieman's Pantry (Pty) Ltd,*[2] the Constitutional Court, as per the majority judgment, endorsed the findings of the second judgment in *Myathaza v Johannesburg Metropolitan Bus Services (SOC) Limited t/a Metrobus and Others*[3] that the provisions of the Prescription Act[4] are applicable to claims arising from allegations of unfair dismissal pursued under the Labour Relations Act.[5] Patently, it was found that a claim for unfair dismissal constitutes a debt as contemplated in section 16(1) of the Prescription Act[6] and that the running of prescription is interrupted by the referral of an unfair dismissal dispute to conciliation, a process commencing legal proceedings in terms of section 15(1) of the Prescription Act.[7]

[2] 2018 (5) BCLR 527 (CC) at paras at paras 195 to 204 (*Pieman's Pantry).*
[3] [2016] ZACC 49; (2017) 38 ILJ 527 (CC); [2017] 3 BLLR 213 (CC); 2017 (4) BCLR 473 (CC); 2018 (1) SA 38 (CC) at paras 83 to 90 (*Myathaza*).
[4] Act 68 of 1969.
[5] Act 66 of 1995 (LRA)
[6] Section 16(1) defines the scope of the provisions of the Prescription Act. It stated that: '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.'

[7] S 15 of the Prescription Act reads:

[10] Also, in terms of section 145(9) of the LRA, 'an application to set aside an arbitration award in terms of this section interrupts the running of prescription in terms of the Prescription Act in respect of that award'. However, since the award sought to be enforced was issued on 4 August 2003, section 145(9) is not applicable since it was promulgated in 2015.

[11] In terms of section 11 of the Prescription Act, the periods of prescription of debt shall be the following:

> '(a) thirty years in respect of—
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> (i) any debt secured by mortgage bond;
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> (ii) any judgment debt;
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> (iii) any debt in respect of any taxation imposed or levied by or under any law;
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> (iv) any debt owed to the State in respect of any share of the profits, royalties or any similar consideration payable in respect of the right to mine minerals or other substances;

'(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.

(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.

(3) If the running of prescription is interrupted as contemplated in subsection (1) and the debtor acknowledges liability, and the creditor does not prosecute his claim to final judgment, prescription shall commence to run afresh from the day on which the debtor acknowledges liability or, if at the time when the debtor acknowledges liability or at any time thereafter the parties postpone the due date of the debt, from the day upon which the debt again becomes due.

(4) If the running of prescription is interrupted as contemplated in subsection (1) and the creditor successfully prosecutes his claim under the process in question to final judgment and the interruption does not lapse in terms of subsection (2), prescription shall commence to run afresh on the day on which the judgment of the court becomes executable.

(5) If any person is joined as a defendant on his own application, the process whereby the creditor claims payment of the debt shall be deemed to have been served on such person on the date of such joinder.

(6) For the purposes of this section, 'process' includes a petition, a notice of motion, a rule *nisi*, a pleading in reconvention, a third party notice referred to in any rule of court, and any document whereby legal proceedings are commenced."

(b) fifteen years in respect of any debt owed to the State and arising out of an advance or loan of money or a sale or lease of land by the State to the debtor, unless a longer period applies in respect of the debt in question in terms of paragraph (a);

(c) six years in respect of a debt arising from a bill of exchange or other negotiable instrument or from a notarial contract, unless a longer period applies in respect of the debt in question in terms of paragraph (a) or (b);

(d) save where an Act of Parliament provides otherwise, three years in respect of any other debt.' (Emphasis added)

[12] In the present case, prescription was interrupted by the conciliation proceedings that commenced on 7 March 2000 and continued to be interrupted pending the review of the outcome certificate and the CCMA ruling dated 20 October 2003, dismissing Rofo's application to rescind the default award dated 4 August 2003. The award was never made an order of court but had been executed consequent to the certification in terms of section 143(3) of the LRA. Therefore, the applicable prescription period is three years.

