IN THE LABOUR APPEAL COURT OF SOUTH AFRICA, JOHANNESBURG

Reportable

Case no: JA 58/16

In the matter between:

CHRIS VAN TONDER	**Appellant**
and	
COMPASS GROUP (PROPRIETARY) LIMITED	**First Respondent**
LYNCH DT NOMINE OFFICII	**Second Respondent**
COMMISSION FOR CONCILIATION, MEDIATION AND ARBITRATION	**Third Respondent**

Held: 01 June 2017

Coram: Landman JA, Davis JA and Phatshoane AJA

EX TEMPORE JUDGMENT

DAVIS JA

Introduction

[1] This case once more raises the question of the relationship between prescription in general, in particular, s 15 of the Prescription Act 68 of 1969 ('the Act') and the

Labour Relations Act 66 of 1995 ('LRA'). In these proceedings the decision of the Constitutional Court in *Myathaza v Johannesburg Metropolitan Bus Services (SOC) Ltd t/a Metro and Others*[1] (*Myathaza*) which dealt with this relationship looms large.

The background

[2] The present dispute was triggered by an application to review and set aside an arbitration award of 14 September 2012.

[3] The appellant was dismissed by his employer, first respondent, having been charged with dishonesty, in that while in possession of a safe key an amount of R 18 100 "went missing" from the employer's safe. Further he was charged with gross negligence in that the appellant had given the safe key to Thuli Busani without following "handover" procedures. The dispute eventually formed the subject of an arbitration before second respondent, who found that the appellant's dismissal, while procedurally fair, had been substantively unfair. Accordingly, he ordered that the respondent pay compensation to the appellant in the amount of R 228 000.00. The award was made on 14 September 2012. On 04 December 2012 first respondent launched an application to review this award.

[4] Third respondent filed a notice of compliance in terms of Rule 7 A (3) on 24 December 2012. The transcribed record of the arbitration proceedings, together with the items set out in the notice pursuant to Rule 7 A (3), were filed by first respondent on 14 February 2013 and 13 March 2013 respectively. Subsequent thereto, the appellant delivered an answering affidavit on 10 April 2013. In this answering affidavit, he requested that the court "confirms the arbitration award as an order of this Honourable Court." The first respondent then filed a replying affidavit on 17 May 2013. On 26 January 2016 the first respondent filed a further supplementary affidavit in which it took the point that, as the arbitration award

[1] 2017 (4) BCLR 473 (CC).

was dated 14 September 2012, it had prescribed on 21 November 2015. In this affidavit, on behalf of the first respondent, Mr Jabu Mathebula said:

> 'The mere fact that a review is pending does not bar the first respondent from launching an application in terms of s 158 (1) (c) to make an arbitration award an order of court. it would be prudent to state that the first respondent did not at any stage prior to the hearing of this matter, launch an application in terms of s 158 (1) (c) of the Labour Relations Act 66 of 1995.'

[5] Mr Mathebula also informed the court by way of this affidavit that:

> 'Throughout the proceeding before this Honourable Court, the applicant has not been dilatory in its prosecution of the review. The noticeable time delay on finalisation of the review was caused by the loss of the court file and the subsequent anticipation of the set down of the matter. The first respondent has not taken the requisite steps to interrupt prescription in this matter and the point *in limine* should be upheld with no order as to costs.'

Proceedings before the court *a quo*

[6] In his judgment in the court *a quo,* Steenkamp J referred to a passage in the appellant's answering affidavit, namely that the court should dismiss the review application 'and confirm the arbitration award as an order of court'. The key question then posed by the learned judge was whether this prayer constituted a form of interruption of prescription.

[7] In the judgment of this Court in *Myathaza v Johannesburg Metropolitan Bus Service (SOC) Ltd t/a Metrobus*[2] Coppin JA referred to s15 (1) of the Act which provides that the running of prescription shall, subject to the provisions of s 15 (2), "be interrupted by the service on the debtor of any process whereby the creditor claims payment of the debt'. The learned judge of appeal then went on to say at paras 76-77:

[2] 2016 (3) SA 74 (LAC).

