**IN THE LABOUR APPEAL COURT OF SOUTH AFRICA, JOHANNESBURG**

Reportable

Case no: JA 122/14

In the matter between:

**SIZWE MYATHAZA** **Appellant**

and

**JOHANNESBURG METROPOLITAN BUS SERVICE**

**(SOC) LIMITED t/a METROBUS** **Respondent**

Case no: JA 39/14

In the matter between:

**DANIEL MAZIBUKO** **Appellant**

and

**CONCOR PLANT** **Respondent**

Case no: CA 3/14

In the matter between:

**CELLUCITY (PTY) LTD** **Appellant**

and

**CWU obo PETERS** **Respondent**

**Heard:** **27 August 2015**

**Delivered:** **6 November 2015**

**Summary**: **Prescription of arbitration awards – applicability of the Prescription Act to arbitration awards prior to the 2015 amendment of the LRA – different schools of thought – HELD-Prescription Act applicable to arbitration awards made in terms of the LRA. regardless of whether it is a compensatory or reinstatement award with or without back-pay. Court finding that an arbitration award under the LRA is not a judgment debt under the Prescription Act but a debt subject to a three-year prescriptive period. - Held that the debt encompassed in the award is due, unless otherwise indicated in the award upon delivery of the award and regardless of whether it is certified. - Held that the running of the prescription is interrupted by the process whereby the creditor claims payment for the debt and that final granting of the order necessary for the interruption to be successful. – Held that a review application and a warrant of execution do not interrupt prescription whereas an application to make an award an order of court does. Appeal in the Cellucity matter is upheld - Labour Court's judgment set aside - Appeal in the other two matters is dismissed.**

**Coram: Musi JA, Coppin JA *et* Makgoka AJA**

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**JUDGMENT**

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COPPIN JA

[1] The three matters are all appeals against judgments of the Labour Court. They were all argued in one session before us and all deal with the issue of prescription of arbitration awards made under and in terms of the Labour

Relations Act ("*LRA*").[1] There have been differences in opinion concerning the applicability of the Prescription Act ("*the Prescription Act*")[2] in respect of arbitration awards made under the LRA.[3]

[2] The appeal of *Myathaza* (Case No JA 122/14) is against the judgment of the Labour Court (Van Niekerk J). The court *a quo* set aside the award obtained by the appellant (i.e. the employee) having concluded that the Prescription Act applies to arbitration awards made in terms of the LRA and that the award made in favour of the employee had prescribed after three years.

[3] Similarly, the appeal in *Mazibuko* (Case No JA 39/14) was by the employee (appellant in that case) against the judgment of the Labour Court (Bank AJ) which found that the Prescription Act was applicable and that the award made in favour of the employee had prescribed after three years.

[4] The appeal in *Cellucity* (Case No CA 3/14) is an appeal by the employer (appellant) against a judgment of the Labour Court (Rabkin-Naicker J) dismissing the employer's application for a declarator that the award made in favour of the employee had prescribed. The Labour Court there held that the Prescription Act was not applicable to arbitration awards made in terms of the LRA.

[5] All of these matters involve arbitration awards made before 1 January 2015 and are to be decided on the LRA as it stood before the amendment of section 145 of that Act[4] and in particular, before the insertion of section 145(9) into that section which only applies to arbitration awards made after 1 January 2015. I shall deal in due course with the facts particular to each of the appeals.

[6] The following issues are common to all these appeals and arise for determination. Firstly, whether the Prescription Act applies to arbitration awards made under and in terms of the LRA. Secondly, what period of

[1] The Labour Relations Act No. 66 of 1995.
[2] The Prescription Act No. 68 of 1969.
[3] J Grogan in an article "*The Sands of Time: Prescription and the LRA*" *Employment Law* Vol 31, Part 1, February 2015, reviews the differing opinions as they pertain in the Labour Court. The author identifies the various approaches taken by the Labour Court in different matters.
[4] By the Labour Relations Amendment Act No. 6 of 2014.

prescription is applicable to such arbitration awards? Thirdly, whether an application brought to review and set aside an arbitration award interrupts the running of prescription, or whether such an application, otherwise, constitutes an impediment to the running of prescription as contemplated in section 13(1) of the Prescription Act.

[7] In respect of two of the matters, a further issue arises, namely, whether the certification of an award, as contemplated in section 143(3) of the LRA, has an effect on the running of prescription and in respect of the *Cellucity* appeal, whether the issue of a warrant of execution on the strength of a certified arbitration award has an effect on the running of prescription. Lastly, and in respect of all matters, and applying the law, whether having regard to their respective facts, the appeals ought to be upheld.

[8] I shall now deal with the issues in turn.

[9] This Court dealt with prescription of claims under the LRA in at least two judgments which are reported, namely, *Solidarity and Others v Eskom Holdings Ltd (Solidarity )*[5] and *SA Post Office Ltd v Communication Workers Union obo Permanent Part-time Employees (SA Post Office )*[6] where it was held that part of the employees' claim brought in terms of the LRA had prescribed in terms of the Prescription Act. However, those cases did not deal with arbitration awards and specifically with the situation where prescription was raised as a defence to defeat an employee's attempt to enforce an arbitration award after a review had been brought to have it set aside.

[10] In my view, the broad approach that the Prescription Act does not apply at all to LRA claims is not correct. I am not persuaded that this Court was wrong in its views regarding the applicability of the Prescription Act, in the context of deciding the issues in light of the facts in the *Solidarity* and *SA Post Office* matters, respectively, but I need not say anything further about those decisions.

[5] (2008) 29 ILJ 1450 (LAC).
[6] [2013] 12 BLLR 1203 (LAC).

[11] However, it is necessary to consider the main reasons for the view that the Prescription Act does not apply to LRA claims; the approach that it only applies to some kinds of arbitration award and not to others and the view that it applies to all arbitration awards made in terms of the LRA.

