CONSTITUTIONAL COURT OF SOUTH AFRICA

Case CCT 236/16

In the matter between:

FOOD AND ALLIED WORKERS' UNION
obo J GAOSHUBELWE Applicant

and

PIEMAN'S PANTRY (PTY) LIMITED Respondent

Neutral citation:	*Food and Allied Workers' Union obo Gaoshubelwe v Pieman's Pantry (Pty) Limited* [2018] ZACC 7
Coram:	Mogoeng CJ, Zondo DCJ, Cameron J, Froneman J, Jafta J, Kollapen AJ, Kathree-Setiloane AJ, Madlanga J, Mhlantla J, Theron J and Zondi AJ
Judgments:	Zondi AJ (minority): [1] to [76] Zondo DCJ (concurring): [77] to [137] Kollapen AJ (majority): [138] to [215]
Heard on:	3 August 2017
Decided on:	20 March 2018
Summary:	interpretation — Labour Relations Act — unfair dismissal claims — applicability of Prescription Act Prescription — interruption — referral to conciliation process

ORDER

On appeal from the Labour Appeal Court (hearing an appeal from the Labour Court):

1. Leave to appeal is granted.
2. The appeal is upheld.
3. The orders of the Labour Court and Labour Appeal Court are set aside.
4. The order of the Labour Court is replaced with the following:

   "The special plea of prescription is dismissed."
5. There is no order as to costs in the Labour Court, Labour Appeal Court, and in this Court.

JUDGMENT

ZONDI AJ (Mogoeng CJ, Zondo DCJ and Jafta J concurring):

Introduction

[1] This matter raises two issues of fundamental importance concerning the litigation of unfair dismissal claims under section 191 of the Labour Relations Act[1] (LRA). The first is whether the Prescription Act[2] applies to such claims and the second is whether the unfair dismissal dispute referred by the applicant to the Labour Court on behalf of the employees employed by the respondent had prescribed. These issues arise because of the findings by the Labour Court and the Labour Appeal Court that the Prescription Act applies to such claims and that the unfair dismissal claims brought by the applicant on behalf of the employees against the respondent had prescribed.

[1] 66 of 1995.

[2] 68 of 1969.

Parties

[2] The applicant, Food and Allied Workers' Union (FAWU), a trade union registered in terms of the LRA, brings this application in its own interest and on behalf of its members, the former employees of the respondent, Pieman's Pantry (Pty) Ltd (Pieman's).

Factual background

[3] The employees were dismissed on 1 August 2001 for allegedly participating in an unprotected strike. On 7 August 2001, FAWU on behalf of the dismissed employees referred a dispute to the Commission for Conciliation, Mediation and Arbitration (CCMA) for conciliation.

[4] On 3 September 2001, the CCMA certified that the dispute remained unresolved. Following the non-resolution of the dispute, FAWU referred the matter to the CCMA for arbitration. On 15 March 2002, the CCMA ruled that it did not have jurisdiction to arbitrate the dispute because the dismissal related to participation in a strike that did not comply with the provisions of Chapter IV of the LRA. FAWU launched a review application seeking the setting aside of the CCMA ruling. That application was dismissed by the Labour Court on 9 December 2003.

[5] On 16 March 2005, some three and half years after the certificate of non-resolution was issued by the CCMA, FAWU referred the dispute to the Labour Court for adjudication in terms of section 191(5)(b)[3] of the LRA. In terms of

[3] Section 191(5)(b) of the LRA reads:

> "[T]he employee may refer the dispute to the Labour Court for adjudication if the employee has alleged that the reason for dismissal is—
>
> (i) automatically unfair;
>
> (ii) based on the employer's operational requirements;
>
> (iii) the employee's participation in a strike that does not comply with the provisions of Chapter IV; or

this section a dispute such as this is referred to the Labour Court for adjudication. On 19 April 2005, Pieman's filed a statement of defence in which it, among others, contended that the employees' claim for reinstatement in terms of the LRA had prescribed. FAWU responded that the Prescription Act did not apply to such claims, alternatively that the referral of the dispute to the CCMA for conciliation interrupted the running of prescription.

[6] By agreement between the parties the Labour Court was required to adjudicate the special plea of prescription separately, before any other issues. The Labour Court held that the Prescription Act does apply to claims under the LRA and it accordingly upheld Pieman's special plea of prescription.

[7] Aggrieved by the Labour Court's ruling upholding the special plea, FAWU appealed to the Labour Appeal Court. On 8 September 2016, the Labour Appeal Court dismissed FAWU's appeal, which resulted in the present application.

[8] It is important to point out that the litigation in this matter occurred before an amendment to the LRA in the form of section 145(9)[4] which took effect on 1 January 2015[5] and the LRA must be interpreted in its pre-amended form.

Litigation history

Labour Court

[9] As I have alluded to above, FAWU challenged the dismissal of its members in the Labour Court[6] on the basis that it constituted an unfair dismissal in terms of the relevant provisions of the LRA.

(iv) because the employee refused to join, was refused membership of or was expelled from a trade union party to a closed shop agreement."

[4] This section provides that "[a]n 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."

[5] For the date on which this amendment took effect see the Government Gazette No. 38317, dated 19 December 2014.

[6] *FAWU obo Gaoshubelwe v Pieman's Pantry (Pty) Ltd* [2014] ZALCJHB 319 (LC).

[10] FAWU contended that the dismissal was substantively unfair in that none of its members had participated in the alleged unprotected industrial action, alternatively that such industrial action had been terminated by agreement prior to the dismissal, and an agreed sanction had been implemented by Pieman's. Procedurally, FAWU contended that the dismissal was unfair in that none of its members received individual notification of the disciplinary hearing. Nor were they afforded sufficient opportunity to prepare their defence.

[11] Pieman's opposed FAWU's claim. Apart from defending the matter on the merits, Pieman's also raised three points in limine, two of which are relevant for the purposes of this appeal. Pieman's contended first, that FAWU's claim had prescribed in terms of the Prescription Act. Second, it contended that the Labour Court did not have the jurisdiction to hear the matter as the referral of the dispute to the Labour Court was made outside of the 90 day period prescribed by section 191(11) of the LRA, without a condonation application.[7]

[12] In relation to the prescription point, Pieman's argued that the provisions of the Prescription Act were applicable in addition to the provisions of section 191(11) of the LRA. The underlying argument was that the Prescription Act applied to any debt, unless it is specifically excluded by an Act of Parliament in terms of section 16(1).[8] Pieman's contended that the claim sought to be enforced by FAWU was a "debt" as

[7] Section 191(11) provides:

> "(a) The referral, in terms of subsection (5)(b), of a dispute to the Labour Court for adjudication, must be made within 90 days after the council or (as the case may be) the commissioner has certified that the dispute remains unresolved.
>
> (b) However, the Labour Court may condone non-observance of that time-frame on good cause shown."

[8] Section 16(1) of the Prescription Act reads:

> "Subject to the provisions of subsection (2)(b), the provisions of [Chapter III] 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."

envisaged by the Prescription Act and was therefore not excluded from the reach of the Prescription Act. The result, argued Pieman's, was that in terms of section 11(d) of the Prescription Act the claim was subject to the prescription period of three years. Pieman's contended that the claim for reinstatement became due on 3 September 2001 when the CCMA commissioner certified that the dispute remained unresolved. It asserted that by the time the statement of claim was filed in the Labour Court on 16 March 2005, being more than three years from 3 September 2001, the claim against it had prescribed.

[13] The Labour Court condoned FAWU's late filing of the statement of claim but, strangely enough, it upheld the prescription plea and dismissed the claim. In the result, the point in limine relating to the late referral was no longer an issue in the Labour Appeal Court.

[14] In upholding the special plea, the Labour Court held that the Prescription Act applies to claims litigated under the LRA and found that, because the referral of the dispute for adjudication by the Labour Court was made more than three years after the date of dismissal, the applicant's claim had prescribed. The Labour Court rejected FAWU's contention that the referral of the dispute to the CCMA interrupted the running of prescription. The basis for the rejection was that the referral of the dispute to the CCMA does not constitute a process by which prescription could be interrupted under the Prescription Act.

Labour Appeal Court

[15] FAWU appealed to the Labour Appeal Court.[9] The issues before that Court were whether the Prescription Act applies to the referral and prosecution of disputes under section 191 of the LRA; and if it does, whether the unfair dismissal dispute referred by FAWU on behalf of its members had prescribed.

[9] *Food & Allied Workers Union on behalf of Gaoshubelwe v Pieman's Pantry (Pty) Ltd* [2016] ZALAC 46; (2017) 38 ILJ 132 (LAC) (LAC judgment).

[16] In considering the issues before it, the Labour Appeal Court analysed the relationship between section 210 of the LRA and section 16(1) of the Prescription Act, which are the sections that contain provisions which may provide a basis for the exclusion of operation of the Prescription Act in litigation under the LRA. Section 16(1) of the Prescription Act provides for the exclusion of the operation of the Prescription Act if its provisions are inconsistent with another Act that prescribes a specific 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. Section 210 of the LRA provides that the LRA would apply should any conflict arise between it and the provisions of any law other than the Constitution or any Act expressly amending it.

[17] The Labour Appeal Court pointed out that the questions whether there is inconsistency or conflict between the LRA and the Prescription Act and whether the latter Act applies to litigation under the LRA were extensively considered by it in *Myathaza*,[10] albeit in the context of awards of arbitrators in the CCMA. It settled the question in favour of the Prescription Act being applicable to such awards before the amendment to the LRA in the form of section 145(9). The Labour Appeal Court held that there was no reason to deviate from *Myathaza* [11] to the extent that it dealt with the applicability of the Prescription Act to litigation under the LRA after the rendering of an award.

[18] Although the Labour Appeal Court accepted that the LRA creates rights unknown to the common law and also a distinct dispute resolution procedure, it could see no reason why that should exclude prescription. The further argument that the LRA creates its own specific deadlines for resolving disputes which should trump the

[10] *Myathaza v Johannesburg Metropolitan Bus Service (SOC) Ltd t/a Metrobus; Mazibuko v Concor Plant Cellucity (Pty) Ltd v Communication Workers Union on behalf of Peters* [2015] ZALAC 45; (2016) 37 ILJ 413 (*Myathaza LAC*).

[11] Id at paras 16-9 and 21.

provisions of the Prescription Act had also been rejected by it in *Myathaza*.[12] The Labour Appeal Court reasoned that the mere fact that the LRA contains its own dispute resolution procedures is a necessary, but not sufficient reason for holding that the Prescription Act is inconsistent with the LRA. Section 191 of the LRA, reasoned the Labour Appeal Court, does not create a cause of action, but merely regulates the process by which a remedy may be obtained. It imposes a time-bar rather than a prescription regime. In its view, the discretion of the Labour Court to condone the late filing of referrals operates within, and not in competition with, the periods prescribed by the Prescription Act.

[19] The Labour Appeal Court held further that a dismissed employee's claim that his or her employment was unfairly terminated and that the unfairness must be remedied, gives rise to a debt because there is no uncertainty about what the former employer is required to do. In its view, an unfair dismissal claim is akin to a demand for specific performance, which forms a debt as contemplated by the Prescription Act. The Labour Appeal Court accordingly held that the Prescription Act applies to all litigation under the LRA, including claims under section 191 of the LRA.

[20] As regards to the question whether the running of prescription had been interrupted, the Labour Appeal Court found that this had not occurred. It rejected FAWU's contention that the referral of the dispute to the CCMA interrupted prescription, holding that a referral is merely a procedural step akin to completing a claim form; in terms of section 17 of the Road Accident Fund Act[13] (RAF Act) it does not initiate litigation. The Labour Appeal Court reasoned that the Prescription Act requires "a process. . . whereby legal proceedings are commenced" to interrupt prescription.[14] According to the Labour Appeal Court, the only manner that legal proceedings can be initiated under the LRA is by a referral under section 191(5)(b). The Labour Appeal Court held that in this case by the time the referral took place the

[12] Id at para 43.

[13] 56 of 1996.

[14] LAC judgment above n 9 at para 55.

claim had prescribed.

In this Court

[21] FAWU has approached this Court seeking leave to appeal against the judgment of the Labour Appeal Court.

Applicant's submissions

[22] FAWU submits that the Prescription Act does not apply to unfair dismissal disputes in terms of section 191 of the LRA. It relies on section 210 of the LRA and the saving clause contained in section 16(1) of the Prescription Act to support its submission. The basis for this submission is that the dispute resolution procedures contained in section 191 of the LRA are designed to ensure the effective resolution of labour disputes.

[23] FAWU argues that an important characteristic of labour disputes that necessitates a different dispute resolution process, is that unresolved disputes have the potential to disrupt labour peace, which may have negative social and economic consequences affecting the rest of society. The argument is that the dispute resolution procedures of the LRA are necessary to promote the expeditious resolution of labour disputes, and to allow for condonation of non-compliance with time periods to ensure the effective resolution of rights disputes by the CCMA and the Labour Court.

[24] FAWU's alternative argument is that even if the Prescription Act does apply, prescription was interrupted by the initial referral of the dispute to the CCMA for conciliation.

Respondent's submissions

[25] Pieman's makes four primary submissions. First, it submits that the Prescription Act applies to disputes under the LRA. The basis for this submission is that an unfair dismissal claim under the LRA is a "debt" for purposes of the Prescription Act. Second,

Pieman's rejects the contention that there is an inconsistency between the Prescription Act and the LRA. It submits that the two Acts are complementary. Pieman's points out that section 191 imposes a time-bar, and not an alternative prescription regime. Thirdly, it submits that FAWU's unfair dismissal claim had prescribed as the statement of claim was filed in the Labour Court more than three years after the certificate of non-resolution was issued. Pieman's argues that the service of a referral for conciliation by the CCMA does not amount to "any process" capable of interrupting prescription in terms of section 15(1) of the Prescription Act. It contends that a referral is a precondition to the enforcement of a debt and does not lead to an ultimate final determination of the dispute. Finally, Pieman's submits that prescription started running after a certificate of non-resolution was issued.

Jurisdiction and leave to appeal

[26] For this Court to grant leave, an applicant must demonstrate that this Court has jurisdiction to entertain the matter and that it is in the interests of justice to do so. The question of jurisdiction arises in this matter because the effect of the Labour Appeal Court order upholding the special plea of prescription based on the Prescription Act preventing the dismissed employees from approaching a court to challenge the fairness of their dismissal. Their right to fair labour practices and the right of access to courts were therefore affected. The issue concerns, essentially, the question whether the Labour Appeal Court's interpretation of the LRA was correct.

[27] This Court, in *Rural Maintenance*, held that:

> "The proper interpretation of the LRA will raise a constitutional issue that clothes this Court with jurisdiction, but this does not mean that this Court will hear all appeals from the Labour Appeal Court. It will only do so if the appeal raises 'important issues of principle'."[15]

[15] *Rural Maintenance (Pty) Limited v Maluti-A-Phofung Local Municipality* [2016] ZACC 37; (2017) 38 ILJ 295 (CC); 2017 (1) BCLR 64 (CC) (*Rural Maintenance*) at para 17.

[28] The interpretation of the LRA, a statute that gives effect to the constitutional right to fair labour practices as envisaged in section 23 of the Constitution, is a constitutional matter.[16] The right to access courts as provided for in section 34 of the Constitution is implicated, as a result of the interpretation of the LRA and the Prescription Act by the Labour Court and Labour Appeal Court.[17] Accordingly, the issues raised are constitutional in nature and this Court has jurisdiction.[18] The matter also raises an arguable point of law of general public importance that ought to be considered by this Court,[19] as the application and operation of the Prescription Act in respect of unfair dismissal claims in terms of the LRA, have not been settled by this Court. There have been a number of different approaches to the issue by the Labour Court and Labour Appeal Court over time.[20]

[29] There are good prospects of success on the merits, and that being so, it is in the interests of justice that leave be granted.

Issues

[30] The main issues are whether the Prescription Act applies to the litigation under the LRA and whether the unfair dismissal claim instituted by FAWU against Pieman's under the LRA had indeed prescribed as the Labour Court and the Labour Appeal Court found.

[31] The answer to this and other related questions must be informed by an analysis of the relevant provisions of the Prescription Act and those of the LRA. It is essentially

[16] *Myathaza LAC* above n 10 at para 17.

[17] *Makate v Vodacom Ltd* [2016] ZACC 13; 2016 (4) SA 121 (CC); 2016 (6) BCLR 709 (CC) at para 32.

[18] Section 167(3)(b)(i) of the Constitution.

[19] *Paulsen v Slip Knot Investments 777 (Pty) Limited* [2015] ZACC 5; 2015 (3) SA 479 (CC); 2015 (5) BCLR 509 (CC) at paras 20-3.

[20] See *Chemical Energy Paper Printing Wood & Allied Workers Union on behalf of Le Fleur v Rotolabel—A Division of Bidpaper Plus (Pty) Ltd* (2015) 36 ILJ 700 (LC) at para 31; *Cellucity (Pty) Ltd v Communication Workers Union on behalf of Peters* (2014) 35 ILJ 1237 (LC) at para 9; *Circuit Breakers Industries Ltd v National Union of Metalworkers of SA on behalf of Hadebe* (2014) 35 ILJ 1261 (LC) at para 19; and *Aon SA (Pty) Ltd v Commission for Conciliation, Mediation & Arbitration* (2012) 33 ILJ 1124 (LC) at para 18.

an exercise involving the interpretation of these two statutes, which must be undertaken through the prism of the Constitution.

[32] Section 3 of the LRA is also very instructive. It reads:

> "Any person applying this Act must interpret its provisions—
> (a) to give effect to its primary objects;
> (b) in compliance with the Constitution; and
> (c) in compliance with the public international law obligations of the Republic."

[33] As the Prescription Act limits the right of access to courts guaranteed by section 34 as well as the right to fair labour practices in terms of section 23(1) of the Constitution, we are enjoined by section 39(2) of the Constitution to promote the spirit, purport and objects of the Bill of Rights in the process of interpreting its provisions. In other words, the Prescription Act must be interpreted to give proper constitutional effect to these rights.