> 'An application to make an arbitration award an order of court could, however, be construed as a 'process whereby the creditor claims payment of the debt'. It is the substance rather than the form of the application that matters. By bringing such an application the creditor is in effect asking the court to order the debtor to pay the debt (represented by the award).
>
> The application to make an award a court order will interrupt prescription by its mere service on the debtor. But, for it to actually and effectively interrupt prescription, the creditor will have to prosecute his claim under that process to final judgment.'

[8] Applying these *dicta* to the present dispute, Steenkamp J found that the filing of an answering affidavit by the winning party in terms of the arbitration award which was not the subject of a review application against the arbitrator's decision, did not amount to taking a legal step to recover the 'debt' owing in terms of the award, sufficient to interrupt the running of prescription in terms of s 15 (1) of the Act.

[9] I should add that the learned judge came to this decision extremely reluctantly, commenting: "I am not persuaded that justice has been served. The law is, in this case, an ass; but I am reluctantly forces to hand down an asinine judgment."

[10] He observed that the LRA had been amended pursuant to a new provision, s145 (9), which provides that an application to set aside an arbitration award in terms of the section interrupts the running of prescription in terms of the Prescription Act in respect of that award. However, the commencement date for this amendment was such that it applied to arbitration awards issued after 1 January 2015 and therefore, could not come to aid of the appellant in the present dispute.

The appeal

[11] Subsequent to the decision of Steenkamp J on 02 March 2016, the judgment of the LAC in *Myathaza, supra,* was overruled by the Constitutional Court. Unfortunately, two judgments were delivered by the Constitutional Court, each

supported by four justices of the court, which, as I shall make clear, leaves the ratio somewhat uncertain.

[12] Briefly the facts of the case were as follows: An arbitration, pursuant to a dismissal of an employee, was conducted in September 2009. The arbitrator found that the dismissal had been both substantively and procedurally unfair and ordered Metrobus to reinstate the employee, Mr Myathaza, with retrospective effect from the date of his dismissal, being 09 July 2008, on the same terms and conditions that were applicable but for the unfair dismissal and without any loss or benefits that would have accrued to him. In terms of this order, Mr Myathaza was entitled to back pay. In a subsequent award, the back pay was quantified in the amount of R 90747, 86, excluding tax.

[13] Metrobus failed to pay this amount. When Mr Myathaza reported for duty within five days as required by the award, Metrobus sent him home, informing him that it had decided to challenge the award on review. It instituted review proceedings on 21 October 2009. These were opposed and eventually pleadings in the matter were closed. Although the matter was ripe for hearing, no date was sought and fixed and the review was still pending in the Labour Court some seven years later. Understandably Mr Myathaza was frustrated and approached the Labour Court in August 2013 with an application that the award be made an order of court. This application was opposed by Metrobus, inter alia, on the basis that the award had prescribed upon the expiry of three years under the Act; that is on 16 September 2012.

[14] In the first judgment, Jafta J held that prescription periods determined by s11 of the Act 'are at odds with the scheme of the LRA. Even the shortest period of three years is way out of line with the speed and periods within which the LRA requires disputes to be resolved. The period of three years is far too long to have an award enforced. Without condonation granted on good cause, a party who sits on an award until the last day of three years allowed by the Prescription Act

would be barred under the LRA when enforcing the award on the basis that such party did not act within a reasonable time. (para 32)

[15] Jafta J also found that the Act "does not cater for a situation where the claim or dispute has been adjudicated and an outcome binding on the parties has been reached, but before that outcome is made an order of court. In terms of s 143 of the LRA, a certified arbitration award is deemed to be an order of court and is enforced as if it were an order of the Labour Court, except an arbitration award for payment of money which is executed as if it were an order of a Magistrate's Court. Since an award is a final and binding remedy it is difficult to determine a prescription period applicable to it under the Prescription Act. The three-year period is meant for claims of disputes which are yet to be determined and in respect of which evidence and witnesses may be lost if there is a long delay." (para 44)

[16] Jafta J observed that the structure of s15 of the Act is predicated on the idea that the judicial interruption envisaged in this section must relate to claims that are yet to be prosecuted to final judgment or where judgment is abandoned or set aside. This is not the same situation as an arbitration award which is itself binding and final. See para 49.