[12] In *Coetzee and Others v Member of Executive Council of the Provincial Government of the Western Cape* ("Coetzee"),[7] the Labour Court (Rabkin-Naicker J) expressed the same view that was expressed in the *Cellucity* appeal, namely that the Prescription Act was not applicable to claims brought in terms of the LRA, irrespective of the delay in enforcing the arbitration award. The Court there accordingly rejected an argument that the award had prescribed, despite the fact that there had been a delay of more than three years from the date the arbitrator ruled that the bargaining council had no jurisdiction to entertain the dispute and the referral of that dispute to the Labour Court.

[13] One of the reasons given for that decision was that if the Prescription Act applied, there would be an inconsistency between the Prescription Act and the LRA. The contention being that the LRA itself provides for specific periods for the lodging of claims and for condonation, while the Prescription Act provides different periods for the prescription of claims and for the enforcement of arbitration awards (i.e three years) and for the enforcement of Labour Court judgments (i.e 30 years). Facts such as those, according to the court in *Coetzee,* could cause difficulties, such as when a delay occurs because an arbitrator's ruling necessitates that the matter be referred to the Labour Court for review, and if the review succeeds, has to be referred back to the CCMA. A further reason cited was that in instances where the LRA allows for certain disputes to be passed from the CCMA to the Labour Court, it would make no sense to stipulate two different (artificial) periods of prescription, depending on the forum in which the dispute was to be resolved.

[14] In the *Cellucity* matter the Labour Court added yet another reason why the Prescription Act should not be applied to awards made in terms of the LRA, namely, because its application would frustrate employees' rights to fair labour

[7] (2013) 34 ILJ 2865 (LC).

practices and that this was against public policy. This being an adjunct to the viewpoint, that whereas the LRA is based in equity and fairness, the Prescription Act is not.

[15] In *CEPPWAWU on behalf of Le Fleur v Rotolabel (a division of Bidpaper Plus (Pty) Ltd* ("*Rotolabel*"),[8] the Labour Court (per Van Niekerk J, who also decided the matter of *Myathaza,* which is one of the appeals before us) identified at least four different approaches to the question whether the Prescription Act applies to any claims under the LRA. Subscribing to the view that the Prescription Act applied to all arbitration awards made in terms of the LRA, irrespective of whether they were for compensation, with, or without, reinstatement and with, or without, back pay, the Labour Court was critical of, and rejected the other approaches.

[16] In particular, with reference to the view held that by the Court in *Coetzee* and *Cellucity*, the court in *Rotolabel* noted, regarding the argument that the LRA provided for its own time periods, that those periods applied to the pre-arbitration and pre-adjudication phases and did not apply to the periods after the statutory dispute resolution processes had been finalised. Further, that there was no inconsistency between the two Acts because the periods in the Prescription Act would apply to the period after finalisation of the dispute resolution process and that the strict time limit in the Prescription Act, namely, three years, was consistent with one of the main objects of the LRA, which is to promote the speedy resolution of disputes.

[17] With regard to the argument of inconsistency in the prescription time periods provided for by the two Acts if a dispute were to be passed from, say the CCMA to the Labour Court, it was held that the solution was to be found in section 158(1)(c) of the LRA, which empowers the Labour Court to make any arbitration award an order of court. The person in whose favour an award is made is thereby afforded an opportunity to make an award (which would otherwise have prescribed under the Prescription Act in three years) into an order of court (which would only prescribe in thirty years) and that such a

[8] [2015] 2 BLLR 147 (LC).

person would only have himself or herself to blame if the opportunity to make the arbitration award an order of court was not made use of.[9]

[18] The court in *Rotolabel* was further critical of the views expressed in *Coetzee* and *Cellucity* in light of this Court's approach in *SA Post Office* and *Solidarity* in respect of the applicability of the Prescription Act to the claims in those matters and, *inter alia,* of the fact that the LRA did not exclude the application of the Prescription Act. The court also noted that the 2014 Labour Relations Amendment Act, which only came into operation on 1 January 2015, fortified its view that the Prescription Act applied to all awards issued under the LRA. The court's view in *Rotolabel* was that if it was not the case, the legislature would not have enacted the new section 145(9).

[19] The court in *Rotolabel* also held, following the decision in *POPCRU obo Sifuba,*[10] that considerations of equity should not to be brought into account to determine the application of prescription if a point of prescription is properly taken by a party; that party would be entitled as of right to have the plea of prescription upheld.

[20] Counsel for Cellucity in the appeal before us, relied on the decision of *Rotolabel* and submitted that the Prescription Act was indeed applicable to arbitration awards made in terms of the LRA.

Discussion

[21] In *Road Accident Fund and Another v Mdeyide,*[11] Van der Westhuizen J, who wrote the judgment of the Court, stated that:

> '*Whether the provisions of the Prescription Act apply is determined by section 16 of the Act. It states that the provisions apply save insofar as they are inconsistent with the provisions of any Act of Parliament…*'[12]

[9] See also *POPCRU obo Sifuba v Commissioner of the SAPS and Others* ("*POPCRU obo Sifuba")* (2009) 30 ILJ 1309 (LC); [2009] 12 BLLR 1236 (LC) at para 30.
[10] Supra.
[11] 2011 (2) SA 26 (CC).
[12] At para 43.

[22] Section 16(1) of the Prescription Act deals with the applicability of its Chapter III, which includes sections 10 to 16 (inclusive) relating to the prescription of debts. It provides:

> '*(1) Subject to the provisions of subsection (2)(b), the provisions of this chapter shall, save insofar 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.*"

[23] The Prescription Act in its general chapter (i.e. Chapter IV) contains provisions precluding its application in specific instances. For example, section 18 provides that the Prescription Act shall not affect the provisions of any law prohibiting the acquisition of land or any right in land by prescription. Section 20 provides that the Act does not apply insofar as any right or obligation of any person is governed by "*black law*". But of significance, there is no provision expressly rendering the Prescription Act inapplicable to arbitration awards issued under the LRA.