[34] This Court in *Makate*,[21] with reference to *Fraser*,[22] affirmed this principle in these terms:

> "It is apparent from *Fraser* that section 39(2) introduced to our law a new rule in terms of which statutes must be construed. It also appears from the same statement that this new aid of interpretation is mandatory. This means that courts must at all times bear in mind the provisions of section 39(2) when interpreting legislation. If the provision under construction implicates or affects rights in the Bill of Rights, then the obligation in section 39(2) is activated. The court is duty-bound to promote the purport, spirit and objects of the Bill of Rights in the process of interpreting the provision in question."[23]

[21] *Makate* above n 17.

[22] *Fraser v Absa Bank Ltd (National Director of Public Prosecutions as Amicus Curiae)* [2006] ZACC 24; 2007 (3) SA 484 (CC); 2007 (3) BCLR 219 (CC).

[23] *Makate* above n 17 at para 88.

[35] The Court went on to explain how this interpretation exercise was to be approached:

> "The objects of the Bill of Rights are promoted by, where the provision is capable of more than one meaning, adopting a meaning that does not limit a right in the Bill of Rights. If the provision is not only capable of a construction that avoids limiting rights in the Bill of Rights but also bears a meaning that promotes those rights, the court is obliged to prefer the latter meaning. For, as this court observed in *Fraser*—
>
> > 'section 39(2) requires more from a court than to avoid an interpretation that conflicts with the Bill of Rights. It demands the promotion of the spirit, purport and objects of the Bill of Rights.'"[24]

[36] The creation of a comprehensive litigation framework under the LRA must be understood in the context of the constitutional right to fair labour practices in section 23(1) of the Constitution. This section guarantees everyone a right to fair labour practices. It envisages legislation that will give effect to this right. The LRA is such legislation. Section 185 of the LRA affirms the right of everyone not to be unfairly dismissed or subjected to unfair labour practices.

[37] An employee who alleges that he or she has been unfairly dismissed by his or her employer has the right to have the dispute concerning the dismissal resolved by the application of law decided in a fair and public hearing before an independent and impartial tribunal or forum. The CCMA and the Bargaining Councils established under the LRA are such independent and impartial fora envisaged by section 34 of the Constitution.

Does the Prescription Act apply to litigation under the LRA?

[38] As I have pointed out, the question whether the Prescription Act applies to claims litigated under the LRA must be informed by an analysis of its provisions and those of the LRA.

[24] Id at para 89.

[39] The starting point is section 16(1) of the Prescription Act. This section reads:

> "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."

[40] Section 210 of the LRA deals with application of the LRA when in conflict with other laws. It provides:

> "If any conflict, relating to the 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."

[41] Section 16(1) is located in Chapter III of the Prescription Act. It renders the provisions of Chapter III applicable to any debt unless there is inconsistency between its provisions and any Act of Parliament. The default position therefore is that, in general, the Prescription Act applies to all debts unless its provisions are inconsistent with the provisions of any Act[25] or if any conflict, relating to the matters dealt with in the LRA, arises between the LRA and the Prescription Act. In other words, the applicability of the Prescription Act to the litigation under the LRA is determined by section 16 of the Prescription Act and section 210 of the LRA.

[42] The purpose and the text of each of the two statutes must be assessed holistically in determining whether a conflict as contemplated in section 210 of the LRA or an inconsistency envisaged in section 16(1) exists. But before doing so, it is necessary to first set out how an inconsistency is evaluated.

[25] *Moloi v Road Accident Fund* [2000] ZASCA 53; 2001 (3) SA 546 (SCA) at para 13.

Inconsistency evaluation

[43] *Mdeyide* dealt with the inconsistency between the provisions of the RAF Act and the Prescription Act.[26] This Court articulated the approach to assessing inconsistency in these terms:

> "A consistency evaluation is thus necessary. The test has been formulated as 'in every case in which a plaintiff relies upon a [certain provision], the cardinal question is whether that provision is inconsistent with [another provision]'. Inconsistency may arise as the result of a different time period being stipulated, but also on other points, for example, with regard to mental capacity. However, where provisions have been found to deal with a similar subject-matter, yet without being identical, it has on occasion been held that there was no inconsistency."[27] (Footnotes omitted.)

[44] The Court went on to examine the differences between the provisions of the two statutes in question and found that—

> "[t]here is therefore a clear reason for the difference between the Prescription Act and the RAF Act. The Prescription Act regulates the prescription of claims in general, and the RAF Act is tailored for the specific area it deals with, namely claims for compensation against the Fund for those injured in road accidents. The legislature enacted the RAF Act – and included provisions dealing with prescription in it – for the very reason that the Prescription Act was not regarded as appropriate for this area. Looking for consistency in this context is a quest bound to fail."[28]

[45] In *Myathaza*, this Court examined whether the Prescription Act applied to arbitration awards in terms of the LRA.[29] Three judgments emanated from the Court

[26] *Road Accident Fund v Mdeyide* [2010] ZACC 18; 2011 (2) SA 26 (CC); 2011 (1) BCLR 1 (CC) (*Mdeyide*). See also *Road Accident Fund v Smith N.O.* [1998] ZASCA 86; 1999 (1) SA 92 (SCA) at 98C; *Kotze N.O. v Santam Insurance Ltd* 1994 (1) SA 237 (C) at 246F-247J; and *Terblanche v South African Eagle Insurance Co Ltd* 1983 (2) SA 501 (N).

[27] *Mdeyide* above n 26 at para 45.

[28] Id at para 50.

[29] *Myathaza v Johannesburg Metropolitan Bus Services (SOC) Limited t/a Metrobus* [2016] ZACC 49; 2018 (1) SA 38 (CC); 2017 (4) BCLR 473 (CC) (*Myathaza CC*).

with a split decision and thus no binding authority on whether the Prescription Act was applicable.[30] Nevertheless, the statements in those judgments are a useful starting point.

[46] The first judgment in *Myathaza*, penned by Jafta J, with Nkabinde ADCJ, Khampepe J and Zondo J concurring, held that—

> "[i]n the context of the Constitution, inconsistency is given a wider meaning which goes beyond contradiction or conflict. Legislation or conduct is taken to be inconsistent with a provision in the Constitution if it differs with a constitutional provision. Sometimes this arises from the overbroad language of a statute."[31]

[47] The first judgment pointed out that "section 16(1) of the Prescription Act does not contemplate that there should be conflict of the nature that renders the two Acts mutually exclusive. It is enough if there are material differences between them."[32]

[48] After examining the provisions in question as well as the purpose of each Act, and in light of the Constitution, the first judgment went on to hold that the two Acts are incompatible.[33] The second judgment in *Myathaza*, penned by Froneman J with Madlanga J, Mbha AJ and Mhlantla J concurring, found otherwise. It held that the two Acts are capable of being interpreted as complementary and thus not inconsistent.[34]

[49] In my view, for the reasons that will become apparent later in this judgment, the provisions of the Prescription Act are inconsistent with those of section 191 of the LRA to the extent that there are material differences between the two Acts. Inconsistency arises as a result of different time periods that are stipulated. Those time periods are

[30] See the analysis of *Myathaza CC* as undertaken by this Court in *Mogaila v Coca Cola Fortune (Pty) Limited* [2017] ZACC 6; (2017) 38 ILJ 1273 (CC); 2017 (7) BCLR 839 (CC) at paras 14-26.

[31] *Myathaza* above n 28 at para 39.

[32] Id at para 42.

[33] Id at paras 43-58.

[34] Id at para 66.

not procedural but are substantive. My conclusion therefore is that the Prescription Act does not apply to litigation conducted under section 191 of the LRA.

Prescription regime

[50] The purpose of prescription is primarily the need for certainty, finality and to ensure the quality of adjudication. In *Mdeyide* this Court stated that:

> "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."[35] (Footnotes omitted.)

[51] As I see it, the bases for the rule concerning extinctive prescription includes the need to protect people from injustice which may result from the fact that their conduct in a certain situation at a certain time could be assessed much more critically, several years later, because of different standards due to changes in cultural values, scientific knowledge, societal interests, or public policy. Therefore, the protection which extinctive prescription affords debtors is justified on the basis of functional utility and societal interests.

[52] Chapter III of the Prescription Act, in which sections 10 to 16 are located, is concerned with the prescription of debts. Section 10 provides for the extinction of debts by prescription. Section 10(1) reads:

[35] *Mdeyide* above n 27 at para 8. See also *Uitenhage Municipality v Molloy* [1997] ZASCA 112; 1998 (2) SA 735 (SCA) at 742I-743A.

> "Subject to the provisions of this Chapter and of Chapter IV, 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 debt."

[53] Section 11 concerns the period of prescription of debts and in terms of section 11(d) the period of prescription is "save where an Act of Parliament provides otherwise, three years in respect of any other debt".

[54] Section 12 provides for the running of prescription. Section 12(1) reads:

> "Subject to the provisions of subsections (2), (3), and (4), prescription shall commence to run as soon as the debt is due."

[55] Section 15 is concerned with judicial interruption of prescription. Section 15(1) provides:

> "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."

[56] The rationale behind section 15 is that where a creditor takes judicial steps to enforce the debt, which is indicative of the creditor's intention to enforce the debt, prescription should not continue running while the law takes its course.[36]

[57] Unless a creditor's failure to take action to enforce his or her debts within the prescribed periods is excused either by the debtor's express or tacit acknowledgment of liability[37] or by circumstances contemplated in section 13, a debt becomes prescribed. Once a debt has prescribed, the creditor cannot apply to court for it to be revived. Neither the Prescription Act nor the common law provides for condonation if a creditor brings its claim after the period has run and the debt has prescribed. Properly viewed,

[36] *Murray & Roberts Construction (Cape) (Pty) Ltd v Upington Municipality* 1984 (1) SA 571 (A) at 578H.

[37] Section 14 of the Prescription Act.

the effluxion of time over the specified period extinguishes the debt. Not even an acknowledgment of a debt will revive a prescribed debt.

[58] That being said, a creditor is not automatically barred from instituting legal proceedings for the recovery of a debt which has prescribed. A court may not raise the issue of prescription of its own accord but may allow the debtor to raise it at any stage of the proceedings.[38] If the debtor raises prescription, the creditor will not be able to pursue the legal proceedings any further and the debt will be irrecoverable.[39]

[59] Accordingly, the Prescription Act prescribes a time period within which a creditor must claim repayment of a debt. If not claimed within the specified period and the debtor avers that the debt has prescribed, a creditor cannot seek condonation of his or her "non-compliance" with the time period. This would be the end of the road and the creditor could not take the enforcement of the prescribed debt any further.

Labour relations regime

[60] The primary object of the LRA, as set out in the long title, is to change the law governing labour relations and for that purpose to give effect to and regulate the constitutional right to fair labour practices enshrined in section 23 of the Constitution. In achieving this purpose, the LRA provides mechanisms including procedures, processes, principles and the fora for the expeditious resolution of labour disputes. The latter is generally evident in Chapter VII of the LRA. In particular section 135(2) reads as follows:

> "The appointed commissioner must attempt to resolve the *dispute* through conciliation within 30 days of the date the Commission received the referral: However the parties may agree to extend the 30-day period."

[38] Section 17 of the Prescription Act.

[39] Section 10(1) of the Prescription Act.

[61] The consistency evaluation concerns section 191 of the LRA and the question that arises is whether the provisions contained in that section—

(a) prescribe a specified period within which a claim is to be made or an action is to be instituted in respect of a debt; or

(b) impose conditions on the institution of an action for the recovery of a debt.

[62] Section 191 of the LRA outlines the procedure in relation to disputes about unfair dismissals and unfair labour practices. Subsection (1) deals with the referral of a dispute to the relevant bargaining council or the CCMA and prescribes certain time periods within which a referral is to be made.[40] Subsection (2) makes provision for the condonation of a late referral in subsection (1), which is conditional upon good cause shown for the delay.[41] Subsection (4) places the duty to resolve the dispute on either the relevant bargaining council or the CCMA.[42] However, should the dispute remain unresolved at the conciliation stage, subsection (5) permits its referral to the council or CCMA for arbitration or to the Labour Court for adjudication.[43] Subsection (11)

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[40] Subsection (1) provides:

> "(a) If there is a dispute about the fairness of a dismissal, or a dispute about an unfair labour practice, the dismissed employee or the employee alleging the unfair labour practice may refer the dispute in writing to—
>
> (i) a council, if the parties to the dispute fall within the registered scope of that council; or
>
> (ii) the Commission, if no council has jurisdiction.
>
> (b) A referral in terms of paragraph (a) must be made within—
>
> (i) 30 days of the date of a dismissal or, if it is a later date, within 30 days of the employer making a final decision to dismiss or uphold the dismissal;
>
> (ii) 90 days of the date of the act or omission which allegedly constitutes the unfair labour practice or, if it is a later date, within 90 days of the date on which the employee became aware of the act or occurrence."

[41] This subsection provides:

> "If the employee shows good cause at any time, the council or the Commission may permit the employee to refer the dispute after the relevant time limit in subsection (1) has expired."

[42] This subsection provides that "[t]he council or the Commission must attempt to resolve the dispute through conciliation".

[43] This subsection provides:

> "If a council or a commissioner has certified that the dispute remains unresolved, or if 30 days or any further period as agreed between the parties have expired since the council or the Commission received the referral and the dispute remains unresolved—

prescribes certain time limits within which the dispute should be referred to the Labour Court, and provides for condonation for the late referral of the dispute upon good cause shown.[44] It is apparent from this analysis that, although the litigation under the LRA requires expedition, it is not intolerant of the delay. It condones delays for which there is a satisfactory explanation.

Is there an inconsistency?

[63] In my view, the Labour Appeal Court erred in finding that the Prescription Act applies to litigation under the LRA and in concluding that the applicant's unfair dismissal claim, which was filed more than three years after the dismissal of the employees, had prescribed. I say so for the following reasons.

(a) the council or the Commission must arbitrate the dispute at the request of the employee if—

(i) the employee has alleged that the reason for dismissal is related to the employee's conduct or capacity, unless paragraph (b)(iii) applies;

(ii) the employee has alleged that the reason for dismissal is that the employer made continued employment intolerable or the employer provided the employee with substantially less favourable conditions or circumstances at work after a transfer in terms of section 197 or 197A, unless the employee alleges that the contract of employment was terminated for a reason contemplated in section 187;

(iii) the employee does not know the reason for dismissal; or

(iv) the dispute concerns an unfair labour practice; or

(b) the employee may refer the dispute to the Labour Court for adjudication if the employee has alleged that the reason for dismissal is—

(i) automatically unfair;

(ii) based on the employer's operational requirements;

(iii) the employees participation in a strike that does not comply with the provisions of Chapter IV; or

(iv) because the employee refused to join, was refused membership of or was expelled from a trade union party to a closed shop agreement."

[44] This section provides:

"(a) The referral, in terms of subsection (5)(b), of a dispute to the Labour Court for adjudication, must be made within 90 days after the council or (as the case may be) the commissioner has certified that the dispute remains unresolved.

(b) However, the Labour Court may condone non-observance of that time frame on good cause shown."

[64] First, the differently stipulated time periods in which to institute litigation are the material indicators for the conclusion that the Prescription Act does not apply to litigation under the LRA. As I have already pointed out, one of the primary objects of the LRA is to change the law governing labour relations and for that purpose to give effect to section 23 of the Constitution. That much is expressly stated in the long title. What this means is that the LRA is "umbilically linked" to the Constitution.[45] Like the Constitution, when the LRA was enacted, it signalled a dramatic change in the industrial relations landscape from one characterised by strike, conflict, and industrial injustice to one in which the rights of the employers and employees are governed by the Constitution. Therefore, the LRA is not an ordinary statute but legislation that is interpreted in the same manner that the Constitution is read. The LRA must be given a generous construction over a merely textual or legalistic one in order to afford employees the fullest possible protection of their constitutional guarantees.

[65] The LRA seeks to "give effect to and regulate the fundamental rights conferred by section 23 of the Constitution".[46] These include the right to fair labour practices. Importantly, the LRA regulates the enforcement of the rights guaranteed by this section by creating special principles applicable to such rights, special processes, and fora where these rights may be asserted. Implicit in the provisions and tone of the LRA is the principle and value of fairness. Section 191 outlines the procedure to be followed in vindicating rights against unfair dismissals and unfair labour practices.

[66] A dispute about the fairness of a dismissal is dealt with in terms of section 191 of the LRA which is the only procedure which must be followed in enforcing the relevant rights. A referral must be made within 30 days of the date of a dismissal. The section makes provision for condonation of a late referral upon good cause shown. The bargaining council having jurisdiction or the CCMA must attempt to resolve the dispute through conciliation. If the CCMA or the bargaining council has certified that the

[45] *Department of Land Affairs v Goedgelegen Tropical Fruits (Pty) Ltd* [2007] ZACC 12; 2007 (6) SA 199 (CC); 2007 (10) BCLR 1027 (CC) at para 53.

[46] Section 1(a) of the LRA.

dispute remains unresolved or if 30 days have expired since the referral and the dispute remains unresolved the employee may refer a dispute to the CCMA or the bargaining council for arbitration or to the Labour Court for adjudication depending on the nature of the dispute. Such a referral must be made within 90 days after the bargaining council or the CCMA has certified that the dispute remains unresolved. The Labour Court may condone non-observance of that time on good cause shown. There is no appeal against an award by a commissioner. The only remedy available to a party aggrieved by a decision of a commissioner is to take the award on review to the Labour Court. These special rights, obligations, principles, processes, procedures, fora, and remedies collectively constitute a special LRA dispensation.[47]

[67] If there is compliance with the stipulated timeframes, the whole process may take place in less than a year. Notably, where there has been compliance with those timeframes, the need to apply the Prescription Act does not arise, simply because the shortest period for a debt to prescribe under it is three years. I cannot think of any reason why the Prescription Act should be taken to apply where, if there is compliance, it will find no application because of the longer time periods that it allows.