[13] The applicants clearly abandoned the award consequent to the dismissal of their application to join the respondent as a party for purposes of execution on 14 August 2005. The prescription henceforth was uninterrupted. Evidently, when this application was launched on 8 March 2016, 11 years later, the claim had already prescribed. In fact, the applicants elected to institute a new dispute against the respondent which is subject to the review proceedings that are pending before this Court.

[14] As stated in *Myathaza*, [8]

'[28] …The purpose of the Prescription Act is to prompt creditors to institute legal proceedings without inordinate delays which may adversely affect the quality of adjudication if witnesses are no longer available or

[8] *Myathaza* , above n 3 at paras 28 to 30.

their memories have faded. Unquestionably the focus here is on having a claim settled without undue delay.

[30] That the protection of debtors and the preservation of quality and reliable evidence is the objective of the Prescription Act was reaffirmed in *Mdeyide*, where Van der Westhuizen J stated:

> "This Court has repeatedly emphasised the vital role time limits play in bringing certainty and stability to social and legal affairs and maintaining the quality of adjudication. Without prescription periods, legal disputes would have the potential to be drawn out for indefinite periods of time bringing about prolonged uncertainty to the parties to the dispute. The quality of adjudication by courts is likely to suffer as time passes, because evidence may have become lost, witnesses may no longer be available to testify, or their recollection of events may have faded. The quality of adjudication is central to the rule of law. For the law to be respected, decisions of courts must be given as soon as possible after the events giving rise to disputes and must follow from sound reasoning, based on the best available evidence.' (Emphasis added)

[15] It is almost 13 years after the last process on the matter and 18 years since the dismissal of the applicants. It is without doubt that the quality of adjudication of this matter would be hampered by the delay. On this point alone, the application stands to be dismissed.

[16] For completeness sake, I deem it necessary to comment on the applicant's substantive claim. It is common cause that Rofo was voluntarily liquidated on 19 June 2001 consequent by its creditors. The liquidation order preceded the award that the applicants seek to enforce. As such, when the liquidation order was granted, the applicants had already been dismissed and, as correctly submitted by the respondent's counsel, there was no persisting

employment contract. In *Hydro Colour Inks (Pty) Ltd v CEPPWAWU,*[9] the Labour Appeal Court, per Tlaletsi JA (As he then was), articulated the difference in effect between sections 197 and 197A as follows:

> 'I have already mentioned that the fact that Keep Inks is insolvent is common cause. Section 197A in so far as it states that the new employer is automatically substituted in the place of the old employer in all contracts of employment in existence immediately before the old employer's winding-up or sequestration finds application. It must be emphasised that the automatic substitution only relates to all "contracts of employment" in existence immediately before the old employer's winding-up or sequestration. This means that the new employer takes no responsibility for the actions of the old employer. By way of an example, any wrongful dismissal by the old employer remains a matter for the old employer.'

[17] It follows that the applicants' contracts of employment were never transferred to the respondent in terms section 197A of the LRA and, as such, their dismissal remained the matter for Rofo and not the respondent.

Conclusion

[18] In all the circumstances, I am persuaded that the award sought to be enforced by the applicants has prescribed.

Costs

[19] The Constitutional Court made it clear in *Zungu v Premier of the Province of KwaZulu-Natal and Others,*[10] that the rule of practice that costs follow the result does not apply in matters before this Court as orders of costs in this Court are to be made in accordance with the requirements of the law and fairness. In this instance, it would not be fair and just to award costs against individual litigants.

[20] I, therefore, make the following order:

Order

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[9] *Hydro Colour Inks (Pty) Ltd v CEPPWAWU* [2011] 7 BLLR 637 (LAC) at para 17.
[10] [2018] ZACC 1 at para 24 to 26.

1. The application is dismissed with no order as to costs.

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P. Nkutha-Nkontwana

Judge of the Labour Court of South Africa

Appearances:

For the applicants:	Mr S Masina of Tshiqi Zabediela Attorneys
For the second respondent:	Advocate WJ van Wyk
Instructed by	Coetzee & Louw Attorneys