[24] In *Moloi and Others v Road Accident Fund,*[13] it was held that:

> '*Although section 16 of the Prescription Act is not drafted as clearly as it might be it is reasonably plain that what is intended is that the provisions of Chapter III will apply to all debts save where they are ousted by the provisions of an Act of Parliament which is inconsistent and then only to the extent of the inconsistency.*'[14]

[25] In order to determine the applicability issue, it is therefore necessary to consider whether an arbitration award is a "*debt*" as contemplated in section 16 of the Prescription Act and whether the LRA has in its provisions specified a period within which the arbitration award (i.e. if it is a debt) is to be paid (or satisfied). And if so, whether in that regard, the provisions of the Prescription Act (i.e. Chapter III) are inconsistent with any of those provisions in the LRA.

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[13] 2001 (3) SA 546 (SCA).
[14] At para 13.

[26] If the arbitration award is not a "debt" as contemplated in section 16(1) of the Prescription Act that is the end of the enquiry, because the Prescription Act can only apply to a "debt"[15] as contemplated in that Act.

[27] If the arbitration award is a "debt", or more specifically, embodies a "debt" and the LRA has in its provisions specified a period within which the "debt" must be paid (or satisfied), but those provisions are inconsistent with the provisions of the Prescription Act, then the latter Act will not be applicable to the arbitration award issued under the LRA. However, if the LRA has not specified such a period, or if it has, but those provisions are not inconsistent with the provisions in Chapter III of the Prescription Act, then the latter Act will be applicable to the arbitration award.

[28] Before I embark on an analysis of those issues, it is necessary to deal with the purpose(s) of extinctive prescription.

[29] In his work, "*Extinctive Prescription*", M Loubser,[16] in my view correctly, states that:

> '*The main object of extinctive prescription is to create legal certainty and finality in the relationship between the parties after the lapse of a period of time, and the emphasis is on the protection of the defendant against a stale claim that has existed for such a long time that it becomes unfair to require the defendant to defend himself against it. The emphasis is on the protection of the defendant because the claimant is responsible for enforcing his right timeously and must suffer the consequences of failure in this regard. Essentially extinctive prescription embodies a desire for finality and serves the common good by creating legal certainty in individual cases.*'[17] [Footnotes omitted]

[30] In *Mohlomi v Minister of Defence,*[18] Justice Didcott stated the reason for time limits in litigation: He said:

[15] Or more specifically, to the kinds of "debt' specifically contemplated in the Prescription Act.
[16] M Loubser *Extinctive Prescription* (Juta & Co 1996).
[17] At 33.
[18] 1997 (1) SA 124 (CC).

> '*Rules that limit the time during which litigation may be launched are common in our legal system as well as many others. Inordinate delays in litigating damage the interests of justice. They protract the disputes over the rights and obligations sought to be enforced, prolonging the uncertainty of all concerned about their affairs. Nor, in the end is it always possible to adjudicate satisfactorily on cases that have gone stale. By then witnesses may no longer be available to testify. The memories of ones whose testimony can still be obtained may have faded and become unreliable. Documentary evidence may have disappeared. Such rules prevent procrastination and those harmful consequences of it. They thus serve a purpose to which no exception in principle can cogently be taken.*'[19] (emphasis added)

[31] In *Uitenhage Municipality v Malloy,*[20] Mahomed CJ said the following about the purposes of the Prescription Act:

> '*One of the main purposes of the Prescription Act is to protect a debtor from old claims against which it cannot effectively defend itself because of loss of records or witnesses caused by the lapse of time. If creditors are allowed by their deliberate or negligent acts to delay the pursuit of their claims without incurring the consequences of prescription that purpose would be subverted.*'[21]

[32] In *Road Accident Fund and Another v Mdeyide,* Justice Van der Westhuizen stated with regard to the purpose and necessity of time limits, the following:

> '*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*

[19] At para 11.
[20] (1998) 19 ILJ 757 (SCA).
[21] At 13.

*their recollection of events may be faded. The quality of adjudication is central to the rule of law.*"[22] [Footnote omitted]

[33] A common thread to be found in the above quotations is that prescription, *per se*, is justified and necessary. It is clear from section 16(1) of the Prescription Act that every debt, contemplated in that section, must in our law prescribe within a certain period. If the Act of Parliament under which the debt resides does not prescribe that period, then the Prescription Act is applicable and it prescribes within that period. Prescription is based on considerations of fairness and equity and it is therefore not correct to argue that prescription is inconsistent with such considerations. Those hallowed concepts do not only apply to one party, but apply to all parties including employers and employees.

*Is an arbitration award issued under the LRA a "debt" as contemplated in the Prescription Act?*

[34] One of the approaches identified by the court in *Rotolabel* was that adopted in *Circuit Breakers Industries Limited v National Union of Metal Workers of South Africa obo Hadebe and Others* ("Circuit Breakers")[23] where the application of the Prescription Act was merely limited to awards granting compensation and not regarded as applicable to orders of reinstatement. The court in *Circuit Breakers* was not content with an arbitration award *per se* being a "debt", but looked at the nature of the relief in the award. While the court regarded an award of compensation as a "debt" as contemplated in the Prescription Act, it regarded the award of reinstatement as an order of specific performance under the common law, but not as a "debt" in terms of the Prescription Act.

[35] The term "debt" is not defined in the Prescription Act, but courts have held that the term should be given a broad and general meaning.

[22] At para 8. See also *Brummer v Minister for Social Development and Others* 2009 (6) 323 (CC) at para 51; and *POPCRU obo Sifuba* at paras 28-30 (inclusive).
[23] (2014) 35 ILJ 1261 (LC).

[36] In *Electricity Supply Commission v Stewarts and Lloyds of SA (Pty) Ltd (Electricity Supply Commission),*[24] it was held that a "'*debt*" means "*that which is owed or due; anything as money, goods or services which one person is under an obligation to pay or render to another*".

[37] In an earlier decision, *Leviton and Son v De Klerk's Trustee,*[25] which was cited with approval in the *Electricity Supply Commission* case, '*debt*' was held to be "*whatever is due – debitum – from any obligation*".

[38] In a more recent decision, *Desai NO v Desai,*[26] it was held that the term "*debt*" has a wide and general meaning and includes an obligation to do something or refrain from doing something.