[68] Moreover, in the context of section 191 it is difficult to see how the Prescription Act may be applied to a dispute that is referred to conciliation. For example, if a dispute is submitted to conciliation more than three years after the date of dismissal but the employee establishes good cause in terms of section 191(2) of the LRA, the CCMA would have a discretion to permit the referral. Without this permission there can be no conciliation. Without conciliation the Labour Court would have no jurisdiction to entertain the matter and no other court would have jurisdiction. That would be the end of the matter. The employee's rights would be unenforceable. Applying the Prescription Act to section 191 disputes raises other difficulties. These include who decides whether the dispute has prescribed or not. The CCMA does not have that power. The only power that it has under section 191(2) is to condone the delay if good

[47] See *Steenkamp v Edcon Ltd* [2016] ZACC 1; 2016 (3) SA 251 (CC); 2016 (3) BCLR 311 (CC) at para 105.

cause has been established by the employee. As mentioned earlier, because conciliation would not have occurred, no court would have jurisdiction to entertain the matter and decide if the dispute has prescribed or not.

[69] Second, while subject to good cause being shown, section 191(2) empowers the CCMA to condone late referrals to conciliation and section 191(11) authorises the Labour Court to condone delays in referring conciliated disputes to it, the Prescription Act does not. This may occur even where the delay is in excess of three years. In other words, the remedy of condonation which the LRA provides is something alien to the concept and scheme of the Prescription Act. Thus, the thesis that holds that the Prescription Act applies to litigation under the LRA seems to suggest that after the expiry of the three year period, the bargaining council, CCMA, or Labour Court ceases to have competency to condone the delay which is the competency that the LRA specifically confers on these fora.

[70] This thesis fails to give heed to the provision of section 39(2) of the Constitution which enjoins the Court when interpreting legislation to promote the spirit, purport, and objects of the Bill of Rights and section 3 of the LRA. It is a construction which has the effect of preventing these important fora created by the LRA from performing a function which the LRA authorises them to undertake. The effect of such an approach is to impede the effective resolution of labour disputes, instead of promoting it. Not only does this approach limit the CCMA's and the Labour Court's powers to permit late referral of the disputes but also takes away the employees' rights to refer their disputes to these fora. This, to my mind, demonstrates the conflict between the two statutes and therefore in terms of section 210 of the LRA, the latter Act must prevail.[48] In terms of the Prescription Act, once the three year guillotine falls no court or body may condone the delay. If the running of prescription is not interrupted before the expiry of three years, nothing can be done.

[48] *Sidumo v Rustenburg Platinum Mines Ltd* [2007] ZACC 22; 2008 (2) SA 24 (CC); 2008 (2) BCLR 158 (CC) at paras 97-100.

[71] This is because section 12(1) of the Prescription Act provides that extinctive prescription commences to run as soon as the debt is due. And the debt is due when it is immediately claimable by the creditor and it is immediately payable by the debtor.[49] In *Truter*, it was stated that a debt is due in this sense when the creditor acquires a complete cause of action for the recovery of the debt, that is, when the entire set of facts which the creditor must prove in order to succeed with his or her claim against the debtor is in place.[50] That is to say, when everything has happened which would entitle the creditor to institute action and to pursue his or her claim. In terms of section 12(3) of the Prescription Act, a debt is not deemed to be due until the creditor has, or ought to have had, knowledge of the identity of the debtor and the facts from which the debt arises. This section requires knowledge only of the material facts from which a debt arises – it does not require knowledge of the legal conclusion.[51]

[72] A case in point is an employee who is dismissed for operational requirements in circumstances where there has been no prior consultation in terms of section 189 of the LRA thus prima facie constituting unfair dismissal. If three years later the dismissed employee becomes aware that in dismissing him the employer had not complied with the provisions of section 189, he may, simultaneously with an application to condone the delay, refer the dispute about the fairness of his dismissal to the CCMA or bargaining council. The CCMA or bargaining council will not be precluded from conciliating a dispute if it decides to grant condonation. The fact that the employee acquired knowledge of the unfairness of the dismissal three years later (that is the legal conclusion flowing from the facts) will not preclude him from enforcing his rights under the LRA.

[73] But under the Prescription Act, unless an employee places herself within the provisions of section 13, 14, or 15 of the Prescription Act, her claim for unfair dismissal

[49] *Benson v Walters* 1984 (1) SA 73 (A) at 82C.

[50] *Truter v Deysel* [2006] ZASCA 16; 2006 (4) SA 168 (SCA) at para 16.

[51] *Fluxman Incorporated v Levenson* [2016] ZASCA 183; 2017 (2) SA 520 (SCA) at para 42 and *Claasen v Bester* [2011] 197 ZASCA; 2012 (2) SA 404 (SCA) at para 15. See also *Mtokonya v Minister of Police* [2017] ZACC 33; 2017 (11) BCLR 1443 (CC) at paras 47-51.

would have prescribed and become unenforceable. This is so because, in terms of sections 12(1) and (3) of the Prescription Act, prescription begins to run as soon as the debt is due and the debt is due when the creditor has acquired knowledge of the identity of the debtor and the facts from which the debt arises. Section 12(3) of the Prescription Act does not require knowledge of the relevant legal conclusion, that is to say the legal effect of the employer's failure to conduct a pre-retrenchment consultation as required by section 189 of the LRA.

Conclusion

[74] This analysis shows that the provisions of the Prescription Act are incapable of importation into the LRA, and they do not therefore apply to litigation under the LRA. To try to apply the Prescription Act to the litigation under the LRA is just like trying to fit square pegs into round holes, ignoring clear structural differences between the two Acts. Legal consequences flowing from failure to comply with the time periods which each legislation respectively stipulates, are not the same. Failure to comply with the time periods stipulated by the LRA is not fatal as such failure may be condoned on good cause shown. Under the Prescription Act a creditor loses a right to enforce its claim once the claim has prescribed. It does not provide a mechanism through which the lost right may be reclaimed. These differences between the two statutes are, in my view, sufficiently material to constitute inconsistency as contemplated in section 16(1) of the Prescription Act.

[75] It follows therefore that the appeal must succeed and the orders of the Labour Court and Labour Appeal Court should be set aside.

Order

[76] The following order is made:

1. Leave to appeal is granted.
2. The appeal is upheld.

3. The orders of the Labour Court and Labour Appeal Court are set aside.
4. The order of the Labour Court is replaced with the following:

"The special plea of prescription is dismissed."

5. There is no order as to costs in the Labour Court, Labour Appeal Court, and in this Court.

ZONDO DCJ: (Jafta J and Zondi AJ and Mogoeng CJ concurring)

Introduction

[77] This is yet another case[52] that has come before this Court in which the issue we are called upon to decide is whether the Prescription Act and the prescription periods it prescribes apply to unfair dismissal claims governed by the dismissal dispute resolution system under the LRA. The applicants contend that the Prescription Act does not apply to unfair dismissal claims or disputes. The respondent disputes this and contends that the Prescription Act does apply.

[78] I have read the judgments prepared by my Colleagues, Zondi AJ (first judgment) and Kollapen AJ (third judgment). The first judgment concludes that that leave to appeal should be granted and the appeal upheld. I concur in the first judgment but write separately to bring another perspective to the matter and give additional reasons for the conclusion that the Prescription Act does not apply to unfair dismissal claims.

[79] Labour legislation, including the LRA, was a response, in part at least, to the inequity against workers inherent in the common law employment relationship. Labour legislation was intended to bring about a better dispensation which would seek to protect and promote the interests of both employers and employees. In other words, labour legislation sought to bring about a new employment regime between employers and

[52] Other cases that have come before us which raised the same issue are: *Myathaza CC*; *NUMSA v Hendor Mining Supplies (A Division of Marschalk Beleggings (Pty) Ltd)* [2017] ZACC 9; (2017) 38 ILJ 1560 (CC); 2017 (7) BCLR 851 (CC).

employees that would seek to strike a balance between the interests of employers and those of employees.

[80] The right not to be unfairly dismissed is conferred by section 185 of the LRA on every employee.[53] The enactment of the LRA marked the first time in South Africa's history that a statute expressly conferred upon employees the right not to be unfairly dismissed. The Labour Relations Act No 28 of 1956 as amended, (the 1956 LRA), the precursor to the current LRA – made provision for an unfair labour practice the definition of which was broad enough in effect to include the right not to be unfairly dismissed but it made no express mention of a right not to be unfairly dismissed. The provisions of the 1956 LRA conferred upon the Industrial Court an extensive unfair labour practice jurisdiction which that Court used most effectively to create labour law jurisprudence on unfair dismissal some of which is reflected in the LRA.[54]

[81] The introduction of the concept of an unfair labour practice placed the principle of fairness at the centre of our law of employment. That included making fairness a requirement for a dismissal. The termination of employment could in effect be reversed if it was found to be unfair despite the fact that it may have been lawful. Special provisions were enacted for the enforcement of this right not to be subjected to an unfair labour practice. Those special provisions encompassed a special dispute resolution system that would be based on fairness to both the employer and employee and one that would not be rigid. The dispute resolution system that applies to unfair dismissal claims under the LRA is a self-contained system of rights and obligations with specialised processes, fora and principles enforceable only under the LRA. It is one that seeks to strike a balance between the interests of employers and those of employees.

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[53] Section 185 of the LRA reads:

> "Every employee has the right not to be—
>
> (a) unfairly dismissed; and
>
> (b) subjected to unfair labour practice."

[54] Examples of this are (a) the requirement in section 185 of the LRA that a dismissal must be for a fair reason and (b) must be procedurally fair and the consultation requirements in section 189 of the LRA. All these provisions of the LRA are derived, at least in part, from the labour law jurisprudence created largely by the Industrial Court in the 1980s under the 1956 LRA.

[82] The National Economic Development Labour Council Act[55] created the National Economic Development Labour Advisory Council (NEDLAC). This body was established to enable Organised Business, Organised Labour and Government to negotiate and reach agreement on matters that affected them so as to advance economic development in the country.[56] The idea was that all these stakeholders would reach "deals" in this body which would be good for the country.[57] The "deals" they would reach could include "deals" on legislation that would be good for the economic development of the country. Those "deals" on legislation would then be referred to Parliament to enact. Obviously, the idea was not that Parliament would act as a rubber stamp for what had been agreed at NEDLAC. Nevertheless, it was hoped that, when dealing with a Bill that sought to capture a "deal" reached at NEDLAC, Parliament would appreciate the special and significant role of NEDLAC in the economic development of the country.[58]

[83] In 1994 the Minister of Labour appointed a Task Team whose mandate was to draft a memorandum in the form of a Bill that would ultimately be passed as the Labour Relations Act for the new democratic state. The Task Team consisted of labour lawyers who were found acceptable to all stakeholders. That Task Team produced a document in Bill-form together with an explanatory memorandum which explained the main features of the "Bill". The Minister of Labour referred the "Bill" and memorandum to

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[55] 35 of 1994.

[56] Section 5(1)(a) provides that:

> "The Council shall—
>
> (a) strive to promote the goals of economic growth, participation in economic decision-making and social equity."

[57] Section 5(1)(b) provides that:

> "The Council shall—
>
> (b) seek to reach consensus and conclude agreements on matters pertaining to social and economic policy."

[58] Section 5(1)(c) provides that:

> "The Council shall—
>
> (c) consider all proposed labour legislation relating to labour market policy before it is introduced in Parliament."

NEDLAC to enable Organised Business, Organised Labour and Government to use it as a basis for negotiation.[59]

[84] Extensive negotiations ensued at NEDLAC which culminated in a "deal" that was reached among all the stakeholders. That "deal" was in the form of the Labour Relations Bill. It included the unfair dismissal dispute resolution system which is reflected in the LRA. The "deal", as agreed to at NEDLAC, was then handed over to Parliament which had its usual debates on the Bill and passed it without any substantial changes, particularly in regard to the unfair dismissal dispute resolution system. Therefore, what we see in the LRA is substantially the "package" or "deal" that was agreed to at NEDLAC among Organised Business, Organised Labour and Government. Organised Business, Organised Labour and Government each made various compromises to achieve this "deal" or "package".

Features of the LRA "deal" or "package"

[85] The "package" included not only the right not to be unfairly dismissed that was conferred on employees – a right that did not exist before – but also the onus to prove that a dismissal is fair was put on the employer. At common law, reinstatement was not competent in an employment relationship. The new dispensation that was aimed at striking a balance between the interests of employers and those of employees came with a new rule on reinstatement. The rule on reinstatement favoured workers. Subject to certain exceptions, reinstatement was made the preferred remedy for an employee who has been dismissed substantively unfairly. However, the new system had a rule that favoured employers as well. That was the rule that reinstatement would not be competent in the case of an employee whose dismissal is found to be unfair only because no fair procedure was followed. This was one of the complaints by employers in the dispensation under the 1956 LRA. The complaint was that an employee could be reinstated by a court even if his or her dismissal was found to have been for a good

[59] *Explanatory Memorandum* (1995) 16 ILJ 278.

reason at a substantive level as long as there had been some procedural defect. The idea was that in such cases an employee should receive compensation and not reinstatement.

[86] At NEDLAC a deal was struck that employees would get reinstatement as a preferred remedy for substantively unfair dismissals and employers would not be forced to reinstate employees in respect of whom there was fair reason for dismissal but a fair procedure had not been followed. The two rules were part of the "deal" or "package" aimed at striking a fair balance between the interests of both employers and employees. As part of the "package", the LRA included various rules regarding compensation for an unfair dismissal in cases where reinstatement is not competent or practicable. The compensation was limited to the equivalent of 12 or 24 months' remuneration of an employee, depending on the type of dismissal involved. If the dismissal was for operational requirements, the employer would have to pay an employee severance pay, another benefit that employees did not enjoy at common law.[60]

[87] That the LRA seeks to strike a balance between the interests of employers and those of employees has already been acknowledged by this Court in *Sidumo*.[61] In that case this Court said:

> "The Constitution and the LRA seek to redress the power imbalance between employees and employers. The rights presently enjoyed by employees were hard won and followed years of intense and often grim struggle by workers and their organisations."[62]

[88] Since it is the LRA that confers on the employee the right not to be unfairly dismissed, it follows that it is the LRA that provides for the enforcement of that right, the times within which unfair dismissal claims are enforced and the processes and fora created by it. It cannot be that a right acquired under the LRA is lost under the

[60] Id at 311.

[61] *Sidumo* above n 48.

[62] Id at para 74.

Prescription Act, unless the LRA specifically so provides. The LRA makes no such provision.

[89] The dispute resolution system under the LRA stipulates the timeframes within which an unfair dismissal dispute must be referred to the relevant forum. It provides, in effect, that, if an employee fails to refer an unfair dismissal dispute to conciliation within the period, the referral will only be accepted if there is good cause for the failure to refer it within the period. Under the LRA an employee forfeits his or her unfair dismissal claim when he or she fails to refer the dismissal dispute to the correct forum within the relevant stipulated period and has no "good cause" for the failure. These provisions might not have the certainty of the common law or of the Prescription Act but they do provide the flexibility that is required in order to ensure that a balance is struck between the interests of employers and those of employees.

[90] If the drafters of the LRA and Parliament wanted a regime that included the Prescription Act, all they would have had to do to achieve that would have been to prefix the relevant provisions relating to condonation and good cause with the phrase: "subject to the Prescription Act". They deliberately did not do so. That was a legislative choice not to add the prescription periods of the Prescription Act to the LRA. For example, section 191(1)(b) provides that the referral of a dismissal dispute to conciliation must be made within 30 days from the date of dismissal. Then section 191(2) says: "[i]f the employee shows good cause at *any time*, the council or the Commission *may permit* the employee to refer the dispute after the relevant time limit in subsection (1) has expired".

[91] With regard to the referral of a relevant dismissal dispute to the Labour Court for adjudication, section 191(11)(a) and (b) read:

> "(a) The referral, in terms of subsection (5) (b), of a *dispute* to the Labour Court for adjudication, must be made within 90 days after the *council* or (as the case may be) the commissioner has certified that the *dispute* remains unresolved.

> (b) However, the Labour Court may condone non-observance of that timeframe on good cause shown."

The provision of section 191(11)(b) confers upon the Court a very wide power to condone non-observance of the timeframe stipulated in section 191(11)(a). There is no indication whatsoever in section 191(11)(b) that that power conferred upon the Labour Court is limited in any way in the sense that it is subject to the Prescription Act. The approach that says that the Prescription Act applies to unfair dismissal claims under the LRA means that a provision such as section 191(11)(b) is subject to the Prescription Act and yet the phrase "subject to the Prescription Act" is conspicuous by its absence in section 191(11)(b).

[92] The provisions of the dispute resolution system of the LRA seek to do things differently from how the common law sought to do things and from the way the Prescription Act seeks to do things. The Prescription Act had long been on the statute book when the LRA was passed. The drafters of the LRA were aware of the Prescription Act and the regime for which it provides. It was constitutionally competent for Parliament, when it passed the LRA, to take the attitude that, in regard to this special category of disputes, it would put in place a regime that differed from the regime in the Prescription Act.

[93] If the drafters had intended that, notwithstanding the fact that section 191(11)(a) and (b) mean that an employee may not refer a dismissal dispute to the Labour Court after the expiry of the 90 day period stipulated therein if he or she is unable to show good cause, such a dismissal dispute is also subject to the Prescription Act, they would have included the phrase "subject to the Prescription Act". In that case they would have formulated section 191(11)(b) in these terms:

> "(b) However, *subject to the Prescription Act,* the Labour Court may condone non-observance of that timeframe."

They did not frame section 191(11)(b) in these terms because it was never intended that the prescription periods stipulated in the Prescription Act should have any role to play in the dismissal dispute resolution dispensation under the LRA.

[94] Section 191(2) confers upon the relevant bargaining council or the CCMA the power, "[i]f the employee shows good cause at any time" — which means even after three years —"to permit the employee to refer the dispute *after the relevant time limit* in subsection (1) has expired". That means that this provision gives the CCMA or the bargaining council jurisdiction or power to permit an employee to refer an unfair dismissal dispute at any time outside the 30 day period provided the employee shows good cause. The provision does not limit the employee to showing good cause only within the three year period prescribed by the Prescription Act. In terms of the provision an employee may show good cause "at any time". The phrase "at any time" includes at any time after the expiry of three years from the date of dismissal provided good cause is shown for the delay.