[17] Referring to the time periods set out in the LRA, Jafta J held that the party against whom an award is issued can, by way of a review, challenge the award provided that the review is instituted within six weeks from the date on which the award was served. Section 145 (5) of the LRA requires that the review must be heard within six months from the date it was launched, save for an extension which may be granted by the Labour Court. In the learned justice's view, even where there is a review challenge, an award that has survived the challenge must be enforced within one year. Were the Act to apply it would mean that the award may not be enforced within a year. If the Act were to apply "the party in whose favour it was issued may wait almost three years and only seek to enforce it on the last day of the third year to interrupt prescription. If this were to happen

such party may have found out that it is no longer open to it to enforce the award under the LRA, owing to a long delay." (para 51)

[18] Referring to s 158 of the LRA, which empowers the Labour Court to make an award an order of court for the purposes of enforcement, Jafta J held that the application of the Act to such awards would effectively achieve the opposite outcome, in that, once prescribed, an award becomes unenforceable and the Labour Court would not be able to exercise its power to make the award an order of court. In this context, the Act would trump the LRA designed process that was specifically crafted to enforce the right to fair labour practices. See para 56.

[19] Jafta J then assumed that the Act could apply to a LRA case. He then said that even then, if the Act were to apply, the main award granted in favour of appellant could not prescribe because Metrobus was not under obligation to pay money, deliver goods or render services to the appellant and hence there was no "debt" as required by the Act.

[20] Given that the Act did not apply, Jafta J and three other justices consequently found that the appeal must succeed and the order of the Labour Appeal Court should be set aside. In terms of s145 (5) of the LRA Metrobus was obliged to apply for a date for the review to be heard within six months of the lodging of the review, subject to the rules of the Labour Court. The unduly long delay undermined the LRA's objective of a speedy resolution of disputes and severely prejudiced the appellant. Jafta J thus found that it would be just and equitable to grant an order which the Labour Court should have granted, namely to make the award an order of the Labour Court.

[21] By contrast, Froneman J, also supported by three justices of the Court, although finding that the appeal had to succeed, held that the relevant provisions of the two Acts were capable of complimenting each other in a way that best protected the fundamental right of access to justice while preserving the objective of a speedy resolution of labour disputes in terms of the LRA.

[22] Froneman J differed with the findings of the first judgment, where the latter held that a reinstatement order is incapable of falling within the scope of "a debt" under the Act. In his view, a claim for the enforcement of legal obligations should qualify "as a debt" in terms of the Act. An unfair dismissal claim under the LRA seeks to enforce three possible legal obligations against an employer, namely reinstatement, reemployment and compensation, all of which impose legal obligations upon an employer of a kind that fall within the scope of the concept 'debt' as employed in the Act.

[23] Once Froneman J accepted that the claim under an unfair dismissal falls within the scope of 'a debt', the question arose as to why prescription should run before the finalisation of court proceedings. In his view, there is little reason 'to say that instituting review proceedings does not also have the effect of extending the finalisation of the judgment until the review is decided'. (para 83)

[24] The LRA provides for two different routes in respect of dispute resolution after an initial referral to conciliation. If the latter fails, arbitration can take place under the aegis of the CCMA or a bargaining council. Alternatively, provision is made for adjudication by the Labour Court. Unfair dismissal disputes concerning an employee's conduct or capacity, continued employment made intolerable by the employer, or where no clear reason is provided to an employee for the dismissal, are dealt with by way of arbitration. Where it is alleged that the dismissal is automatically unfair, based on an employee's operational requirements or due to an employee's participation in an unprotected strike or pursuant to lockout disputes, adjudication is conducted in the Labour Court. That Labour Court judgments are subject to appeal to the Labour Appeal Court, while arbitration award can only become the subject of review should not, in Froneman J's view, justify a distinction insofar as the application of prescription is concerned. There is no plausible reason why a statutory review under s145 of the LRA is not to be considered as a judicial process that interrupts prescription until finality is reached. In other words, the right to review should play the same role in respect of prescription as does the right of appeal.