[39] In a number of decisions of the Labour Court, which are referred to in *Rotolabel,* it has been held that all arbitration awards for compensation and /or reinstatement with, or without, back pay, were "*debts"* as contemplated in the Prescription Act.

[40] Treating a compensation award differently from a reinstatement award appears to be erroneous in light of the wide general meaning to be given to the term "*debt*". Both those kinds of award impose obligations on the person of entity against whom the award is made. That person or entity has an obligation to pay compensation and/or to reinstate as stated in the award. The award creates a "*debt*" for that person and/or entity.

[41] In my view any arbitration award that creates an obligation to pay or render to another, or to do something, or to refrain from doing something, does meet the definitional criteria of a '*debt*' as contemplated in the Prescription Act.

[42] Generally, arbitration awards pertaining to unfair dismissals, in which compensation and/or reinstatement, with or without back pay are awarded, shall constitute '*debts*' as contemplated in the Prescription Act.

[24] 1981 (3) SA 340 (A) at 344F-G.
[25] 1914 CPD 685 at 691 and following.
[26] 1996 (1) SA 141 (A) at 146H-147A.

*Does the LRA prescibe a period within which the arbitration awards made under theLRA are to be paid, recovered or satisfied?*

[43] It is clear from a close reading of the LRA that even though it stipulates timeframes in relation to arbitration awards, those timeframes are primarily of application to the stage prior to the making of the award. There is no provision in the LRA which prescribes a period or time limit within which the arbitration award is to be executed, or within which the "*debt*" embodied in, or represented by, the award is to be recovered or enforced. There is therefore in my view nothing inconsistent in the LRA and the Prescription Act regarding the imposition of a prescriptive period in respect of the execution or enforcement of arbitration awards, which constitute "debts" as contemplated in the Prescription Act.

[44] In those circumstances, on a proper construction of section 16(1) of the Prescription Act, the provisions of Chapter III of that Act "*shall*" apply to arbitration awards that constitute "debts" as contemplated in that Act.

[45] Having determined that arbitration awards, generally, constitute "debts" as contemplated in the Prescription Act and that the provisions of Chapter III of the Prescription Act will be applicable to them, it needs to be determined what prescriptive period would be applicable to such "debts".

[46] The period is dependent on whether an arbitration award constitutes "*a judgment debt*", in which case a 30 year prescription period would be applicable, or a simple "*debt*", in which case a three year prescriptive period would be applicable.

[47] The argument raised on behalf of the appellant in the *Cellucity* appeal and by the respondents in the other two appeals is that the respective arbitration awards would be simple "debts" and not "judgment debts" as contemplated in the Prescription Act and would thus be subject to a prescriptive period of three years. On the other hand, it was argued on behalf of the appellants in the matters of *Myathaza* and *Mazibuko* that the awards in those matters are "*judgment debts*" and therefore have a 30 year prescriptive period.

[48] Counsel for the appellant, in the *Myathaza* appeal, submitted with reference to a number of decisions referred to below, that because "*our courts consider an arbitration award as a 'judgment'"* and the term has been used "interchangeably" with the term "award", an arbitration award is therefore a "judgment debt". [27] In my view, this argument is based on a misreading of those decisions. There are significant differences between judgments and orders of court and arbitration awards. Using those terms interchangeably does not make one into the other.

[49] Those decisions are also distinguishable on their facts. None of them were concerned with whether an arbitration award, let alone an arbitration award made in terms of the LRA, constituted a "*judgment debt"* as contemplated in the Prescription Act. Using the terms "award" and "judgment" interchangeably, does not clothe one with the unique characteristics of the other.

[50] In *Blaas v Athanassiou,*[28] the court (possibly *obiter*) accepted as an argument, that because a clause in a arbitration agreement specifically provided that *inter partes* the award had the status of an order of court, the prescriptive period applicable to court orders (i.e. namely thirty years) was applicable to the award.[29] But that decision is also distinguishable from the facts of the appeals before us. The arbitrations in terms of the LRA are different from private arbitrations. They are not conducted in terms of the provisions of the LRA.

[51] The LRA clearly distinguishes between arbitration awards and court orders made in terms of that Act. Although section 143(1) of the LRA provides that an arbitration award issued by a Commissioner is final and binding and may be enforced as if it were an order of court (unless it is an advisory arbitration award) and although, in terms of section 143(2), if it is for the payment of a

[27] Counsel for the appellants in *Myathaza* referred to *Die Akademik Fyodorov: Government of the Russian Federation and Another v Marine Expeditions Inc* 1996 (4) SA 422 (C) at 446E-I; *MV Yu Long Shan: Drybuck SA v MV Yu Long Shan* 1998 (1) SA 646 (SE) at 655A; *Manning v Metro Nissan – A Division of Venture Motor Holdings Ltd and Another* (1998) 19 ILJ 1181 (LC) at para 55; *Armstrong v Tee and Others* (1999) 20 ILJ 2568 (LC) at para 22; *Volkswagen SA (Pty) Ltd v Brand NO and Others* (2001) 22 ILJ 1993 (LC) at para 110; *Balasana v Motor Bargaining Council and Others* (2011) 32 ILJ 297 (LC) at para 10.

[28] 1991 (1) SA 723 (W) at 725H-I.

[29] Also referred to in *POPCRU obo Sifuba* at para 32.

sum of money, it attracts interest like in a judgment debt, section 143(3) provides that it may only be enforced as contemplated in section 143(1) (i.e. as if it were a court order), if the director has certified that it is an award as contemplated in section 143(1).

[52] Furthermore, an arbitration award in terms of the LRA is not subject to an appeal like a judgment or order of the Labour Court, but it is subject to review. In contrast, an order of judgment of the Labour Court is not subject to review.[30] A court order or a judgment also does not require certification for its execution.

[53] Unequivocal confirmation that an arbitration award is not equal to (or equivalent to) an order, or judgment of the Labour Court is provided by section 158(1)(c) of the LRA, which empowers the Labour Court to make "*any arbitration award an order of court*". If they were the same thing, section 158(1)(c) would be totally superfluous.