[95] The approach that says that unfair dismissal claims are subject to the Prescription Act actually is a result of reading section 191(2) and 191(11)(b) as meaning that the CCMA or a bargaining council under section 191(2), and, the Labour Court under section 191(11)(b) have no jurisdiction to condone a referral of an unfair dismissal dispute after the expiry of three years stipulated in the Prescription Act. If it was intended to limit the jurisdiction of those tribunals to condone late referrals of unfair dismissal disputes to three years, and that, after that, they could not permit or condone a late referral of an unfair dismissal dispute, there would have been a provision in the LRA that says so expressly. The ousting of the jurisdiction of a court is not to be lightly inferred.

[96] I am of the view that, even after three years, the CCMA or a bargaining council or the Labour Court does have jurisdiction to permit or condone a late referral of an unfair dismissal dispute if the employee can show good cause. There may be a temptation to think that there will be no cases where an employee fails over three years

to refer an unfair dismissal dispute to the CCMA or to a bargaining council or to the Labour Court and has good cause and that, therefore, there is no problem if one adopts the approach that the Prescription Act is applicable to unfair dismissal disputes. However, there are situations where an employee may refer an unfair dismissal dispute to conciliation or arbitration or adjudication after the expiry of three years and he or she has good cause for the delay. I refer below to examples of such cases that are to be found in our law reports.

Steenkamp[63]

[97] A good example is *Steenkamp* where, for years, an employee wrongly or rightly believes that he or she is entitled to pursue a claim on the basis of a cause of action other than an unfair dismissal claim and later gets a court decision that says that he or she has no claim under that cause of action and the claim he or she should have pursued is one under the LRA. By that time three years may have lapsed. In such a case that employee would be able to refer the unfair dismissal dispute to the CCMA or to the relevant bargaining council for conciliation and apply for condonation for referring the unfair dismissal dispute to conciliation or arbitration or adjudication after the lapse of such a long time e.g. three years from the date of dismissal.

[98] In *Steenkamp* employees who were dismissed challenged the validity and lawfulness of their dismissal in the Labour Court and sought an order that their dismissals were invalid and of no force or effect. They also sought an order of reinstatement. They did not challenge the fairness of their dismissals. Therefore, they did not refer an unfair dismissal dispute to conciliation under the LRA. There was precedent in both the Labour Court and the Labour Appeal Court upholding this approach they were taking. However, when the Labour Appeal Court dealt with their matter, it overruled its previous decision that they had been following as well as the decision of the Labour Court. When the matter came to this Court, this Court held that

[63] *Steenkamp v Edcon Ltd* [2016] ZACC 1; 2016 (3) SA 251 (CC); 2016 (3) BCLR 311 (CC).

the approach they had followed was wrong and was not open to them and they should have followed the unfair dismissal route. It, accordingly, dismissed the appeal. By this time a period of more than three years had lapsed. This meant that, if the Prescription Act applied to unfair dismissal claims, the employer could raise prescription when they sought to refer unfair dismissal disputes to conciliation.

[99] In a case such as *Steenkamp* an employee would say that, until the date of this Court's judgment in that case, he or she had *bona fide* believed that he or she did not have to refer an unfair dismissal dispute to a conciliation process because, based on decisions of the Labour Court and Labour Appeal Court, she or he believed that he or she could obtain from the Labour Court the relief that she or he wanted. That is an order that the dismissal was unlawful, invalid and of no force and effect and granting reinstatement. He or she would say that it was only after this Court had handed down its judgment in the matter that he or she realised that the route he or she had followed was not available to him or her in law and that he or she had to refer the dispute to a conciliation process.

[100] Provided that the employee acted without delay after the delivery of the judgment of this Court clarifying the position, there are good prospects that the CCMA or bargaining council considering his or her condonation application would find that he or she had shown good cause for the delay. In that event, it would condone the delay or permit him or her to refer the unfair dismissal dispute to conciliation even after the expiry of three years from the date of his or her dismissal. That is what can happen under the LRA and its dispute resolution dispensation. However, under the Prescription Act, once the prescription period of three years has expired, the claim has prescribed and it is "dead", no matter how plausible the creditor's explanation for the failure to institute the action and serve the summons within the applicable prescription period.

[101] In *Steenkamp* this Court was alive to the kind of situation where an employee *bona fide* believes for a long time that he or she does not need to refer an unfair dismissal

dispute to a conciliation process until this Court delivers a judgment that shows that he or she does need to do so. After this Court had concluded in *Steenkamp* that the employees' appeal had to fail, it said:

> "Does this mean that this is the end of the road for the employees in this case? Not necessarily. Until the decision of this Court, the employees acted on the strength of decisions of the Labour Court and Labour Appeal Court whose effect was that in this type of case it was open to them not to use the dispute resolution mechanisms of the LRA and not to seek remedies provided for in section 189A but instead to simply seek orders declaring their dismissals invalid. It is arguably open to them to seek condonation and pursue remedies under the LRA. Obviously, Edcon would be entitled to oppose that."[64]

Steenkamp is not an isolated case in which an employee was required to refer a dismissal dispute to a conciliation process after the expiry of three years and possibly had good cause for referring it after the expiry of such a long time from the date of dismissal.

Chirwa[65]

[102] Ms Chirwa was dismissed from the Transnet Pension Fund in 2002. She had initially referred her dismissal dispute to the CCMA for conciliation. Conciliation failed. From then she had 90 days within which to request that her unfair dismissal dispute be arbitrated. It would appear that that was an unfair dismissal dispute that under the LRA would have had to be arbitrated rather than adjudicated. Ms Chirwa then decided not to pursue the matter under the LRA dispute resolution system. Instead, she decided to launch a review application in the High Court under the Promotion of Administrative Justice Act[66] (PAJA) on the basis that her dismissal constituted an administrative action. That would have ordinarily meant that her review application could be decided by the High Court. If her review application succeeded, she would, in effect, have achieved reinstatement.

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[64] *Steenkamp* above n 63 at para 193.

[65] *Chirwa v Transnet Limited* [2007] ZACC 23; 2008 (4) SA 367 (CC); 2008 (3) BCLR 251 (CC).

[66] 3 of 2000.

[103] Ms Chirwa's review application failed in the High Court. That Court said that it did not have jurisdiction because this was a matter which should have been pursued as an unfair dismissal claim under the LRA. She appealed to this Court. This Court held that her dismissal did not constitute an administrative action and she should have pursued her case as an unfair dismissal claim under the LRA. Ms Chirwa had been dismissed in 2002. Her case was heard by this Court in March 2007 and judgment was handed down in November 2007. That was about five years from the date of dismissal. However, since the failure of the conciliation process, the period must have been at least more than four years.

[104] This Court was alive to the fact that the time within which Ms Chirwa was required to have requested that her dispute be arbitrated under the LRA had long expired and she would need to apply for condonation. This Court did not think that her unfair dismissal claim had prescribed under the Prescription Act. Indeed, this Court thought that an unfair dismissal claim was only subject to the periods provided for in the LRA and condonation for delays could be granted when there was good cause. That is why this Court said through Skweyiya J at the end of its judgment:

> "Although on her pleadings the applicant appears to be out of court, she is not left without a remedy. She must follow the route created by the LRA and exhaust all the remedies that are still available to her within that specialised framework. A condonation procedure is provided for by section 136(1) of the LRA, and thus the applicant may still pursue the route of arbitration. If she is dissatisfied with the outcome, she has the further option of pursuing the review of the arbitration award in the Labour Court, in terms of section 145 of the LRA."[67]

Fredericks[68] *and Gcaba*[69]

[67] *Chirwa* above n 65 at para 77.

[68] *Fredericks v MEC for Education and Training, Eastern Cape* [2001] ZACC 6; 2002 (2) SA 693 (CC); 2002 (2) BCLR 113.

[69] *Gcaba v Minister for Safety and Security* [2009] ZACC 26; 2010 (1) SA 238 (CC); 2010 (1) BCLR 35 (CC).

[105] *Fredericks* and *Gcaba* are cases in which employees could easily have found themselves having to refer unfair dismissal disputes to conciliation or arbitration or adjudication under the LRA dispute resolution system after the expiry of a period of three years because they had first pursued the High Court route on the basis that they sought to vindicate their constitutional rights and not their rights under the LRA. Fortunately for the employees in those cases, they did not have to deal with that situation.

Intervalve[70]

[106] *Intervalve* is another case where employees may have had to refer their dismissal dispute to a conciliation process after the expiry of three years. The employees involved in *Intervalve* whose dismissal disputes were not referred by their union to the conciliation process may have had to refer their dismissal disputes to conciliation after the expiry of three years if they referred the disputes after the judgment of this Court. This Court thought that, even after the expiry of such a long time, the employees could still refer their dismissal disputes to conciliation and apply for condonation. This appears from what this Court said through Cameron J:

> "The dissenting judgment suggests that the approach favoured here is overly restrictive and formalistic and will impede the effective resolution of labour disputes. This seems undue. A clear requirement that a union must include every employer in conciliation proceedings is likely to lead to less, not more, litigation. The dissent rightly notes that in a complex working relationship it may be difficult to determine the true employer of each employee. But the LRA offers condonation if this complexity results in missed deadlines. Indeed, condonation for the late referral involving Intervalve and BHR was available here, and it is not clear why NUMSA did not seek to review the Bargaining Council's decision in August 2010 to deny it condonation. NUMSA may indeed still seek to review that decision on the basis that, until the decision of this Court, it believed that it was entitled to have the companies joined.

[70] *National Union of Metal Workers of South Africa v Intervalve (Pty) Ltd* [2014] ZACC 35; (2015) 36 ILJ 363 (CC); 2015 (2) BCLR 182 (CC) (*Intervalve*).

> Nor is condonation the only recourse for the employees who, through no fault of their own, will be unable to join the action against Steinmüller. NUMSA failed to act promptly at various points during the litigation. That may make it possible for the employees of Intervalve and BHR to seek recompense from it on the basis of negligent mismanagement of their claim."[71]

CMI v September[72]

[107] This is a case where employees and their employer were in dispute about whether the Labour Court had jurisdiction to adjudicate an alleged constructive dismissal dispute or an alleged automatically unfair dismissal dispute when it granted a default judgment against the employer, CMI Business Enterprises (CMI). This issue arose in circumstances where employees had referred to the CCMA for conciliation a dispute they described as "unfair discrimination S10 of the Employment Equity Act" but, after the conciliation process had failed, they referred to the Labour Court for adjudication a dispute concerning an alleged constructive dismissal or an automatically unfair dismissal.

[108] In seeking a rescission of the default judgment, the employer took the point that no constructive dismissal dispute or automatically unfair dismissal dispute had been referred to the CCMA for conciliation and, therefore, the Labour Court had no jurisdiction to adjudicate such a dispute. The employees contended that the Labour Court did have jurisdiction because at the conciliation meeting the true dispute, namely, constructive dismissal, had been discussed. The Labour Court upheld the employees' contention and held that, therefore, it had had jurisdiction to grant the default judgment. It dismissed CMI's rescission application. In a subsequent appeal to the Labour Appeal Court, that Court upheld CMI's contention that the Labour Court had not had jurisdiction to grant the default judgment because no dismissal dispute had been referred to the conciliation process and reversed the decision of the Labour Court.

[71] Id at paras 71-2.

[72] *CMI Business Enterprises CC v September* unreported judgment of the Labour Appeal Court, Case No: JA 111/2014, 26 October 2016.

[109] The matter then came before this Court. The employees' claim for constructive dismissal or automatically unfair dismissal was based on their allegation that they had resigned from CMI's employ on 13 September 2011 because their continued employment had become intolerable as a result of the racist treatment to which the employer had allegedly subjected them. Had this Court decided that no dismissal dispute of any kind was referred to the CCMA for conciliation and that, therefore, the Labour Court had not had jurisdiction to grant the default judgment against the employer, the question that would have arisen for the parties would have been this: as the period of three years since the alleged resignation had lapsed, could the employees still have referred their unfair dismissal claim to the CCMA for conciliation if they could show good cause or could they not do so because, in the meantime, their unfair dismissal claim had prescribed under the Prescription Act? In my view they would still have been able to refer their dismissal dispute if they could show good cause.

[110] The cases referred to above show that there are cases in which employees' failure over three years to refer their unfair dismissal disputes to conciliation or to arbitration or adjudication could be due to a *bona fide* error of law. The cases show some of the instances where employees who had failed over three years to refer their unfair dismissal disputes to conciliation could possibly show good cause as required by the LRA for the referral of their unfair dismissal disputes after the expiry of three years since dismissal. In those cases the CCMA or relevant bargaining council would be entitled to permit the employee in terms of section 191(2) to refer the dispute to conciliation after the expiry of three years if the Prescription Act did not apply to unfair dismissal disputes under the LRA and if good cause was shown. However, that employee's claim would be "killed" if the Prescription Act applied to such claims or disputes because, under the Prescription Act, if the prescription period of three years has expired, the claim has prescribed and is "dead" and the presence or absence of good cause for the delay is irrelevant. Therefore, applying the LRA rather than the Prescription Act is the right approach.

Difficulties of interpretation

[111] The proposition that the Prescription Act applies to unfair dismissal disputes under the LRA suggests that the prescription period prescribed by the Prescription Act begins to run from the date of dismissal (i.e. that is when the debt is said to be due) and is interrupted by the service on the employer of the referral document referring the dismissal dispute to the process of conciliation. One of the difficulties with this is that, when, under the Prescription Act, it is said that a debt is due, it means that the debt or claim is enforceable and the creditor may immediately institute court proceedings to recover it. Yet, under the LRA no court proceedings may be instituted to obtain any order of reinstatement or for the payment of compensation until the conciliation process has failed. The failure of a conciliation process is proved by the issuing of a certificate by a commissioner to the effect that the dispute remains unresolved or by the expiry of 30 days (or any agreed extended period) after the receipt of the referral of the dispute to the conciliation process.

[112] In *Intervalve* this Court held that the referral of an unfair dismissal dispute to conciliation is a jurisdictional requirement that must be met before the Labour Court may acquire jurisdiction to adjudicate a dismissal dispute. This also applies to a dismissal that may need to be referred to arbitration after the conciliation process. This, therefore, means that at the time of the referral of a dismissal dispute to conciliation, the CCMA does not have jurisdiction to arbitrate the dispute nor does the Labour Court have jurisdiction at that stage to adjudicate the dispute if it is a dispute that could otherwise end up having to be referred to the Labour Court for adjudication.

[113] If, under the Prescription Act, a creditor instituted, within the relevant prescription period, an action in a court that does not have jurisdiction to adjudicate his or her claim, that action would not interrupt prescription. It is difficult to see why then, when it comes to unfair dismissal claims, referring a dismissal claim to the CCMA, a body that has no competence or jurisdiction to adjudicate the claim at any stage before, the position should be different. Since the CCMA cannot adjudicate the claim, lodging and serving a referral document with the CCMA cannot interrupt prescription.

Prescription gets interrupted when the court process that is served relates to an action that has been instituted in a court that has jurisdiction.

[114] Another difficulty with the approach that the Prescription Act applies to unfair dismissal disputes and that the referral of a dismissal dispute to conciliation interrupts prescription is that prescription is interrupted by the referral of the dispute to conciliation but, if conciliation fails and the employee is required to refer the dispute to, for example, the Labour Court for adjudication within 90 days of the failure of conciliation but fails over three years to do so, his claim would not prescribe. In such a case the employee would forfeit his unfair dismissal claim only on the terms of the LRA.[73] That is if he or she fails to show good cause for the failure to refer the dispute to the Labour Court within the period required by the LRA. The LRA requires an employee to refer such a dismissal dispute to the Labour Court within 90 days from the date of the issuing of the certificate that says that the dispute remains unresolved or within 90 days from the date when the CCMA or bargaining council received the referral of the dispute to conciliation.

Interference with an agreed balance

[115] Applying the Prescription Act to unfair dismissal claims under the LRA would introduce into the LRA dispute resolution dispensation a foreign rule that operates under a different statute. The result would be that this foreign rule would tamper with a specialised dispute resolution dispensation agreed to between employers and workers that seeks to strike some balance between the parties' competing interests. That would create a system that is more advantageous to employers than to employees. The foreign rule would have the effect of taking away from employees' rights and benefits, including the ability to pursue unfair dismissal claims beyond three years in those cases where there is good cause for failing to refer the dispute to the relevant forum within the period stipulated in the LRA. Invoking this foreign rule into the LRA tampers with or disturbs the balance struck under the LRA at NEDLAC and approved by Parliament.

[73] LRA above n 1 at section 191(11).

Invoking the Prescription Act disturbs that balance in favour of employers and to the detriment of workers.

Benefits of the LRA regime

[116] Under the LRA unfair dismissal dispensation, there are advantages for both employers and the employees. An employer may be able to make the unfair dismissal claim of an employee go away in a shorter period of time than the time provided for in the Prescription Act. In that way the LRA is able to give an employer certainty much earlier in regard to such a claim if the employee fails to refer the dispute within the stipulated period and fails to show good cause.[74] This may be within one year. This disadvantages employees because it makes it possible for them to forfeit their unfair dismissal claims much earlier than otherwise would have been the case under the Prescription Act. However, the same provision in the LRA also makes it possible for an employee to pursue his or her unfair dismissal claim after the expiry of three years from the date of dismissal if he or she can show good cause.[75] This is disadvantageous to employers as it takes long before they have certainty about that unfair dismissal claim. Under the Prescription Act, once the period of three years has expired, the claim is forfeited regardless of whether there is good cause or not.[76] Under the LRA dispensation there is something for both employers and employees. This example illustrates that the LRA unfair dismissal dispensation seeks to strike a fair balance between the interests of employers and those of employees. This is part of the "deal" or "package" agreed to at NEDLAC among Organised Business, Organised Labour and Government.