[25] Froneman J considered that the new provision to the LRA which took effect after the dispute in Myathaza, namely s145 (9) of the LRA "merely confirmed what I consider to have been the legal position before its enactment. It provides that an application to set aside an arbitration award interrupts the running of prescription." (para 88). In the final analysis, until the review was finalised in this case, the appellant's claim could not have prescribed.

[26] To the argument that as the LRA provides that unfair dismissal referrals must be instituted within 30 days of the date dismissal, Froneman J classified this as a time bar rather than a true prescription period which "may admit of amelioration through condonation." (para 94). Accordingly, the 30-day period for the referral, being a time bar, can thus be interpreted to be congruent with the normal prescription periods provided for under the Act. (See para 96).

Implications

[27] This Court is therefore faced with two judgments which have taken different approaches to the very problem that confronts this Court. Jafta J found that the Act has no application. Froneman J found that a review of an arbitration award which constitutes a debt in terms of the Act is suspended pending the finalisation of the review.

[28] In normal circumstances, given the equipoise in the Constitutional Court, this Court would follow the decision of this Court in *Myathaza, supra* or, if it considered that judgment to be palpably wrong, it would be free to adopt what it considered to be the correct approach.

[29] But, the split in the Constitutional Court notwithstanding, all the justices agreed that the order of this Court in *Myathaza* had to be set aside. For this reason, it cannot be considered to remain the default position. See the subsequent judgment of the Constitutional Court in *Mogaila v Coca Cola Fortune (Pty) Ltd*[3] (*Mogaila*) which finds that upon either approach, the appeal must succeed.

[3] [2017] 5 BLLR 439 (CC).

Regrettably, the court in *Mogaila* did not resolve the difference between the eight justices.

[30] While I consider that the approach of Froneman J, which seeks to reconcile the Act with the LRA to be preferable, in that I to have some difficulty in understanding why an arbitration award does not constitute a debt which falls within the scope of the Act, mercifully, on the basis, of either judgment this case must be decided in terms of the unanimous order of the Constitutional Court.

[31] This was sensibly the approach adopted by the respondents' counsel at the hearing before this court, namely that in the light of the Constitutional Court's judgment, in *Myathaza supra*, the appeal had to succeed and the order of the court *a quo* had to be set aside.

[32] In summary, on the basis of Jafta J's approach, the Act does not apply and accordingly the debt owed by respondent to the appellant in the amount of R 228 000.00 has not prescribed. On the basis of the approach adopted by Froneman J, the review has not been finalised and hence, prescription has been interrupted.

[33] The result, on either judgment, prevents the injustice of which Steenkamp J in the court *a quo* referred which is described as follows by Froneman J:

> 'The manifest injustice of depriving the applicant of the arbitration award in his favour by first avoiding its implementation by way of instituting review proceedings and then crying prescription on the back of the time wasted by the review can be met by application of the principle that prescription should not run until court proceedings are finalised.' (para 67)

[34] In the result the following order is made:

1. The appeal is upheld.

2. The order of the court *a quo* is set aside and replaced with the following order:

'The arbitration award of 15 September 2012 has not prescribed.'

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DAVIS JA

Landman JA and Phatshoane AJA concurred.

APPEARANCES:

FOR THE APPELLANT:	Adv AJ Nel
	Instructed by Lee and McAdam attorneys
FOR THE FIRST RESPONDENT:	H Pretorius of Macgregor Erasmus Attorneys