[54] In the circumstances, to give the term "*judgment debt*" in the Prescription Act a meaning which includes "*arbitration awards*" made under the LRA, would unduly strain the language of the Prescription Act. Orders or judgments of the Labour Court would clearly fall within that meaning, but not arbitration awards made under the LRA, which differ from Labour Court orders and judgments in significant respects.

[55] Even though, generally, an arbitration award under the LRA is not a "*judgment debt*" under the Prescription Act, it comfortably satisfies the definitional criteria of a mere "*debt*" under that Act. The other categories of debt in the Prescription Act are clearly not applicable. Accordingly, a three year prescriptive period is applicable to such arbitration awards (i.e. the debts embodied in them) generally. That is, in the absence of an Act of Parliament providing otherwise.[31]

[30] Even if it was made by the Labour Court pursuant to the proceedings contemplated in section 159(2)(b) of the LRA. See *SAA v Jansen-Van Vuuren and Another* (2014) 35 ILJ 2774 (LAC). .Also compare *Kilroe-Daley v Barclays National Bank Ltd* 1984 (4) 609 (A) at 629F-I.
[31] See section 11(d) of the Prescription Act 68 of 1969.

[56] In terms of section 10(1) of the Prescription Act, subject to the provisions of Chapters III and IV of that Act, a debt shall be extinguished by prescription after the lapse of the period which, in terms of the relevant law, applies in respect of the prescription of such a debt.

[57] Section 12 of the Prescription Act stipulates when prescription begins to run and provides, in essence, in section 12(1) that prescription commences to run as soon as the debt is "*due*".

*When is the debt "due" in respect of an arbitration award made under the LRA?*

[58] A debt is due "*when the time arises for the performance by the debtor of the obligation…*".[32]

[59] The inception of prescription in respect of such awards depends on the wording of the award. It will generally be clear in respect of the time for the performance by the debtor of the obligation(s) embodied in it. The debt embodied in, or represented by the award, is generally due, unless the award provides otherwise, upon the issue or handing down of the award. The general position will thus be that a person or entity in whose favour it is made may immediately, unless the award provides otherwise, claim satisfaction of the debt embodied in the award.

[60] Section 143(3) of the LRA provides that an arbitration award may only be enforced in terms of section 143(1), i.e. as if it were an order of the Labour Court, if the director has certified that it is an arbitration award as contemplated in section 143(1)[33].

[61] The question that immediately arises, with particular reference to the appeals before us, is whether the certification, contemplated in section 143(3) of the LRA, affects the inception of prescription in respect of the award, or more particularly, whether the lack of certification of an award means that the award, or more specifically the "debt" embodied in the award, is not due.

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[32] See *Uitenhage Municipality v Malloy (supra*).

[33] This Court was not addressed on the position after the amendment of s143 by s20 of Act No. 6 of 2014. Accordingly the judgment only deals with that section as it read before such amendment.

[62] The certificate is merely required to enforce arbitration awards as if they were orders of the Labour Court.[34] But compliance with the award is not delayed pending certification. Performance by the debtor of the obligation(s) embodied in the reward is not dependent upon, or subject to, the certification contemplated in section 134 of the LRA.

[63] Certification therefore has nothing to do with whether the award is due or not, but is part of the process of executing an award as if it is an order of the Labour Court.

[64] We were not specifically addressed on whether the issue of a warrant of execution on the strength of a certified award interrupts the running of prescription in respect of the award. It is however a feature of the *Cellucity* appeal and requires to be dealt with, albeit, very briefly. In terms of section 143 of the LRA, properly construed, a warrant of execution may be issued on the strength of an award for the payment of money (i.e. *ad pecuniam solvendam*). Although this may be a necessary step to obtain satisfaction of the award, it does not interrupt the running of prescription in respect of the award, because it is not a "process" as envisaged in section 15 of the Prescription Act, which deals with the judicial interruption of prescription. In order for it to constitute the "process" envisaged in that section, it must result in a "final judgment", because the section provides that in order for the "process" to effectively interrupt prescription, the creditor must "successfully prosecute his claim under the process in question to final judgment".

[65] Section 13 of the Prescription Act deals with the delay in the completion of prescription in certain circumstances. In my view, it does not apply here. The reliance by some of the parties before us on section 13(f) of the Prescription Act, which provides that there would be a delay in the case where "*the debt is the object of a dispute subjected to arbitration*" is misplaced. This is because an arbitration award itself is the debt, but is not the object of the dispute subjected to arbitration. The arbitration award is the final outcome of the

[34] See section 143(3) read with section 143(1) and 143(4) of the Labour Relations Act.

arbitration and it replaces the original debt which was the object of the dispute subjected to arbitration.[35]

[66] Section 14 of the Prescription Act provides that prescription of a debt shall be interrupted by an acknowledgment (be it tacit or express) of liability by the debtor. The application of the section does not require consideration here because of the facts of the appeals before us. However, the appeals require us to consider the application of section 15 of the Prescription Act which deals with the judicial interruption of prescription.

*The interruption of prescription*

[67] The questions that arise for determination in this regard are whether an application to make an arbitration award made in terms of the LRA, an order of court, interrupts prescription and, also more importantly, whether an application to review an arbitration award made and issued in terms of the LRA (i.e. before 1 January 2015) interrupts prescription of the arbitration award.

[68] Section 15(1) of the Prescription Act provides that the running of prescription shall, subject to the provisions of section 15(2), "*be interrupted by the service on the debtor of any process whereby the creditor claims payment of the debt*". It is important to note that for the prescription to actually be interrupted, the creditor must "*successfully prosecute his claim under the process in question to final judgment*". If he does not and the debtor does not acknowledge liability, prescription shall not be deemed to have been interrupted.

[69] An amendment to section 145 of the LRA inserts, *inter alia,* a new section 145(9) which provides that "*an application to set aside an arbitration award in terms of this section interrupts the running of prescription in terms of the Prescription Act, 1969 (Act No 68 of 1969) in respect of that award*".

[70] Section 145(10) of the LRA as amended, which is also a new insertion provides, *inter alia,* that section 145(9) only "*applies to an arbitration award*

[35] See *POPCRU obo Sifuba* (supra) at para 32.