[117] That the LRA dispute resolution system is a "package" or "deal" or a special dispensation has been decided by this Court. In *Steenkamp* this Court said:

[74] Id.

[75] Id.

[76] Prescription Act above n 2 at section 11.

"[105] The LRA created special rights and obligations that did not exist at common law. One right is every employee's right not to be unfairly dismissed which is provided for in section 185. *The LRA also created principles applicable to such rights, special processes and fora for the enforcement of those rights. The principles, processes, procedures and fora were specially created for the enforcement of the special rights and obligations created in the LRA.* Indeed, the LRA even provides for special remedies for the enforcement of those rights and obligations. The special remedies include interdicts, reinstatement and the award of compensation in appropriate cases. These special rights, obligations, principles, processes, procedures, fora and remedies constitute a special LRA dispensation"[77]

[118] Bringing the foreign rule into the LRA system takes away from the workers a benefit which they had been given as part of the "deal". In *Steenkamp* the Court said:

"[116] [T]hrough the LRA the Legislature sought to create a dispensation that would be fair to both employers and employees, having regard to all the circumstances, including the power imbalance between them.

[117] Furthermore, the fairness required by the LRA dictates that the relief that is granted by the Labour Court or an arbitrator for an unfair dismissal must take account of all the relevant circumstances of the case and the interests of both the employer and employee. As a result of this approach, there is flexibility in the relief that may be granted in a particular case. The remedy may be reinstatement with or without retrospectivity. It may be an award of compensation. The compensation is capped at 12 months' remuneration or 24 months' remuneration, depending on whether it is for an automatically unfair dismissal or a substantively or procedurally unfair dismissal. If the dismissal is substantively fair but procedurally unfair, reinstatement is not competent but an award of compensation is competent.

[118] All of these enable the Court or an arbitrator to grant relief for unfair dismissal that is just and equitable to both the employer and the employee in a particular case. The common law which gives us the concept of the invalidity of a dismissal is rigid. It says that if a dismissal is unlawful and invalid, the employee is treated as never having been dismissed irrespective of whether the only problem with the dismissal was some minor procedural non-compliance. It says that in such a case the employer must pay

[77] *Steenkamp* above n 63 at para 105.

> the employee the whole backpay even if, substantively, the employer had a good and fair reason to dismiss the employee.
>
> [119] Whereas the LRA requires a number of factors to be taken into account in deciding what the appropriate remedy is for an unfair dismissal including an automatically unfair dismissal, the common law's remedy of an invalid dismissal takes into account one fact and one fact only. That is that the dismissal was in breach of statutory provisions. Under the LRA if the remedy that is considered fair is compensation, the Court grants compensation. The compensation is limited to 12 months' or 24 months' remuneration, as the case may be, in terms of section 194 of the LRA. Under the LRA if the Court thinks reinstatement would be an appropriate remedy, it will grant reinstatement. When considering the flexibility required by the LRA in the grant of a remedy for unfair dismissal, one thinks of the flexibility in regard to a remedy that section 172(1)(b) of our Constitution contemplates. Section 172(1)(b) confers on the courts the power to make "any order that is just and equitable" when dealing with constitutional matters within their powers. I make these points to show that the exclusion of the remedy of an invalid dismissal under the LRA was deliberate. It did not fit into the dispensation of the LRA which required flexibility so as to achieve fairness and equity between employer and employee in each case."[78]

[119] Bringing the Prescription Act into the unfair dismissal claims under the LRA gives employers two "sledgehammers" capable of "killing" an employee's unfair dismissal claim in circumstances where the "deal" reached at NEDLAC among all the stakeholders was that the employer would have only one "sledgehammer", namely the LRA "sledgehammer". In other words, that an employer could "kill" an employee's unfair dismissal claim for a delay in referring it by showing that the employee had no good cause. If an employee referred a dismissal dispute to the relevant forum outside the stipulated period but before the expiry of three years, the employer would use an LRA "sledgehammer" to try and "kill" the claim by taking the point that there was no good cause shown for the delay. If the claim was referred after the expiry of the three year period provided for in the Prescription Act, the employer could invoke the

[78] Id at paras 116-9.

Prescription Act "sledgehammer" and take the point that the claim has prescribed and, with or without good cause, the claim is "dead".

[120] If one takes the approach that the Prescription Act has no application to unfair dismissal claims, the employer can only rely upon the absence of good cause to "kill" an unfair dismissal claim on grounds of delay and he or she cannot rely upon the Prescription Act as well. Therefore, bringing the Prescription Act into the unfair dismissal claims unduly advantages employers to the detriment of employees, tipping the scale, once again, in favour of employers. The approach that says that the Prescription Act applies to unfair dismissal claims under the LRA allows employers to use the LRA when it suits them to "kill" employees' unfair dismissal claims and to use the Prescription Act when using the LRA does not suit them and it suits them to use the Prescription Act. That is what I call the LRA "sledgehammer" and the Prescription Act "sledgehammer".

[121] There is a presumption in our law that, where a statute creates new rights that did not exist before and provides remedies for the breach of those rights, those are the only remedies that can be granted in the case of the infringement of those rights. I think that it can also be said that, where a statute creates new rights and provides for a special way in which those rights can be lost, those special ways in which they can be lost are the only ways in which those rights can be lost. Where a right is created by statute A and statute A provides how that right is lost or forfeited, you cannot invoke a way of losing rights or forfeiting rights provided for in statute B to say that rights under statute A have been lost. The right not to be unfairly dismissed created by section 85 of the LRA is a special right that did not exist at common law. The LRA has provisions governing how, where and when an unfair dismissal claim may be enforced and how an employee forfeits it. There is no reason why it should be said that we should look at the Prescription Act to see how an employee forfeits an unfair dismissal claim when the LRA has a special provision on how an employee forfeits his or her unfair dismissal claim.

[122] In this case the Prescription Act is a general statute. The LRA is a specific statute dealing specifically with, among others, the right not to be unfairly dismissed and how unfair dismissal claims are enforced and lost. So, that alone should be enough to justify the conclusion that a specific statute applies to the exclusion of a general statute.

Application of Sidumo to the present case

[123] In *Sidumo*[79] this Court had to decide whether it would be the LRA review regime or the PAJA review regime that would govern review applications relating to CCMA arbitration awards. It had to decide this issue within the following context. PAJA was enacted to give effect to section 33 of the Constitution which provided that everyone had a right to administrative action that is lawful, reasonable and procedurally fair. This Court decided in *Sidumo* that a CCMA arbitration award is administrative action. Ordinarily, this Court's conclusion that a CCMA arbitration award was administrative action would have meant that such an award would be reviewed under PAJA. Yet, section 145 of the LRA specifically provided that a CCMA arbitration award was to be reviewed under that provision in the LRA. The grounds upon which a CCMA award could be reviewed under section 145 of the LRA and the grounds upon which administrative action could be reviewed under PAJA differed, to some extent. Also, under section 145 the period within which a review application of a CCMA award had to be brought was shorter than the period applicable under PAJA.

[124] The LRA required review applications to be lodged within six weeks of the handing down of arbitration awards.[80] PAJA required review applications to be lodged within 180 days of the making of the administrative action or of the applicant gaining knowledge of the administrative action. So, obviously, if it was the LRA regime that would apply, then the six-week period would be applicable. If it was PAJA that would apply, then the 180 day period would be applicable. Also, the grounds of review provided for under section 145 of the LRA were not exactly the same as those applicable

[79] *Sidumo* above n 48.

[80] LRA above n 1 at section 145.

under PAJA even though there was much overlap. The question that faced this Court was, therefore, whether CCMA arbitration awards – which are administrative actions – had to be reviewed under section 145 of the LRA or under PAJA.

[125] Faced with this situation, this Court referred to the fact that in *Bato Star*[81] it had left open the question of what the position was in respect of "causes of administrative action that did not fall within the scope of PAJA". This Court then said:

> "Does this mean that review provisions of PAJA are automatically applicable in the present context? To answer this question it is necessary to deal with the LRA and its applicable provisions in relation to PAJA. *The LRA is specialised negotiated national legislation giving effect to the right to fair labour practices. . . . Section 145 was purposefully designed as was the entire dispute resolution framework of the LRA.*"[82]

[126] This Court said later in *Sidumo*:

> "[95] The Supreme Court of Appeal was of the view that the only tension in relation to the importation of PAJA was the difference in time-scales in relation to reviews under s 145 of the LRA and PAJA. This difference is but one symptom of a lack of cohesion between provisions of the LRA and PAJA.
>
> [96] Section 157(1) of the LRA provides that, subject to the Constitution and except where the LRA provides otherwise, the Labour Court has exclusive jurisdiction. Section 157(2) provides that the Labour Court has concurrent jurisdiction with the High Court in respect of any alleged or threatened infringement of any right in the Constitution and arising, inter alia, from employment and labour relations. High courts will of course always have jurisdiction where a fundamental right is pertinently implicated in the labour relations field, as, for example, when a union might seek to interdict an employment practice that is obviously racist. This, of course, does not mean that in the ordinary course of reviewing decisions of CCMA commissioners concerning unfair labour practices, the Labour Court does not enjoy exclusive jurisdiction.

[81] *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Tourism* [2004] ZACC 15; 2004 (4) SA 490 (CC); 2004 (7) BCLR 687 (CC) (*Bato Star*).

[82] *Sidumo* n 48 above at para 94.

[97] If PAJA were to apply, s 6 thereof would not allow for such exclusivity and would enable the High Court to review CCMA arbitrations. This would mean that the High Court would have concurrent jurisdiction with the Labour Court. This negates the intended exclusive jurisdiction of the Labour Court and provides a platform for forum shopping.

[98] The powers of the Labour Court set out in s 158 of the LRA differ significantly from the powers of a court set out in s 8 of PAJA. The powers of the Labour Court are directed at remedying a wrong and, in the spirit of the LRA, at providing finality speedily. If an application in the normal course for the review of administrative action succeeds, an applicant is usually entitled to no more than the setting aside of the impugned decision and its remittal to the decision-maker to apply his or her mind afresh. Section 8(1)(c)(ii) of PAJA provides that only in exceptional cases may a court substitute the administrative decision or correct a defect resulting from the administrative action. This is a significant difference between the LRA and PAJA.

[99] All of this explains why s 210 of the LRA was enacted and why it was not amended or repealed by PAJA. Section 210 of the LRA provides as follows:

> 'If any conflict, relating to the 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.'

[100] The State in both its executive and legislative arms was involved in finalising the LRA together with persons representing business, labour and community interests. Section 210 is unsurprising. The main protagonists in industrial relations, having negotiated the terms of the legislation, were not likely to countenance any non-agreed intrusions. This is particularly so in relation to the method and manner of determining disputes.

[101] For more than a century courts have applied the principle that general legislation, unless specifically indicated does not derogate from special legislation. Lord Hobhouse, delivering the judgment of the Privy Council in *Barker v Edger and Others*, stated the following:

> 'When the Legislature has given its attention to a separate subject, and made provision for it, the presumption is that a subsequent general enactment is not intended to interfere with the special provision unless

> it manifests that intention very clearly. Each enactment must be construed in that respect according to its own subject-matter and its own terms. . . . It would require a very clear expression of the mind of the Legislature before we should impute to it the intention of destroying the foundation of the work which it had initiated some four years before, and to which the Court has ever since been assiduously addressing itself.'

[102] In *R v Gwantshu*, after citing *Barker* with approval, the court quoted the following passage from *Maxwell on the Interpretation of Statutes*:

> 'Where general words in a later Act are capable of reasonable and sensible application without extending to subjects *specially* dealt with by earlier legislation, that earlier and *special legislation* is not to be held indirectly . . . altered . . . merely by force of such general words, without any indication or particular intention to do so.'

[103] The legislature had knowledge of s 210 of the LRA and deliberately decided not to repeal that section or s 145 of the LRA. Moreover, it resulted from intense negotiations that led to the enactment of the LRA. This is an appropriate case for the application *of the principle that specialised provisions trump general provisions*.

[104] For the reasons set out above the Supreme Court of Appeal erred in holding that PAJA applied to arbitration awards in terms of the LRA."[83]

[127] It seems to me that, in relation to whether the Prescription Act applies to unfair dismissal claims under the LRA, we must adopt the same approach that this Court adopted when it had to decide whether PAJA would apply to the review of CCMA arbitration awards. That approach was to say that the LRA is specialised national legislation enacted to give effect to the right to fair labour practices whose dispute resolution framework was purposefully designed and it contains specialised provisions whereas the Prescription Act contains general provisions. As this Court did in *Sidumo* in relation to PAJA, we must then invoke the principle "that specialised provisions

[83] Id at paras 94-104.

trump general provisions".[84] If we invoke this principle, the result will be that the provisions of the LRA that say that a dismissal dispute may be referred to conciliation or adjudication outside the stipulated timeframe if the employee shows good cause will prevail even beyond three years from the date of dismissal and the provisions of the Prescription Act relating to the three year prescription period will have no application to unfair dismissal claims under the LRA.

Non-agreed intrusion

[128] Furthermore, in *Sidumo* this Court referred to bringing into the LRA "non-agreed intrusions". It put it in these terms:

> "[100] The State in both its executive and legislative arms was involved in finalising the LRA together with persons representing business, labour and community interests. Section 210 is unsurprising. The main protagonists in industrial relations, having negotiated the terms of the legislation, were not likely to countenance any non-agreed intrusions. This is particularly so in relation to the method and manner of determining disputes."[85]

What this Court meant here was that, if it held that CCMA arbitration awards could be reviewed under PAJA, that would bring into the LRA dispensation a non-agreed intrusion whereas, if it said that such awards had to be reviewed under section 145 of the LRA, that would be in line with the "deal" reached among the stakeholders.

[129] The context in which this Court said this in relation to PAJA applies to the present case in relation to the question whether the Prescription Act applies to unfair dismissal claims under the LRA. In the present case it seems to me that bringing the three year prescription rule into the dispute resolution system under the LRA concerning unfair dismissal claims when the LRA has got its own provisions on when an employee forfeits his or her unfair dismissal claim is to bring into the LRA a

[84] Id.

[85] Id at para 100.

"non-agreed intrusion". It should be rejected here as this Court rejected such a non-agreed intrusion in *Sidumo* in regard to PAJA.

[130] The LRA tells us when a person acquires the right not to be unfairly dismissed. It says that happens when you are an employee.[86] The LRA also tells us how or when that right gets infringed. It says that that happens when an employer dismisses an employee without following a fair procedure and/or when there is no fair reason to dismiss. It also tells us that that right is infringed if the reason for the dismissal is listed in section 187 of the LRA. That is a provision for automatically unfair dismissals. The LRA also tells us what processes are to be employed by an employee who seeks a remedy for an alleged infringement of that right. Those processes are conciliation and, thereafter, either arbitration or adjudication, depending on the alleged reasons for the dismissal.[87]

[131] The LRA also tells us what remedies are available for the vindication of the right not to be unfairly dismissed or for the enforcement of that right. Those remedies are reinstatement, re-employment and compensation.[88] It also tells us which fora an employee must go to in order to obtain a remedy for the infringement of that right. It says that these are the CCMA, bargaining councils, Labour Court and even a private arbitration forum where this is agreed to between the parties. Most importantly for present purposes, the LRA tells us when an employee forfeits his or her unfair dismissal claims. It says an employee forfeits an unfair dismissal claim if he or she fails to refer the unfair dismissal dispute or claim to the relevant forum within the stipulated period and has no good cause for that failure.

[86] LRA above n 1 at section 185.

[87] Section 191(4) provides that a bargaining council or the CCMA must attempt to resolve through conciliation an unfair dismissal dispute that has been referred to it in terms of section 191(1). Section 135(2) provides that a Commissioner who has been appointed to resolve a dispute through conciliation must determine a process to attempt to resolve that dispute and that process may involve mediating the dispute or conducting a fact-finding exercise and making a recommendation to the parties which may be in the form of an advisory arbitration award.

[88] LRA above n 1 at section 193.

[132] The LRA obliges an employee to refer an unfair dismissal claim to the relevant forum within a period stipulated in the LRA and provides what the consequences are of a failure to refer that dispute within such stipulated period. Unlike the Prescription Act, the LRA's approach is that failure to refer a dismissal dispute to the relevant forum within the period stipulated in the LRA does not *ipso facto* result in the forfeiture of that claim by the employee. The LRA requires more than the failure to refer the dismissal dispute within the stipulated period. It requires that, in addition, there must be no good cause for the failure to refer the dispute within that time. It was competent for the Legislature to make the legislative choice that for this special category of claims or disputes, how the right not to be unfairly dismissed is acquired, how it will be infringed, how it will be enforced and how it is forfeited would be governed by the LRA, rather than another piece of legislation such as the Prescription Act.[89]

[133] The above is the LRA "package" that has worked very well without reliance on any rules falling outside of the LRA. There is no warrant to change it or to in effect amend it by invoking a rule of the Prescription Act.

[134] In regard to those debts to which the Prescription Act applies, the Prescription Act confers benefits on debtors and creditors. With regard to creditors, it gives a creditor – in the case of a debt which would prescribe after the expiry of three years since the debt became due – the right to sit back and do nothing to recover the debt for close to three years. The creditor only needs to start acting i.e. instituting action and serving papers on the debtor, a short while before the expiry of the three year period. Under the LRA an employee who has an unfair dismissal claim against his or her employer has no such benefit in the form of a right to sit back and do nothing for close to three years. An employee has a duty under the LRA to refer an unfair dismissal dispute to conciliation within 30 days unless he or she has good cause for any delay.

[89] Id at section 191.

[135] The benefits that the Prescription Act gives to debtors in regard to those debts to which that Act applies is the certainty that, once the prescription period applicable to a particular debt has expired, the debt is "dead" and cannot be revived. In that way he or she no longer owes the creditor. The LRA dispensation is different. It does not give the creditor i.e. the employee such a long time to sit back and do nothing about the unfair dismissal claim or dispute nor does it give the debtor i.e. the employer any certainty that the unfair dismissal claim is "dead" after the expiry of 30 days from the date of dismissal of the employee. The LRA dispensation does not give the employer any certainty because, even after months or even more than a year (since the expiry of the period), the employee may still refer the dismissal dispute to conciliation if he or she is able to show good cause.

[136] The view that the Prescription Act applies to unfair dismissal claims or disputes imposes on employees a burden or disadvantage without giving them any benefit such as that Act gives to creditors and debtors to whose debts the Prescription Act applies. There is no justification for a view with such implications. The result of the other construction is, therefore, to bring about a system that is more oppressive to workers than was agreed to by employers and trade unions at NEDLAC. I think it is unwarranted and fails to appreciate the world of equity and fairness that the LRA strives for in regulating the interests of employers and employees.

Conclusion

[137] In the light of the above, it is precisely because the Prescription Act is not meant to be applied to unfair dismissal claims under the LRA that one experiences all sorts of difficulties when one tries to apply it to unfair dismissal claims. For example, the Prescription Act provides that the mechanism or instrument to be used to interrupt the running of prescription is the "service on the debtor of any process" whereby legal proceedings are commenced (section 15(1) read with the definition of "process" in section 15(6)). If one reads section 15(1) and (6) together with subsections (2), (3), (4) and section 16(1), one sees in those subsections references to "judgment", "court" and "action" that the proceedings envisaged in section 15(1) read with subsection (6) are

legal proceedings in a court of law that may result in the court giving a judgment on the debt. To say that the referral of an unfair dismissal dispute to the CCMA for conciliation is a process commencing legal proceedings is to do violence to the language of the statute. In the result, I would uphold the appeal.

KOLLAPEN AJ (Cameron J, Froneman J, Kathree-Setiloane AJ, Madlanga J, Mhlantla J and Theron J concurring):

Introduction

[138] Time is central to, and certainly, the essence of this matter, which involves a consideration of whether time periods that regulate litigation as provided for in two separate pieces of legislation, namely the Prescription Act[90] and the LRA,[91] are consistent with each other. The legal question that arises for determination is whether the provisions of the Prescription Act apply to litigation involving unfair dismissal claims that are brought under the LRA.

[139] I have read the lucid and comprehensive judgments prepared by my colleagues Zondi AJ (first judgment) and Zondo DCJ (second judgment). I concur that leave to appeal must be granted and that the appeal must succeed. However, I do not agree that the provisions of the Prescription Act are inconsistent with those of the LRA, and on account of that, the Prescription Act is not applicable to litigation under the LRA.

[140] In my view, there is compatibility and consistency between the two Acts. Although they both deal with the issue of time, they focus on different aspects of its application in the litigation process. The LRA deals with time periods that do not necessarily result in the extinction of a claim in the event of non-compliance with them, while the Prescription Act deals with time periods that will result in the extinction of

[90] Prescription Act above n 2.

[91] LRA above n 1.

the claim in the event of non-compliance. They are considerably different in the consequences they carry and for the reasons that follow; I conclude that the time periods prescribed in terms of the Prescription Act are consistent with both the time periods contained in the LRA and the general scheme of the LRA.

[141] The parties to the dispute, the factual background to the matter, the litigation history and the contentions of the parties in this Court are comprehensively set out in the first judgment and accordingly do not warrant restating.

[142] The two relevant statutory provisions that require consideration are section 16(1) of the Prescription Act and section 210 of the LRA. Section 16(1) of the Prescription Act reads:

> "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."

Section 210 of the LRA reads:

> "If any conflict, relating to the 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."

The different character of time periods

[143] While the rationale for the existence of time periods is generally to expedite litigation, to limit delays, and to bring a measure of certainty to the litigation process,[92] depending on their location in the litigation timeline and the consequence they carry in the event of non-compliance, there are essentially two distinguishable kinds of time

[92] *CUSA v Tao Ying Metal Industries* [2008] ZACC 15; 2009 (2) SA 204 (CC); 2009 (1) BCLR 1 (CC) at para 63. See also *Myathaza CC* above n 29 at para 30.

periods.[93] While both impose a specific time period within which a step in the litigation process is to be taken, in the one instance non-compliance is capable of being condoned while in the other instance it cannot. This difference was described in *Myathaza* as being that between a time bar and a true prescription time period.[94]

[144] The starting point in the interpretative exercise that section 16(1) of the Prescription Act contemplates is to properly recognise that its interpretation must occur against the backdrop of the Constitution and the values it seeks to advance. This being the case, this Court, in *Mohlomi*, recognised that time periods in general restrict the right of access to courts. It has also expressed itself decisively to the effect that the timeous resolution of disputes, which time periods seek to engender, enhances the quality of adjudication that must ultimately be the outcome of the assertion of a right of access to courts.[95]

[145] Further, in *Mohlomi*, this Court in dealing with both the limitation that time periods introduce as well as the utility of expedition in the resolution of disputes said:

> "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.
>
> It does not follow, however, that all limitations which achieve a result so laudable are constitutionally sound for that reason. Each must nevertheless be scrutinised to see

[93] *Myathaza CC* id at para 94.

[94] Id.

[95] *Mohlomi v Minister of Defence* [1996] ZACC 20; 1997 (1) SA 124 (CC); 1996 (12) BCLR 1559 (CC) at paras 11-2.

> whether its own particular range and terms are compatible with the right which section 22 [of the interim Constitution] bestows on everyone to have his or her justiciable disputes settled by a court of law. The right is denied altogether, of course, whenever an action gets barred eventually because it was not instituted within the time allowed. But the prospect of such an outcome is inherent in every case, no matter how generous or meagre the allowance may have been there, and it does not *per se* dispose of the point, as I view that at any rate. What counts rather, I believe, is the sufficiency or insufficiency, the adequacy or inadequacy, of the room which the limitation leaves open in the beginning for the exercise of the right. For the consistency of the limitation with the right depends upon the availability of an initial opportunity to exercise the right that amounts, in all the circumstances characterising the class of case in question, to a real and fair one. The test, thus formulated, lends itself to no hard and fast rule which shows us where to draw the line. In anybody's book, I suppose, seven years would be a period more than ample during which to set proceedings in motion, but seven days a preposterously short time. Both extremes are obviously hypothetical. But I postulate them in order to illustrate that the enquiry turns wholly on estimations of degree."[96]

[146] Thus, even though the Court was dealing with the constitutionality of time limits, what was ultimately to be determined in the balancing exercise was whether there was an adequate and fair opportunity to seek judicial redress. This remains an important operating principle in the interpretation exercise. In addition, the prospect of a right becoming incapable of being asserted was a risk inherent in every matter.

[147] The statement in *Mohlomi* was cited with approval in *Barkhuizen*.[97] Even though the latter case dealt with time periods in the context of a private contractual dispute, the Court accepted the principle that a limitation within which an action was to be instituted was not in itself constitutionally offensive.[98] A limitation's ultimate coherence with the

[96] Id.

[97] *Barkhuizen v Napier* [2007] ZACC 5; 2007 (5) SA 323 (CC); 2007 (7) BCLR 691 (CC) at para 47.

[98] Id at para 48.

scheme of the Constitution would be determined by whether the time prescribed could be regarded as constituting a reasonable and fair opportunity to seek redress.[99]

[148] Finally in *Mdeyide*, this Court 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."[100]

[149] Thus, while it may be seductively simple to see time periods as being purely restrictive, viewed in their proper context, they seek to enhance the quality of justice and adjudication, which must be the hallmark of a system of constitutional justice such as ours. For these reasons, I take the view that time periods are equally consistent with the imperatives of the Constitution and in particular section 34.[101]

[150] To the extent that the Prescription Act would apply to actions for the recovery of a debt, a question arises as to whether, given the admittedly unique and context sensitive nature of the LRA, there is an in-principle incompatibility in seeking to interpret the Prescription Act in a manner that renders it applicable to the LRA dispute resolution process. I do not think so. The inclusion of labour rights in the Bill of Rights signalled

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[99] Id.

[100] *Mdeyide* above n 26 at para 8.

[101] The Supreme Court of Canada recently expressed a similar view on prescription periods promoting access to justice, particularly where they are "harmonised". See *Montreal (City) v Dorval* [2017] SCC 48 at para 2. Wagner J added that "[s]uch rules are essential in a democratic society that wishes to preserve public order, sanction the negligence of creditors or ensure social peace".

a significant and seismic development in the recognition of the rights of workers.[102] However, in much the same way, the Bill of Rights recognises the existence, on equal footing, of a host of other rights and it does so not on the basis that rights are hierarchical but rather on the basis that they are interdependent, interwoven and mutually reinforcing.[103]

[151] Simply to illustrate the point, a claim for damages against the state for the violation of the right to physical integrity, which is guaranteed by section 12 of the Bill of Rights must be prosecuted within the time periods that the law prescribes. Notice of the intended claim must be given within a specified time and summons must be issued and served within a specified time. These time periods do in fact restrict the time frame within which the right is to be exercised, but those restrictions enhance the protection of the right by ensuring the expeditious prosecution of the claim.

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[102] Section 23 of the Constitution provides:

> "(1) Everyone has the right to fair labour practices.
>
> (2) Every worker has the right–
>
> (a) to form and join a trade union;
>
> (b) to participate in the activities and programmes of a trade union; and
>
> (c) to strike.
>
> (3) Every employer has the right–
>
> (a) to form and join an employers' organisation; and
>
> (b) to participate in the activities and programmes of an employers' organisation.
>
> (4) Every trade union and every employers' organisation has the right–
>
> (a) to determine its own administration, programmes and activities;
>
> (b) to organise; and
>
> (c) to form and join a federation.
>
> (5) Every trade union, employers' organisation and employer has the right to engage in collective bargaining. National legislation may be enacted to regulate collective bargaining. To the extent that the legislation may limit a right in this Chapter, the limitation must comply with section 36(1).
>
> (6) National legislation may recognise union security arrangements contained in collective agreements. To the extent that the legislation may limit a right in this Chapter, the limitation must comply with section 36(1)."

[103] United Nations Human Rights Office of the High Commission "What are Human Rights" available at http://www.ohchr.org/EN/Issues/Pages/WhatareHumanRights.aspx. See also *De Reuck v Director of Public Prosecutions (Witwatersrand Local Division)* [2003] ZACC 19; 2004 (1) SA 406 (CC); 2003 (12) BCLR 1333 (CC) at para 55.

Is the claim a "debt" under the Prescription Act?

[152] Section 16(1) of the Prescription Act deals with the applicability of the Act and prescribes that its provisions apply to "any debt arising after the commencement of this Act". The preliminary enquiry must accordingly be whether what is being asserted is a debt. If not, that would be the end of the matter, obviating the need for a consistency enquiry.

[153] While the term "debt" is not defined in the Prescription Act, our courts, including this Court, have over time considered the meaning of the term "debt". In *Makate*, the majority judgment considered the meaning of the term "debt". As its point of departure, it took the view that, in the context of the Prescription Act, the meaning to be ascribed to the word "debt" has implications for the right of access to courts.[104] A wide meaning would result in greater inroads into the right of access to courts as it would broaden the base of the application of the extinctive provisions of the Prescription Act.[105] It concluded that a narrower meaning would be more in accord with the dictates of the Constitution in creating the necessary space for the assertion of rights and would also be consistent with the provisions of section 39(2) of the Bill of Rights, which provides that when interpreting legislation a court must give effect to the spirit, purport and objects of the Bill of Rights.[106]

[154] The remarks in *Makate* were in large measure prompted by a finding of the trial court, in that matter, that the claim had prescribed.[107] The trial court relied on the decisions in *Desai*[108] and *LTA Construction*,[109] and suggested that the meaning of "debt"

[104] *Makate* above n 17 at para 90.

[105] Id at para 84.

[106] Id at paras 87-93. See also section 39(2) of the Constitution which reads "[w]hen interpreting any legislation, and when developing the common law or customary law, every court, tribunal or forum must promote the spirit, purport and objects of the Bill of Rights".

[107] Id at para 26.

[108] *Desai N.O. v Desai* [1995] ZASCA 113; 1996 (1) SA 153 (A).

[109] *LTA Construction v Minister of Public Works and Land Affairs* [1993] ZASCA 149; 1994 (1) SA 153 (AD).

was sufficiently broad so as to cover an obligation to do something, for example claims to pay a fair share of revenue and obligations to negotiate reasonable compensation for the use of an idea.[110]

[155] To that extent, this Court cautioned against such a broad approach and supported the approach taken in *Escom*,[111] that the word "debt" should be given the meaning ascribed to it in the Shorter Oxford Dictionary, namely:

> "1. Something owed or due: something (as money, goods or service) which one person is under an obligation to pay or render to another.
> 2. A liability or obligation to pay or render something; the condition of being so obligated."[112]

[156] If regard is had to this, then it must follow that a claim for dismissal is, as pointed out in the second judgment in *Myathaza*, a claim that seeks to enforce three possible kinds of obligations against an employer: reinstatement, re-employment, and compensation.[113] All three obligations fit neatly within the definition of debt that *Escom* and *Makate* accepted, as they constitute either an obligation to pay or render something.[114]

[157] I accordingly conclude on this aspect that an unfair dismissal claim activates proceedings for the recovery of a debt as contemplated in section 16(1) of the Prescription Act and that the first leg of the enquiry is answered in the affirmative. That, however, is not the end of the enquiry as what now falls to be determined is the evaluation of inconsistency which the first judgment concludes does indeed exist.

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[110] *Makate* above n 17 at para 25.

[111] *Electricity Supply Commission v Stewarts and Lloyds of SA (Pty) Ltd* 1981 (3) SA 340 (A) (*Escom*).

[112] *Makate* above n 17 at para 85. See also *The New Shorter English Dictionary* 3ed (Clarendon Press, Oxford 1993) vol 1 at 604.

[113] *Myathaza CC* above n 29 at para 79. See also section 193 of the LRA.

[114] *Escom* above n 111 at para 344F and *Makate* above n 17 at para 188.

Inconsistency versus difference

[158] The universal application of the Prescription Act to the recovery of debts allows for an exception. Section 16(1) of the Prescription Act excludes its application when its provisions are found to be inconsistent with the provisions of an Act of Parliament that prescribes a specified time period within which a claim is to be made or an action to be instituted in respect of a debt or imposes conditions on the institution of an action for the recovery of a debt.[115]

[159] To the extent that it is contended that the LRA is an Act that is contemplated in section 16(1), the time periods provided for in the LRA within which a matter is to be referred to conciliation and, if necessary, thereafter to arbitration, may well constitute the "specified time period", referred to in section 16(1), in respect of which a claim is to be made or an action to be instituted. But the question is whether there is an inconsistency between these provisions and those of Chapter III of the Prescription Act. In the judgment of the Labour Appeal Court, on which this appeal is based, the Court appeared to adopt the approach that the mere existence of provisions in the LRA that relate to time periods or conditions triggers the risk of inconsistency but would not be sufficient to constitute the inconsistency. What was required was to establish qualitatively whether there was an inconsistency.[116]

[160] I think there is merit in this approach. An inconsistency does not arise merely from the fact that the Prescription Act and the LRA deal with time periods or impose conditions. What is required to be demonstrated is that the provisions of the two Acts are inconsistent, or more accurately, that the provisions of the Prescription Act are inconsistent with the relevant provisions of the LRA.

[161] If inconsistency were held to arise from the mere existence of such provisions, without further enquiry as to their inconsistency with the Prescription Act, that would

[115] See the reference to section 16(1) at [142].

[116] LAC judgment above n 9 at para 9.

not do justice to the language of section 16(1). It would render meaningless the inconsistency requirement that section 16 specifically sets as the jurisdictional requirement to oust the provisions of Chapter III of the Prescription Act. On what basis could it conceivably be argued that, absent an exercise in evaluating consistency, the mere existence of provisions in the LRA that specify time periods or impose conditions constitute the necessary inconsistency the Prescription Act requires before it can be said that its provisions are ousted? I am not persuaded that jettisoning the consistency evaluation can lead to a conclusion of inconsistency.

[162] In *Mdeyide*, this Court when called upon to consider whether an inconsistency existed between the Prescription Act and the RAF Act remarked that what was required was a "consistency evaluation".[117] An evaluation requires a proper consideration of the provisions of the two Acts, followed by a motivated conclusion as to whether there is consistency or not.[118] It cannot happen in any fashion other than through a qualitative process.

[163] Before considering the relevant provisions of the two Acts in undertaking the consistency evaluation, it may be necessary to pause and consider the meaning to be ascribed to the term "inconsistent".

[164] The ordinary meaning of the word inconsistent is amongst others "irreconcilable with", "out of keeping with", "at variance with", or "incompatible with".[119] This meaning accords with the context within which the term is used in the Prescription Act, which provides for the universal application of the Prescription Act in respect of proceedings to recover a debt, except where there are inconsistencies with another law that relates to time periods or conditions. Clearly, and even in the face of difference, what is required is more than difference. Where differences do exist and even materially so, they cannot, in themselves constitute inconsistency unless by their very nature they

[117] *Mdeyide* above n 26 at paras 44-5.

[118] Id at paras 46-52.

[119] *Oxford Thesaurus of English* 2 ed (OUP, Cape Town 2004) at 456.

render the two Acts irreconcilable with each other. I can see no justification, in particular regard being had to *Mdeyide* and the "consistency evaluation" it requires to jettison that in favour of a lesser requirement of mere difference. I am not persuaded that even if one used the prism of section 39(2) of the Constitution in determining the meaning to be ascribed to the term "inconsistent", that a conclusion so far removed from the ordinary meaning of the word can be justified. In any event, as I have said, the need to – at some point – eventually sound the death knell in respect of claims is itself consistent with meaningful and wholesome access to courts. Thus my approach is by no means antithetical to the injunction in section 39(2) of the Constitution.