*issued after such commencement date*". The commencement date is 1 January 2015.

[71] It is thus clear what the position is in relation to reviews for the setting aside of awards issued after 1 January 2015 is, because the LRA in section 145(9) now specifically provides that such reviews interrupts the running of prescription in terms of the Prescription Act. However, the issue to be decided pertains to the position regarding awards issued prior to 1 January 2015 (i.e. prior to the amendment or the commencement of the amendment), when there was no operative provision in the LRA to the effect that an application to set aside an arbitration award interrupts the running of prescription.

[72] I agree with the argument that it is not correct to utilise the amendment as justification or fortification for the view that the position in the amendment was always the legislative intent or purpose. The Legislature may simply have had nothing to say on the matter before that or may have been content with the strict position under section 15 of the Prescription Act, or may since have changed its mind on the matter, hence the amendment. It is noteworthy that the amendment is expressly not retrospective.

[73] Section 15(1) of the Prescription Act is unambiguous and it is plain that a review to set aside an award is not "*process whereby the creditor claims payment of the debt*". On the contrary, it is a process whereby the debtor seeks to set aside the debt. Such a review, therefore, does not interrupt prescription.

[74] But for the amendment contained in section 145(9), the same principle would have pertained to reviews in respect of awards made after January 2015. Section 145(9) makes, or introduces, a special exception, but it is not retrospective and cannot be applied to reviews in respect of awards issued before 1 January 2015.

[75] In any event, it has long been recognised in our law that a creditor cannot "*by his conduct postpone the commencement of prescription.*"[36] Thus a creditor cannot by his own conduct in bringing a review application, interrupt or postpone the running of prescription in respect of the award, unless the law provides otherwise, as is the case under the amendment.

[76] An application to make an arbitration award an order of court could however be construed as a "*process whereby the creditor claims payment of the debt*". It is the substance rather than the form of the application that matters. By bringing such an application, the creditor is in effect asking the court to order the debtor to pay the debt (represented by the award).

[77] The application to make an award a court order will interrupt prescription by its mere service on the debtor. But for it to actually and effectively interrupt prescription, the creditor will have to prosecute his claim under that process to final judgment.[37]

[78] In argument, counsel pointed to the fact that where a review is pending, the Labour Court is not likely to make the award an order of court. That may be the case, as was discussed by the Labour Court in *Rotolabel* and *POPCRU obo Sifuba ,*[38] amongst others, but there is nothing preventing a debtor to, at any time after the issue of the arbitration award, and before its prescription, bring an application to make such an award an order of court.

[79] The review is not a bar to the bringing of an application to make the award an order of court. In addition, it is also important to note that it is not the granting of the order in such an application that will trigger the deemed interruption of prescription, but the mere service of the application for such an order, although the final granting of the order is necessary for the interruption to be successful in the end.

[80] I now turn to consider the facts of each of the appeals.

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[36] See *Uitenhage Municipality v Malloy (supra*) where the court referred with approval to what had been said in that regard in *Benson and Another v Walters and Others* 1981 (4) SA 42 (C) at 49G and in *The Master v IL, Back and Co Ltd and others 1983 (1) SA 986 (A)* at 1005G.

[37] An acknowledgement of liability by the debtor will also interrupt prescription. See sections 14 and 15 of the Prescription Act.

[38] *Supra* at pages 1244-1245 at paras 34-35 inclusive.

*Re Sizwe Myathaza v Johannesburg Metropolitan Bus Service (Soc) Limited t/a Metrobus* (Appeal Case JA 122/14)

[81] For the purposes of deciding the point of prescription, the following facts are relevant: The appellant was employed by the respondent as a bus driver in May 2001. On 20 September 2007, he was suspended pending an investigation into ticketing irregularities. In terms of an agreement entered into by the two unions, that is IMATU and SAMWU, with the respondent, all employees charged for ticketing irregularities were to return to work. The appellant failed to return to work.

[82] The appellant was charged with unauthorised absenteeism and, subsequently as a result, dismissed on 9 July 2008. He referred the dispute to the South African Local Bargaining Council (SALBC) for conciliation and arbitration. Following an arbitration in that forum, the arbitrator issued an award in favour of the appellant on 17 September 2008.

[83] The arbitrator found that the appellant's dismissal was both substantively and procedurally unfair and she ordered the respondent to reinstate the appellant with full retrospective effect. The award, in which the appellant is referred to as "*the applicant*", reads as follows:

> '*The applicant's dismissal was both substantively and procedurally unfair. The respondent City of Johannesburg (Metrobus) is ordered to reinstate the applicant, Sizwe Myathaza, with retrospective effect from his date of dismissal, 9 July 2008 on the same terms and conditions that were applicable but for his unfair dismissal and without any loss of benefits that would have accrued to him.*
>
> *The applicant is ordered to submit valid proof of his remuneration to calculate the back pay payable to him in terms of this award, within five days of receipt of this award.*
>
> *The applicant is ordered to report to work within five days of receipt of this award.*
>
> *No costs order is made…*'

[84] In a supplementary award, which is also dated 17 September 2009, the arbitrator calculated the actual amount of back pay which the respondent had to pay the appellant. According to the supplement, the respondent was to pay the appellant an amount of R90 747,86 (less the statutory tax that was payable on such amount) within 14 days from the receipt of the award.

[85] It does not appear *ex facie* the award that either the main award or the supplementary award had been certified as contemplated in section 143(1) of the LRA.

[86] On 21 October 2009, the respondent delivered an application in terms of section 145 of the LRA to review and set aside the award. The appellant opposed the application. All affidavits and heads of argument were filed and the matter was ripe for hearing.

[87] On 27 August 2013, the appellant delivered an application in terms of section 158(1)(c) of the LRA to make the award an order of court. The respondent opposed the application on two grounds namely that the application to review the award was still pending and that the award had prescribed after three years (i.e. by 16 September 2012).

[88] The appellant, in a replying affidavit, averred in essence, that the award was for reinstatement and not for monetary compensation; that the only debt that flows from the reinstatement order was the order relating to the payment of back pay. It was also averred, that the reinstatement order had the effect of restoring the contract of employment as if no dismissal had occurred. And that the non-payment by the respondent of the remuneration and other benefits, the appellant was entitled to by virtue of his reinstatement, amounted to a breach of contract giving rise to an independent cause of action, which "*results in a series of 'debts' arising from month to month"*; otherwise the reinstatement order itself was not a "*debt*". Counsel for the appellant argued that the order "*does not give rise to new rights and obligations as it merely restores the rights and obligations that are contained in the contract of employment which was unfairly terminated by the employer*".

[89] The matter was set down for hearing on 9 October 2014. The Labour Court (Van Niekerk J), essentially adopting the same reasons or views expressed in *Rotolabel,* rejected the appellant's argument that the order for reinstatement was not a "debt". The court held that an arbitration award under the LRA was a "debt" for the purposes of the Prescription Act, irrespective of whether it was an award for reinstatement or compensation. The Labour Court in *Rotolabel*, had referred and relied on what was held in the *Electricity Supply Commission* case[39] regarding the meaning of "*debt*", and what *Loubser* had said about the use of the word "*debt*" in the Prescription Act[40] namely, that it is used primarily to describe the "*correlative of a right or claim to some performance, in other words as the duty side of an obligation…produced by a contract, delict, unjust enrichment, statute or other source*". The court in *Rotolabel* also relied on a similar conclusion of J S Saner.[41]

[90] The court *a quo* upheld the point of prescription, having found that the arbitration award issued in favour of the appellant had prescribed, and consequently dismissed the appellant's application to make the award an order of court.

[91] In his application for leave to appeal against that decision, the appellant essentially alleged that the court *a quo* had erred in finding that an arbitration award constitutes a "*debt*" under the Prescription Act; and that it prescribes within three years after publication; and in coming to the same conclusions as in *Rotolabel*. The appellant stated that the court *a quo* "*ought to have held that an arbitration award for reinstatement is a restoration of a contract of employment…*" and that "*an award for reinstatement does not constitute an obligation sounding in money, goods or services*".

[92] In argument before us, counsel for the appellant submitted that: the Prescription Act did not apply; that an arbitration award was not a "*debt*" for the purposes of the Prescription Act; that if it was a "*debt*", it was a "*judgment debt*" that prescribed after 30 years; that even if it was a "*debt*" that prescribed

[39] (*Supra*) at 344F-G.
[40] See M Loubser "*Extinctive Prescription*" page 100 *et seq*.
[41] See J S Saner "*Prescription in South African Law*" at 3-45.

after three years, an application to review the award interrupted prescription; that in any event, prescription ran from month to month, meaning that a portion of the appellant's claim "*remains alive and enforceable*"; and, lastly, that "*that there are public policy and interest of justice considerations that militate against prescription of a reinstatement arbitration award*". The appellant also moved to make the award for reinstatement and the payment of back pay an order of court.

[93] I have dealt with these arguments earlier and each of them stands to be rejected in light of what I have stated earlier. The Prescription Act applies to all "*debts*". The arbitration award in question is a "*debt"* as contemplated in the Prescription Act. It creates an obligation(s). The employer has (in terms of the award) an obligation to reinstate on the terms stated by the Court, including paying the back pay. It is not a "*judgment debt",* but merely a "*debt*". In terms of the Prescription Act, a three year prescriptive period applies. The application for review did not interrupt prescription. While an application to make an award an order of court does interrupt prescription, at the time the appellant brought that application the period of prescription had already run, i.e. the debt (embodied in the award) had already been extinguished by prescription. There is no public policy or interest of justice considerations that militate against prescription being applicable to an award for reinstatement. On the contrary, there are compelling public policy and interest of justice considerations that justify the prescription of such awards. The obligation to reinstate the appellant and to pay him back pay became due at the time the award was issued, i.e. published. Prescription began to run from then on and the "debt" became prescribed after three years.

[94] In the circumstances, the court *a quo* correctly held that the arbitration award issued in favour of the appellant (*Myathaza*) had prescribed and consequently, correctly dismissed the application to make the award an order of court. The appeal therefore stands to be dismissed.

*Re the appeal of Mazibuko v Concor Plant* (Appeal Case No JA 39/14)

[95] The appellant in this matter, Mr Mazibuko, was employed by the respondent, which operates in the building and civil engineering sector, until his retrenchment by the respondent on 24 April 2009.

[96] Mr Mazibuko referred a dispute of unfair dismissal to the CCMA. After arbitration proceedings in that tribunal, the arbitrator (i.e. the Commissioner) issued an arbitration award in favour of Mr Mazibuko on 24 September 2009. The Commissioner found that his dismissal was substantively unfair. The Commissioner did not order reinstatement but merely awarded Mr Mazibuko monetary compensation. In terms of the award, the respondent was to pay Mr Mazibuko an amount of R21 000,00, being the equivalent of seven months' salary within 14 days of receipt of the award.

[97] The respondent delivered an application to review the award on 19 November 2009. The award was filed together with the record of the arbitration proceedings on 7 September 2010. The appellant delivered its answering affidavit to the review on 5 October 2010. After an application for condonation was filed on 25 January 2012 by the respondent for the late filing of the notice and the record, the review application was set down for hearing on 2 February 2012.

[98] On that occassion, a postponement was granted in favour of the appellant to enable him to file the necessary papers opposing the application for condonation, or alternatively, to bring an application to dismiss the review. Answering and replying affidavits, respectively, were filed. The respondent applied on 26 April 2012 to the Registrar to enrol the matter for hearing. The date allocated for hearing was 10 January 2013.

[99] On 10 December 2012, the respondent delivered an application for the dismissal of the appellant's claim on the grounds that it had prescribed. The appellant did not oppose that application, but, instead, on 22 December 2012, delivered an application to make the arbitration award an order of the court and also filed a response to the respondent's application for condonation.

[100] On 9 January 2012, the respondent opposed the appellant's application for the dismissal of the review and his application to make the award an order of court and filed a reply in respect of the condonation application.