[165] Indeed, in *Mdeyide* this Court indicated the test for inconsistency in the following terms:

> "[I]n every case in which a plaintiff relies upon a [certain provision], the cardinal question is whether that provision is inconsistent with [another provision]."[120]

[166] Thus, even on an acceptance that in some instances difference in the various provisions may provide evidence of inconsistency, it does not alter the fundamental test that the section requires, namely a finding of inconsistency. In *Mdeyide*, this Court concluded that looking for consistency in the two Acts was "a quest bound to fail", largely on account of the conclusion that in that matter the Prescription Act dealt with prescription of claims while the RAF Act also dealt with prescription, albeit on a different basis.[121] Accordingly, the subject matter of the two Acts was identical, namely prescription periods, and they provided different time periods when a claim in respect of each Act would prescribe. This was overwhelmingly a case where difference resulted in clear inconsistency.

[120] See *Mdeyide* above n 26 at para 45 referencing *Road Accident Fund v Smith N.O.* [1998] ZASCA 86; 1999 (1) SA 92 (SCA) at 98F.

[121] Id at paras 50-1.

[167] Equally, if one has regard to the wording of section 210 of the LRA, which provides that the provisions of the LRA will apply in the event of conflict between it and the provisions of any other law, the meaning of the word conflict must also assume the meaning ordinarily assigned to it and difference in itself will not constitute conflict unless such difference necessarily leads to conflict.

The consistency evaluation

[168] Section 10(1) of the Prescription Act reads:

> "Subject to the provisions of this Chapter and of Chapter IV, 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 debt."

[169] Thus, once a debt becomes due, prescription begins to run and provided that prescription is not interrupted by the circumstances set out in sections 13,[122] 14,[123] and 15[124] of the Prescription Act, the debt shall, in terms of section 10, be extinguished after

[122] Section 13 of the Prescription Act reads:

> "(1) If—
>
> (*a*) the creditor is a minor or is insane or is a person under curatorship or is prevented by superior force including any law or any order of court from interrupting the running of prescription as contemplated in section 15 (1); or
>
> (*b*) the debtor is outside the Republic; or
>
> (*c*) the creditor and debtor are married to each other; or
>
> (*d*) the creditor and debtor are partners and the debt is a debt which arose out of the partnership relationship; or
>
> (*e*) the creditor is a juristic person and the debtor is a member of the governing body of such juristic person; or
>
> (*f*) the debt is the object of a dispute subjected to arbitration; or
>
> (*g*) the debt is the object of a claim filed against the estate of a debtor who is deceased or against the insolvent estate of the debtor or against a company in liquidation or against an applicant under the Agricultural Credit Act, 1966 (Act No. 28 of 1966); or
>
> (*h*) the creditor or the debtor is deceased and an executor of the estate in question has not yet been appointed; and
>
> (*i*) the relevant period of prescription would, but for the provisions of this subsection, be completed before or on, or within one year after, the day on which the relevant impediment referred to in paragraph (a), (b), (c), (d), (e), (f), (g) or (h) has ceased to exist,
>
> the period of prescription shall not be completed before a year has elapsed after the day referred to in paragraph (i).
>
> (2) A debt which arises from a contract and which would, but for the provisions of this subsection, become prescribed before a reciprocal debt which arises from the same contract becomes prescribed, shall not become prescribed before the reciprocal debt becomes prescribed."

[123] Section 14 of the Prescription Act reads:

> "(1) The running of prescription shall be interrupted by an express or tacit acknowledgement of liability by the debtor.
>
> (2) If the running of prescription is interrupted as contemplated in subsection (1), prescription shall commence to run afresh from the day on which the interruption takes place or, if at the time of the interruption or at any time thereafter the parties postpone the due date of the debt, from the date upon which the debt again becomes due."

[124] Section 15 of the Prescription Act reads:

> "(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

the lapse of time set out. Once a debt has prescribed, there is no basis upon which a creditor can seek to have non-compliance with the time periods provided for in the Prescription Act condoned.[125] The debt has been extinguished and no after-life or a resuscitation of the debt is possible. Such an outcome is consistent with providing the certainty and predictability that prescription periods are intended to introduce into the law relating to the enforcement of debts.[126] The circumstances under which prescription begins to run, as well as those that may interrupt its running are all intended to provide a balance between fairness and flexibility, on the one hand, and certainty and predictability, on the other.

[170] The provisions of the LRA, which were enacted to give effect to the right to fair labour practices, also deal with time periods within which various steps in advancing the dispute resolution process must take place.

[171] Section 191(1) of the LRA provides, amongst other things, that a dispute concerning an unfair dismissal which is referred to the CCMA must be referred within

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."

[125] *Mdeyide* above n 26 at para 10.

[126] Id at para 8.

30 days after the date of dismissal or within 30 days after the employer has made a final decision to dismiss or uphold the dismissal.

[172] Section 191(1) also provides for the referral to the CCMA of a claim relating to an unfair labour practice which referral must be made within 90 days of the act or omission or 90 days of the date the employee became aware of it.

[173] In the same vein, section 191(5) provides for arbitration by the CCMA or adjudication by the Labour Court after the expiry of 30 days and 90 days respectively, since the CCMA received the referral and the dispute remains unresolved.

[174] The general scheme of section 191 is thus, to provide for time periods within which a matter has to be referred to the CCMA and if necessary to arbitration as well as to the Labour Court for adjudication. Section 191(2) and (11)(b), however, provide that where there is non-observance with the specified time period, the CCMA or the Labour Court may condone such non-observance if good cause is shown.[127]

[175] These relatively short time periods, in my view, illustrate the point made, in *Myathaza*, in the first judgment:

> "Employment disputes by their very nature are urgent matters that require speedy resolution so that the employer's business may continue to operate and the employees may earn a living. Undue delays, even of a period of three years, may have catastrophic consequences to the employer's business and the employee whose only source of income is remuneration received from the employer. Such employees can hardly survive for three years without a salary."[128]

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[127] Section 191(2):

> "If the *employee* shows good cause at any time, the *council* or the Commission may permit the *employee* to refer the *dispute* after the relevant time limit in subsection (1) has expired."

Section 191(11)(b):

> "However, the Labour Court may condone non-observance of that timeframe on good cause shown."

[128] *Myathaza CC* above n 29 at para 33.

[176] Properly viewed, section 191 does two things. Firstly, it provides a specific time frame within which a referral is to be made and secondly, it provides a mechanism to seek an indulgence upon good cause being shown where there has been non-observance of the specified time period. What the LRA does not do is set an outer limit to the litigation process that provides for the extinction of a claim. In this regard, it certainly would follow that a claim would be extinguished in respect of a litigant, who has not observed the time periods in the LRA and is unable to show good cause. This is, however, different from a prescription time period. In the former case, the extinction of the claim would arise from the failure to demonstrate good cause while in the latter, it would arise as a result of the running of prescription within a particular time frame. While the same result is achieved it is arrived at through a different route in each case.

[177] Are the time periods provided for in section 191 of the LRA inconsistent with the provisions of the Prescription Act? As I have demonstrated, while they both deal with time periods, they do so for different reasons and to achieve different objectives. The time periods in the LRA indicate when a litigant is expected to take the necessary steps in the dispute resolution process to properly prosecute a claim, while the Prescription Act provides a cut-off point when those steps are no longer available to a litigant on account of the claim having prescribed.

[178] Simply on that analysis, it can hardly be said that there is inconsistency between the provisions of the LRA and the Prescription Act, in so far as they relate to time periods. Of course, if the LRA provided for a prescription period, as did the RAF Act in *Mdeyide*, that would have been a different matter, but that is not the case here.

[179] The time periods in the LRA and in the Prescription Act regulate different features of the litigation process and are not only reconcilable but can exist in harmony alongside each other.

[180] The application of the Prescription Act to the LRA would advance the speedy resolution of employment disputes by firstly, leaving wholly intact the mandated time periods for referrals that section 191 provides for. The application of the Prescription Act cannot have as an unintended consequence the implied extension of those time periods to coincide with the period of prescription. Secondly, subjecting claims under the LRA to an outer time limit would considerably enhance the efficiency of the dispute resolution process. Placing an outer limit beyond which the litigation process simply cannot continue prevents employment disputes from being litigated after a considerable passage of time. This may impact negatively on both the quality of adjudication as well as the important policy considerations that relate to the quick and speedy resolution of employment related disputes, the ability of workers to continue to earn a living, as well as the ongoing ability of businesses to continue operating.

[181] For these reasons, I must also conclude, regard being had to section 210 of the LRA, that the provisions of the LRA are not in conflict with the provisions of the Prescription Act. It must follow that if there is no inconsistency then, *a fortiori* (with stronger reason), there can be no conflict. The definition of conflict is a considerably higher bar to meet than the consistency evaluation which I have undertaken. I also conclude that the existence of conflict between the two statutes has not been established.

The good cause "at any time" argument

[182] Section 191(2) of the LRA, in dealing with the respective time periods of 30 and 90 days within which a referral to conciliation must be made, provides that if an employee shows good cause at any time, the referral may be made outside of the time provided for. Arising out of this is the proposition that the words "at any time" militate against the provisions of the Prescription Act in that they create a litigation time frame that is either inconsistent with or in conflict with the Prescription Act. I do not think this is the case, regard being had to the character of section 191 as well as the meaning that has come to be ascribed to the words "at any time" as they appear in section 191(2).

[183] Section 191(2) provides that "[i]f the employee shows good cause at any time, the council or [CCMA] may permit the employee to refer the dispute after the relevant time limit . . . has expired". Section 191(2) stands to be interpreted with regard to the section as a whole as well as the broad scheme of the LRA. It cannot, accordingly, be interpreted in isolation or, for that matter, disjunctively. Section 191(2) does not relieve an employee of the obligation to refer the dispute within the time period stipulated in section 191(1)(b) nor does it purport to create a separate and different time regime from the one prescribed in that section. What it does is regulate the procedure to be followed by an employee in asserting a right created by the LRA.

[184] In this sense, section 191(2) is procedural as opposed to substantive in nature. The difference between procedural and substantive prescription periods was described in *Society of Lloyd's*, where the Supreme Court of Appeal distinguished between statutes that extinguish a right and those that bar a remedy by imposing a procedural bar on the institution of an action.[129] In this regard, section 191 deals with what may be described as matters of a procedural nature while the Prescription Act deals with what is described as substantive in nature. This distinction is important in that it contemplates a substantive issue such as prescription and a procedural matter such as a time bar running along parallel tracks and having different objectives. The former regulates and imposes a cut-off period in respect of litigation while the latter seeks to regulate, through the imposition of time bars, the procedure to be followed in asserting a right. They are separate and distinctive processes and indeed can operate in harmony with each other when one is interlaid with the other. On this basis alone, my view would be that whatever meaning was ascribed to the words "at any time" would hardly matter, given the very different nature of prescription periods and time bars and what they seek to achieve.

[185] However, and to the extent that it is necessary, what does the phrase "at any time" mean and what does it refer to? Is it to be given its literal meaning, and if so,

[129] *Society of Lloyd's v Price; Society of Lloyd's v Lee* [2006] ZASCA 88; 2006 (5) SA 393 (SCA) at para 10.

what does this mean in relation to the time-centred approach which is at the heart of the LRA, or does it derive its meaning from the context of the LRA as a whole?

[186] In *Endumeni Municipality*, the Supreme Court of Appeal, in setting out the approach to interpretation, referred to the need to have regard to both the language used as well as the context within which the words are used:

> "Over the last century there have been significant developments in the law relating to the interpretation of documents, both in this country and in others that follow similar rules to our own. It is unnecessary to add unduly to the burden of annotations by trawling through the case law on the construction of documents in order to trace those developments. The relevant authorities are collected and summarised in *Bastian Financial Services (Pty) Ltd v General Hendrik Schoeman Primary School*. The present state of the law can be expressed as follows: Interpretation is the process of attributing meaning to the words used in a document, be it legislation, some other statutory instrument, or contract, having regard to the context provided by reading the particular provision or provisions in the light of the document as a whole and the circumstances attendant upon its coming into existence. Whatever the nature of the document, consideration must be given to the language used in the light of the ordinary rules of grammar and syntax; the context in which the provision appears; the apparent purpose to which it is directed and the material known to those responsible for its production. Where more than one meaning is possible each possibility must be weighed in the light of all these factors. The process is objective, not subjective. A sensible meaning is to be preferred to one that leads to insensible or unbusinesslike results or undermines the apparent purpose of the document. Judges must be alert to, and guard against, the temptation to substitute what they regard as reasonable, sensible or businesslike for the words actually used. To do so in regard to a statute or statutory instrument is to cross the divide between interpretation and legislation; in a contractual context it is to make a contract for the parties other than the one they in fact made. The 'inevitable point of departure is the language of the provision itself', read in context and having regard to the purpose of the provision and the background to the preparation and production of the document." [130] (Footnotes omitted.)

[130] *Natal Joint Municipal Pension Fund v Endumeni Municipality* [2012] ZASCA 13; 2012 (4) SA 593 (SCA) (*Endumeni Municipality*) at para 18.

The Supreme Court of Appeal approved the statements in *K & S* which held that an exercise of legal interpretation should ensure that words or phrases are not given meanings that isolate or divorce the words or phrases from their context.[131] The Court in *K & S* held that context must be considered in the early stages of any interpretation exercise and not at a later stage where ambiguity may arise.[132] There is much to be said for this approach, as words or phrases insulated from their context may well take on a meaning and have an effect that is wholly inconsistent with the context in which they are used.

[187] Adopting the approach that the phrase "at any time" must be given its literal meaning runs counter to the stated objectives of the LRA and the expeditious resolution of disputes that it seeks to advance.[133] It would suggest that, notwithstanding the time frames of 30 and 90 days, respectively, within which it is mandatory to refer a dispute to conciliation, it nevertheless remains open to a party to make such a referral at any time, provided that it is accompanied by an application for condonation. In my view, such a stance would be wholly inconsistent with the scheme of the LRA and would undermine the very objectives of the LRA which set relatively tight timeframes for the commencement of proceedings. Our courts have, on occasion, pronounced on the importance of labour disputes to be conducted with expedition. For example, in *National Research Foundation* the Labour Court held:

> "It is now trite that there exists a particular requirement of expedition where it comes to the prosecution of employment law disputes. Skweyiya J in *Khumalo and Another v Member of the Executive Council for Education: KwaZulu-Natal* said: 'the importance of resolving labour disputes in good time is thus central to the LRA

[131] Id at para 19 referencing *K & S Lake City Freighters Pty Ltd v Gordon & Gotch Ltd* (1985) 157 CLR 309 (*K & S*).

[132] *K & S* id at 315:

> "Problems of legal interpretation are not solved satisfactorily by ritual incantations which emphasise the clarity of meaning which words have when viewed in isolation, divorced from their context. The modern approach to interpretation insists that context be considered in the first instance, especially in the case of general words, and not merely at some later stage when ambiguity might be thought to arise."

[133] *CUSA* above n 92 at para 63.

framework'. Similarly, and in *Aviation Union of SA and Another v SA Airways (Pty) Ltd and Others*, Jafta J held: 'Speedy resolution is a distinctive feature of adjudication in labour relations disputes'.

In *National Education Health and Allied Workers Union v University of Cape Town and Others* Ngcobo J said:

> 'By their very nature labour disputes must be resolved expeditiously and be brought to finality so that the parties can organise their affairs accordingly. They affect our economy and labour peace. It is in the public interest that labour disputes be resolved speedily.'

The message conveyed, respectfully, is clear."[134] (Footnotes omitted.)

[188] Therefore, it would hardly make sense to prescribe an approach that makes time of the essence by prescribing relatively short time periods within which to effect a referral, while having an indefinite and open-ended time frame within which the dispute may be referred upon the demonstration of good cause. The Labour Court in *Makuse* adopted the position that—

> "condonation for delays in all labour law litigation is not simply there for the taking. . . . the courts have made it clear that applications for condonation will be subject to 'strict scrutiny', and that the principles of condonation should be applied on a 'much stricter' basis."[135]

This approach illustrates that, in all applications where a litigant applies for condonation, the court will apply its mind strictly in deciding whether condonation should be granted. Thus the open-ended approach which advances the notion that a referral to conciliation can be sought at any time is clearly at odds with the approach that the Labour Court takes in *Makuse*.

[189] Whilst accepting that prescription serves the important purpose of ensuring finality, certainty and the quality of adjudication, it nevertheless advocates – subject to

[134] *NEHAWU obo Leduka v National Research Foundation* [2016] ZALCJHB 445 at paras 15-6.

[135] *Makuse v Commission for Conciliation, Mediation and Arbitration* [2015] ZALCJHB 265 at para 5.

the showing of good cause – for a totally unbounded period within which claims may be lodged. I find an internal contradiction in this.[136] The first judgment's approach lies in the fact that, whilst that approach correctly emphasises the need for the expeditious resolution of labour matters, it – at the same time – says the time within which these matters must be litigated is limitless, subject of course to the showing of good cause.[137] The need to ensure finality, certainty and quality adjudication and to resolve labour matters expeditiously point to the need to read the provisions of the Prescription Act and LRA harmoniously.

[190] The Labour Court had the opportunity to consider the meaning of the phrase "at any time" used in section 191(2) in *Balaram*[138] and *Gianfranco.*[139] While both matters dealt with the tangential question of when a good cause application had to be made following a late referral, they both offered some insight into the interpretation of the words "at any time". They both took the position that the meaning of the phrase had to be considered in context. In *Balaram*, the Labour Court took the view that condonation could be sought at any time prior to a binding arbitration award being made[140] while in *Gianfranco* the Labour Court took the position that condonation must be sought at the conciliation stage and the phrase "at any time" was qualified to mean at any time during the conciliation phase. The Labour Court in the latter case held:

> "Seen in this context, the words 'at any time' in subsection (2) must be qualified to mean at any time during the conciliation process. As a general principle, an application for condonation must be made as soon as the employee becomes aware that condonation must be sought. This would usually be before the hearing of the conciliation proceedings. In my view, the use of the words 'at any time' was intended to cater for, *inter alia*, the contingency that the need for condonation is brought to the notice of the employee only at the conciliation. In such a case, he could there and then

[136] First judgment at [50] and [69].

[137] Id.

[138] *Balaram v Commission for Conciliation Mediation and Arbitration* [2000] 9 BLLR 1015 (LC).