[101] All these matters first came before the Labour Court (Bank AJ) on 10 January 2013, but were postponed to 25 January 2013 to allow the parties to submit written heads of argument in respect of the prescription issue and costs.

[102] These matters were then argued before the Labour Court on 25 January 2013 and judgment was handed down on 18 July 2013. The court *a quo* held that the applicant's arbitration award had prescribed on 8 October 2012. The appellant's application to dismiss the respondent's review application was also dismissed.

[103] The court *a quo,* sympathising with appellant about this "*hard*" outcome, remarked that he ought to have been advised at the earliest date to *inter alia*, apply to make the award an order of court. When he eventually brought an application to dismiss the review, which included a prayer to make the arbitration award an order of court, it was too late, because the award had already prescribed about three months earlier. To interrupt prescription that application ought to have been brought before 8 October 2012.

[104] The court *a quo,* accordingly, upheld the respondent's application in terms of Rule 11, for the appellant's claim (in terms of the award) to be dismissed on the grounds that it had prescribed. The court *a quo* made no order as to costs.

[105] The court *a quo* granted the appellant leave to appeal to this Court on a narrow point relating to prescription, in particular, in respect of whether the "*debt*" was proven to be due. The court *a quo* rejected arguments that the award was a "*judgment debt*" and also rejected the appellant's reliance on section 13(1)(f) of the Prescription Act and arguments that the service of the award had interrupted prescription.

[106] Before us the appellant's attorney argued that the Prescription Act did not apply because it was inconsistent with the LRA; alternatively that an arbitration award made in terms of the LRA, even though not appealable, was

the "*equivalent of a judgment or order of any court of law and not merely a claim*"; that at worst, it was a "*judgment debt*" that prescribed after 30 years.

[107] The appeal is opposed and contradicting argument was advanced. I have traversed the appellant's arguments earlier. They do not stand up to scrutiny. In my view, the court ***a quo's*** decision is unassailable and the appeal stands to be dismissed.

*Re Cellucity (Pty) Ltd v CWU obo Peters* (Appeal No CA 3/14)

[108] The appellant in this matter, Cellucity, dismissed Mr Peters, its employee for unauthorised absenteeism on 3 June 2009.

[109] Mr Peters caused the dispute to be referred to the CCMA which found that his dismissal was substantively unfair and an award dated 4 September 2009 was handed down on 9 September 2009 directing the appellant to pay Mr Peters an amount of R42 000,00 as compensation.

[110] On 21 October 2009, the appellant brought an application to review the arbitration award. The actual relief sought by the appellant was an order in the following terms:

> '*1. That it is to be declared that the respondent is not entitled in terms of the arbitration award handed down by arbitrator S Bhana of the CCMA dated 4 September 2009 under case number WECT9584/09, on the basis that it has become prescribed;*
>
> *2. That it be declared that the warrant of execution issued by the court on 12 July 2010 under case number WECT9584/09 be finally set aside;*
>
> *3. Granting such further and/or alternative relief for the applicant as may be deemed meet;*
>
> *4. That those parties who opposed the granting of this application be ordered to pay the costs thereof.*'

[111] The application was not opposed and was heard and dismissed by the Labour Court on 6 November 2012.

[112] In the meantime, on 12 July 2010, the respondent had caused a writ of execution to be issued against the appellant. The appellant then brought another application in the Labour Court during about January 2013 declaring that the award had become prescribed and for the setting aside of the writ. The Labour Court (Rabkin-Naicker) dismissed the application and this is the decision on appeal before us.

[113] The Labour Court, in essence, held that that the Prescription Act was not applicable to arbitration awards made in terms of the LRA. I have already dealt with the reasons for rejecting this approach at the outset of this judgment.

[114] There was no appearance for the respondent at the appeal and no heads of argument had been filed by him or on his behalf.

[115] In light of what I had stated at the outset, the Prescription Act is clearly applicable to the award. Nothing was done to interrupt prescription of the "debt" embodied in the award, which was due since 9 September 2012. Certification of the award and the issuing or service of the warrant *per se,* did not interrupt prescription. The award is a debt to which a prescriptive period of three years applied and the award had prescribed by 9 September 2012.

[116] The appeal stands to be upheld. In my view, there is no reason why the application for a declarator that the award had prescribed, and for the setting aside of the warrant, should not have succeeded.

[117] In respect of all three appeals, all parties involved were in agreement that there should be no costs order irrespective of the outcome of any of these appeals. In my view, in light of the circumstances of these matters, the approach is fair.

[118] In the result, the following is ordered:

1. *Re Sizwe Myathaza v Johannesburg Metropolitan Bus Service (Soc) Limited t/a Metrobus* (LAC JA 122/14)

   The appeal is dismissed.

2. *Re Daniel Mazibuko v Concor Plant* (LAC JA 39/14)

The appeal is dismissed.

3. *Re Cellucity (Pty) Ltd v CWU obo Peters* (LAC CA 3/14)

3.1 The appeal is upheld.

3.2 The order of the court *a quo* dismissing the application is set aside and substituted with the following order:

"*The order sought in terms of paragraphs 1 and 2 of 'the notice of motion' dated 23 January 2013 is granted.*"

_____

P Coppin

Musi JA *et* Makgoka AJA concur in the judgment of Coppin JA.

APPEARANCES

In the *Myathaza* matter

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|---|---|
| FOR THE APPELLANT: | Adv V R Ngalwana SC and Adv Mbelle and Adv R Naidoo |
| | Instructed by Ndumiso Voyi Attorneys |
| FOR THE RESPONDENT: | Adv W Hutchinson |
| | Instructed by Moodie and Robertson |

In the *Mazibuko* matter

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| FOR THE APPELLANT: | Mr M E S Makinta of Makinta Attorneys |
| FOR THE RESPONDENT: | Adv L Charoux |
| | Instructed by Stanley Moldt Attorneys |

In the *Cellucity* matter

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|---|---|
| FOR THE APPELLANT: | Mr S Snyman of Snyman Attorneys |
| FOR THE RESPONDENT: | No appearance |