[139] *Gianfranco Hairstylists v Howard* [2000] 3 BLLR 292 (LC) (*Gianfranco*).

[140] *Balaram* above n 138 at para 20.2.

> apply for condonation. A formal, written application would not be a prerequisite for the granting of condonation.
>
> However, this is a far cry from the contention of the respondent that 'at any time' means even after the conciliation phase has been completed and the dispute has entered the arbitration or adjudication stage. To adopt this interpretation requires that one accepts that there can be a valid arbitration or adjudication even though there has not been a valid conciliation. In my view, such a view is untenable. To borrow from terminology which appears to be outdated, but still appears useful: a jurisdictional fact for a valid arbitration or adjudication is a certificate issued after a valid conciliation which has failed to resolve the dispute."[141]

[191] These judgments demonstrate the importance of context in the exercise of interpreting legislation, that the phrase "at any time" cannot simply be given its literal meaning and that the phrase dealt with what was in essence a procedural matter. In *Gianfranco*, it was also held that the phrase "at any time" had to be seen in context and was susceptible to qualification.[142]

[192] In addition, when one has due regard to the structure and language of section 191(2), it is evident that the phrase "at any time" is used in the context of good cause rather than in the context of when a dispute that is brought out of time may be referred. Clearly, if it was intended to permit a late referral at any time, then the words "at any time" would have been inserted after the word "dispute" in the section to give effect to that intention. Therefore, the interpretation that the phrase "at any time" if used in the context of good cause, is supported by section 191(11)(b), which empowers the Labour Court to grant condonation for a late referral upon good cause shown.[143] The language used in this section does not include the phrase "at any time", which in my view, provides support for the interpretation that the words "at any time" refer to no more than the timing of the good cause application within the dispute resolution process.

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[141] *Gianfranco* above n 139 at paras 12-3.

[142] Id at paras 12 and 14.

[143] Section 191(11)(b) provides that "the Labour Court may condone non-observance of that timeframe on good cause shown".

[193] Arising out of this, I would conclude for all the reasons advanced that the words "at any time" do not have the effect of extending the mandatory time frames of 30 and 90 days set out in section 191(2) of the LRA and accordingly do not provide the basis for an inconsistency argument in relation to the Prescription Act.

Was the running of prescription interrupted by the referral of the matter to conciliation?

[194] Section 15(1) of the Prescription Act provides for the interruption of the running of prescription "by the service on the debtor of any process whereby the creditor claims payment of the debt". The heading to the section is "[j]udicial interruption of prescription". The crisp question that follows from this is, whether the commencement of proceedings before the CCMA constitutes the service of a process the section contemplates. An associated question is whether, if the referral constitutes such a process, it subsumes features of a judicial process.

[195] Section 15(6) of the Prescription Act defines process to include "a petition, a notice of motion, a rule *nisi*, a pleading in reconvention, a third party notice referred to in any rule of court and any document whereby legal proceedings are commenced". While most of the documents to which reference is made ordinarily constitute documents associated with the courts and the litigation advanced there,[144] the reference to "any document whereby legal proceedings are commenced" is clearly indicative of a broader and more generous approach to what may constitute such a document. The second judgment in *Myathaza*, referred to a Zimbabwean case which dealt with a similar provision to section 15(6) and defined the precise meaning of "process".[145] The Zimbabwe Supreme Court per Georges CJ held:

[144] See *Myathaza CC* above n 29 at para 116.

[145] Id at para 75.

> "The definition of 'process' in subsection (6) is not exclusive in its scope. The section merely enumerates some documents which fall within the ambit of the word. It clearly contemplates that other documents may fall within that ambit."[146]

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

[196] The interpretation I have attached to the term "any document" is not offensive to the section, nor is it overly broad and inconsistent with the context within which it is used. In addition, and to the extent that it may be necessary, interpreting the term "any document" in a narrow sense, as being confined to documents used in formal court processes, would not accord with what is required if the interpretation exercise, as it must, is viewed through the prism of section 39(2).[147] The interruption of prescription, in effect, releases the constraint that the running of prescription has on the right of access to courts, which is provided for in section 34 of the Constitution.[148] It accordingly justifies a broader meaning to be attached to the term "any document", for the same reasons advanced above in support of a narrower meaning to be ascribed to the term "debt".

[197] If ultimately the re-interpretation of the Prescription Act must demonstrate a fidelity to the values of the Constitution, then there can be no justification in seeking to assign a narrow meaning to the term "any document", which in any event is qualified by the reference to it being "any document" commencing legal proceedings.[149] In *Wessels,* the High Court held that the meaning ascribed to "any", as contemplated in

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[146] Id. See also *Mountain Lodge Hotel (1979) (Pvt) Ltd v McLoughlin* 1984 2 SA 567 (ZS) at 570-1.

[147] See *Myathaza CC* above n 29 at para 23. See also *Bato Star* above n 81 at para 91:

> "The technique of paying attention to context in statutory construction is now required by the Constitution, in particular, section 39(2). As pointed out above, that provision introduces a mandatory requirement to construe every piece of legislation in a manner that promotes the 'spirit, purport and objects of the Bill of Rights.'"

[148] *Makate* above n 17 at para 90.

[149] See [153] referencing *Makate* above n 17.

section 15(6), did not even require a reading in of the term, because the subsection was already "wide" and clearly "inclusive of a wide range of documents".[150]

[198] Is a referral to the CCMA a document commencing legal proceedings constituting judicial interruption of prescription? In both the first and second judgments in *Myathaza*, it was accepted that the CCMA is an independent and impartial forum of the kind contemplated in section 34 of the Constitution, where a dispute could be resolved by the application of law.[151] Clearly the adjudicative processes of the CCMA function like courts of law in resolving labour disputes as was observed in the first and second judgments in *Myathaza*.

[199] If arbitration constitutes adjudicative proceedings, what then of the conciliation process? The scheme of the LRA makes a referral to conciliation a mandatory first step in the process that may ultimately lead to adjudication.[152] While conciliation may not be adjudicative in nature, it is a necessary and mandatory part of the dispute resolution process that the LRA creates and it occurs within the operations of the CCMA, which is an independent and impartial forum.[153] It is not possible to activate the adjudicative features of the CCMA without first resorting to conciliation.[154] It is also so inextricably linked to the arbitration process that the LRA envisages, as part of a continuum as well as in terms of the connectivity in the subject matter of the two processes. I believe it does an injustice to the architecture of the LRA and the CCMA to see and characterise conciliation as anything other than the commencement of legal proceedings in an independent and impartial forum. For those reasons, I would conclude on this aspect that the referral of disputes to the CCMA for conciliation constitutes the service of a process commencing legal proceedings. I will elaborate further on this point below.

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[150] *Wessels v Coetzee* [2013] ZAGPPHC 82 at para 29.

[151] See *Myathaza CC* above n 29 at paras 23 and 73.

[152] Section 191(1)(a) of the LRA.

[153] *Myathaza CC* above n 29 at para 23.

[154] *National Union of Metalworkers of South Africa v Driveline Technologies (Pty) Ltd* [1999] ZALC 157 (*Driveline*) at para 73.

[200] While conciliation is a process facilitated by a Commissioner of the CCMA to enable parties to a dispute to seek a mutually acceptable solution,[155] it is also not a wholly informal process. The LRA contemplates a possible resolution of the dispute at that stage. In addition, our courts have meticulously outlined the role expected of a Commissioner in such a setting. The Commissioner must have regard to the nature of the dispute and correctly identify it, if need be, to ensure that the certificate of outcome correctly reflects the nature of the dispute.[156] The reason for this is that, if and when a matter is referred to arbitration, then the process of conciliation becomes important as far as the evidence in the referral form and certificate of outcome become relevant.

[201] In addition, Rule 5A of the Rules of the CCMA also recognises a conciliation hearing as part of the category of proceedings before the CCMA.[157] While Rule 16, in turn, protects the content of conciliation proceedings from disclosure, it gives a court the power to lift such protection.[158] The point is simply, that even absent an adjudicative component, conciliation proceedings carry with them many features of a judicial process. A referral to conciliation activates the jurisdiction of the CCMA, the CCMA is obliged to appoint a Commissioner to conciliate the dispute,[159] the role of the Commissioner in such conciliation proceedings has been carefully delineated by our

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[155] *Myathaza CC* above n 29 at para 133.

[156] *Driveline* above n 154 at para 9. See also *CUSA* above n 92 at paras 65-6.

[157] Rule 5A reads:

> "The Commission may provide notice of a conciliation or arbitration hearing, or any other proceedings before it, by means of any of the methods prescribed in Rule 5 and may, in addition, give notice by means of short message service."

[158] Rule 16 reads:

> "(1) Conciliation proceedings are private and confidential and are conducted on a without prejudice basis. No person may refer to anything said at conciliation proceedings during any subsequent proceedings, unless the parties agree in writing or as ordered otherwise by a court of law.
>
> (2) No person, including a commissioner, may be called as a witness during any subsequent proceedings in the Commission or in any court to give evidence about what transpired during conciliation unless as ordered by a court of law."

[159] Section 135(1) of the LRA.

courts, the proceedings may involve a determination of the facts[160] – all of these strongly point to the direction that those proceedings are indeed the commencement of proceedings for the enforcement of a debt.

[202] In addition, given the mandatory nature of conciliation as a requirement for arbitration or a referral to the Labour Court,[161] it follows, in my view that the proceedings for the recovery of the debt, that arise from an unfair dismissal, commence when a dispute is referred to conciliation. To hold otherwise would simply mean airbrushing the important and legally mandated process of conciliation, from what can only be seen as a continuum in the legal process from conciliation to adjudication that the LRA evidences. In *Cape Town Municipality*, the Court held that a process that initiates proceedings for enforcement of payment of a debt interrupts prescription:

> "It is sufficient for the purposes of interrupting prescription if the process to be served is one whereby the proceedings begun there under are instituted as a step in the enforcement of a claim for payment of the debt.
>
> A creditor prosecutes his claim under that process to final, executable judgment, not only when the process and the judgment constitute the beginning and end of the same action, but also where the process initiates an action, judgment in which finally disposes of some elements of the claim, and where the remaining elements are disposed of in a supplementary action instituted pursuant to and dependent upon that judgment."[162]

[203] What is instructive from this decision is that it recognises that the judicial process may consist of various steps that are intertwined and that it is not necessary that the process that commences proceedings must result in a judgment in the same action. Thus, it matters not that the process that constitutes a referral to conciliation does not result in a judgment. It may still, and does indeed, constitute the commencement of proceedings for the enforcement of a debt.

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[160] *CUSA* above n 92 at paras 65-6.

[161] *Driveline* above n 154. See also *Intervalve* above n 70 at para 40.

[162] *Cape Town Municipality v Allianz Insurance Co Ltd* 1990 (1) SA 311 (C) at 334H-J.

[204] For these reasons, I would conclude that, although prescription began to run when the debt became due on 1 August 2001, it was interrupted by the referral of the dispute to the CCMA on 7 August 2001 and continued to be interrupted until the dismissal of the review proceedings by the Labour Court on 9 December 2003. Accordingly, when the dispute was referred to the Labour Court for adjudication on 16 March 2005, it clearly had not prescribed. It is for these reasons that the appeal must succeed.

Fairness and flexibility

[205] While it is not clear whether considerations of fairness and flexibility are part of the consistency evaluation, the better view is that they are not. I, nevertheless, deem it important to deal with them, insofar as it may be suggested that the application of the Prescription Act will result in inflexibility and unfairness in the manner in which labour rights are given effect in terms of the LRA.

[206] While prescription has been broadly identified as limiting the right of access to courts,[163] the operation of the provisions of the Prescription Act and in particular section 12 were described as striking the necessary balance between certainty and fairness by introducing the necessary flexibility in determining when a debt becomes due and, by implication, when such a debt prescribes. In *Links*, this balance was described in the following terms:

> "The provisions of section 12 seek to strike a fair balance between, on the one hand, the need for a cut-off point beyond which a person who has a claim to pursue against another may not do so after the lapse of a certain period of time if he or she has failed to act diligently and on the other the need to ensure fairness in those cases in which a rigid application of prescription legislation would result in injustice. As already stated, in interpreting section 12(3) the injunction in section 39(2) of the Constitution must be

[163] *Makate* above n 17 at para 90.

borne in mind. In this matter the focus is on the right entrenched in section 34 of the Constitution."[164]

[207] In the same judgment, this Court examined, in considerable detail, the circumstances under which a debt becomes due and when prescription begins to run:

"In *Gore* the Supreme Court of Appeal said through Cameron and Brand JJA:

> 'This court has in a series of decisions emphasised that time begins to run against the creditor when it has the minimum facts that are necessary to institute action.'

Later in the same case the [C]ourt said:

> 'The defendants' argument seems to us to mistake the nature of 'knowledge' that is required to trigger the running of prescriptive time. Mere opinion or supposition is not enough: there must be justified, true belief. Belief on its own is insufficient. Belief that happens to be true . . . is also insufficient. For there to be knowledge, the belief must be justified.'

The [C]ourt also said:

> 'It follows that belief that is without apparent warrant is not knowledge; nor is assertion and unjustified suspicion, however passionately harboured; still less is vehemently controverted allegation or subjective conviction.'"[165]

[208] The unavoidable conclusion to be drawn from the above is that the manner in which our courts have interpreted the Prescription Act does indeed demonstrate a significant measure of flexibility, in striking the necessary balance between fairness and

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[164] *Links v Member of the Executive Council, Department of Health, Northern Cape Province* [2016] ZACC 10; 2016 (4) SA 414 (CC); 2016 (5) BCLR 656 (CC) at para 26.

[165] Id at para 35. See also this Courts minority judgment in *Mtokonya* above n 51 at para 135:

> "To hold that a debt is recoverable even where the creditor has no knowledge of it would clearly subvert the objects of section 12 in particular. The main object is that prescription shall not begin to run unless the debt is due and the creditor actually knows about it or he or she is deemed to know. Such an interpretation would not accord with section 39(2) of the Constitution. It would frustrate the enjoyment of the rights guaranteed by section 34 in circumstances where it was impossible for the creditor to institute legal proceedings."

certainty. The application of the Prescription Act will accordingly import the same balance into the LRA processes, in the context of dealing with prescription. The concern that the LRA represents a fair and flexible model of dispute resolution, in contrast to the rigid and presumably unfair system of the Prescription Act, is accordingly not warranted.

[209] In the same breath, the manner in which the running of prescription is interrupted also allows and provides for that same flexibility. While the Supreme Court of Appeal in *Ngqula*[166] left open the question of whether prescription is interrupted by proceedings in the wrong forum, the Free State High Court answered that question in the affirmative in *Kruger*, where the Court held:

> "It is my view that the institution of proceedings in a court with or without jurisdiction *does interrupt prescription*."[167]

[210] Thus, while prescription has been described as a ticking clock running against a litigant, its operation is far from mechanical and context insensitive. The approach taken in interpreting section 12, as requiring a creditor to have full knowledge of all the material facts that would support a claim before it can be said that a debt is due,[168] provides considerable flexibility and protection to a creditor, just as the provisions that relate to the interruption of prescription do.

[211] It would accordingly be inaccurate to label the LRA system of dispute resolution as being flexible and fair and the provisions of the Prescription Act as introducing a measure of inflexibility in an otherwise flexible system. I believe I have sufficiently demonstrated that such is not the case.

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[166] *Ngqula v South African Airways (Pty) Ltd* [2012] ZASCA 120; 2013 (1) SA 155 (SCA) at para 18.

[167] *Kruger v Minister of Health* [2016] ZAFSHC 179 at para 36.

[168] *Mtokonya* above n 51 at paras 138 and 150.

[212] In addition, it must be recalled that the flexibility in the LRA is not of the open-ended kind. Failure by a party to comply with time frames requires an application for condonation where good cause must be shown. Condonation, however, is not for the asking and, in each case, a litigant who is out of time and who seeks condonation must demonstrate facts and circumstances that justify such relief. In *Ngcobo*, the Supreme Court of Appeal held that when determining good cause, courts will take into account a number of "interrelated factors which include the explanation for the failure to comply with the time limit and the applicant's prospects of success in the claim before the Labour Court".[169] In *SA Truck Bodies*, the Labour Court held that the notions of good cause and sufficient cause are used interchangeably.[170] The Court relied on the *locus classicus* (best known) decision of *Melane*, which reiterated the position that the determination of good cause is reliant on various interrelated factors:

> "In deciding whether sufficient cause has been shown, the basic principle is that the Court has a discretion, to be exercised judicially upon a consideration of all the facts, and in essence it is a matter of fairness to both sides. Among the facts usually relevant are the degree of lateness, the explanation therefor, the prospects of success, and the importance of the case. Ordinarily these facts are interrelated: they are not individually decisive, for that would be a piecemeal approach incompatible with a true discretion, save of course that if there are no prospects of success there would be no point in granting condonation."[171]

[213] The principle of fairness to both sides encapsulated in the "good cause" exercise is similar to the approach taken in the interpretation of the Prescription Act, to which I have already made reference by relying on *Links* and I would say no more than that the consciousness that is brought to bear on these two different but reconcilable pieces of legislation evidences the same golden thread – fairness to both sides and certainty in the process.

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[169] *Food and Allied Workers Union v Ngcobo N.O.* [2013] ZASCA 45; 2013 (5) SA 378 (SCA) (*Ngcobo*) at para 10.

[170] *National Union of Metal Workers v SA Truck Bodies (Pty) Ltd* [2007] ZALC 20 (*SA Truck Bodies*) at para 24.

[171] *Melane v Santam Insurance Co Ltd* 1962 (4) SA 531 (AD); [1962] 4 All SA 442 (AD) at 532B-F.

Conclusion

[214] The LRA and the Prescription Act both seek to achieve objectives that are compatible with each other – the efficient and timely resolution of disputes within a specified time frame. They are not at opposite ends of the litigation spectrum nor do they seek to advance different and inconsistent litigation imperatives. They can and do co-exist alongside each other in an integrated fashion. I would, accordingly, uphold the appeal.

[215] For these reasons, I concur in the order in the first judgment.

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