IN THE LABOUR APPEAL COURT OF SOUTH AFRICA, PORT ELIZABETH

Reportable

Case no: PA6/19

In the matter between:

NUM obo MAYIME DALTON MAJEBE **Appellant**

and

CIVIL & GENERAL CONTRACTORS **Respondent**

Heard (via submissions): 17 November 2020

Delivered: Deemed to be the date on which the judgment is e-mailed to the parties.

Summary: Prescription—Debt—Prescription Act 68 of 1969—Whether arbitration award constituting debt for purposes of s 16(1)—Enforcement of arbitration award in the form or reinstatement and backpay fitting within definition of debt.

Prescription—Interruption of prescription—Section 15(6) of Prescription Act 68 of 1969—Review application constituting any document commencing legal proceedings—Prescription interrupted by review application to the Labour Court.

Coram: Phatshoane ADJP, Coppin JA *et* Kathree-Setiloane AJA

JUDGMENT

COPPIN JA

[1] This is an appeal against an order of the Labour Court (Lallie J), with the leave of that court, dismissing an application in terms of section 158 (1)*(c)* of

the Labour Relations Act[1] ("the LRA") to make an arbitration award of the Commission for Conciliation Mediation and Arbitration ("the CCMA") an order of the court.

[2] The Labour Court dismissed the application having found that the award had prescribed. In arriving at that conclusion, it relied on this court's decision in *Myathaza (LAC),*[2] which was subsequently overturned by the Constitutional Court in *Myathaza (CC).*[3]

[3] The significance of this appeal lies therein that in *Myathaza (CC)* no binding ratio had been produced. Since then, following the less than ideal approach adopted by the Constitutional Court regarding the prescription of arbitration awards in *Mogaila*[4], and by this Court in *Van Tonder*[5], the Constitutional Court has since decided *Pieman's.*[6] The question is whether in light of all those developments the CCMA award in this matter had indeed prescribed.

[4] This judgment will deal, firstly, with the common cause background facts, then with the issue of condonation and the reinstatement of the appeal, thirdly with the law on the prescription of arbitration awards made in terms of the LRA, fourthly, with the question whether the appellant's claim in terms of the arbitration award has prescribed, and lastly, with the relief, including the issue of costs.

Common Cause Facts

[5] After the employee, Mr Majebe, was dismissed by the respondent on 8 December 2006 for alleged misconduct, the appellant union and the employee ("the appellant") referred an unfair dismissal dispute to the CCMA

[1] Act 66 of 1995.
[2] *Myathaza v Johannesburg Metropolitan Bus Service (SOC) Ltd t/a Metrobus; Mazibuko v Concor Plant Cellucity (Pty) Ltd v Communication Workers Union obo Peters* [2015] ZALAC 45; (2016) 37 ILJ 413 ("*Myathaza (LAC)*").
[3] *Myathaza v Johannesburg Metropolitan Bus Service (SOC) Ltd t/a Metrobus* [2016] ZACC 49;2018 (1) SA 38 (CC); 2017 (4) BCLR 473 (CC) ("*Myathaza (CC)*").
[4] *Mogaila v Coca Cola Fortune (Pty) Limited* [2017] 5 BLLR 439 (CC); (2017) 38 ILJ 1273 (CC) ("*Mogaila*").
[5] *Van Tonder v Compass Group (Propriety) Limited and Others* [2017] 10 BLLR 1024 (LAC) ("*Van Tonder*").
[6] *Food and Allied Workers' Union obo Goashubelwe v Pieman's Pantry (Pty) Limited [*2018] ZACC 7; 2018 (5) BCLR 527; [2018] 6 BLLR 531: (2018) 39 ILJ 1213 (CC) ("*Pieman's*").

on 2 January 2007. Upon conclusion of the arbitration, a commissioner of the CCMA issued an arbitration award on 19 June 2007 in favour of Mr Majebe. The commissioner found that Mr Majebe's dismissal was substantively unfair and ordered the respondent to (retrospectively) reinstate him, with back-pay.

[6] In August 2007, the respondent brought an application to the review and set aside the CCMA award. There was a substantial delay in the prosecution of the review application. After a period of almost seven years and on 14 January 2014 (while the review application was still in limbo) the appellant brought an application in terms of section 158(1)*(c)* of the LRA to make the CCMA award an order of the court.

[7] The respondent opposed that application, alleging, *in limine*, that the CCMA award had prescribed and could therefore not be made an order of court. On that basis, it sought dismissal of the application with costs. When the application came before the Labour Court there were conflicting decisions on the question of prescription and this court had just decided *Myathaza(LAC)*. The Labour Court applying that decision, come to the conclusion that the CCMA award in favour of Mr Majebe had prescribed.

[8] The Labour Court found (a) that prescription of the award commenced on the twenty-second day from the day on which the award was issued; (b) that the running of prescription was not interrupted by the filing of the review application brought by the respondent; (c) that the award prescribed three years from the twenty-second day after 19 June 2007; and (d) when the application to make the award an order of court was filed on 14 January 2014 the award had already prescribed. On the basis of those findings, the Labour Court dismissed the appellant's application on 20 November 2015.

[9] The application to review the award, brought by the respondent, was never withdrawn, or further dealt with. The appellant brought an application on 11 August 2017 for leave to appeal against the Labour Court's dismissal of its application. The application was accompanied by a condonation application of the same date. In the founding affidavit of the condonation application Mr

Mandisile Mzwana, an official of the appellant union, explained the delay in bringing the application for leave to appeal.

[10] He averred that after the Labour Court had dismissed the appellant's application, on 20 November 2015, the matter was regarded as finalised and was filed away because the union had no further instructions for its attorneys of record. On 12 June 2017, he was contacted by the appellant's attorney, Mr. Wesley Pretorius, who requested that the union and the employee, Mr Majebe, attend a consultation with the attorneys. The consultation was held on the earliest available date, being 17 June 2017. The purpose of the consultation was essentially to advise the union of the Constitutional Court's decision in *Myathaza (CC)* and of the approach followed by the Constitutional Court in *Mogaila*, and by this Court in *Van Tonder*.

[11] According to Mr Mzwana, they were advised, essentially, in light of those decisions, that the appellant had excellent prospects of succeeding in an appeal because, either the Prescription Act does not apply to arbitration awards issued in terms of the LRA, alternatively, if it did, the review application brought by the respondent had interrupted the running of prescription.

[12] Having found that the appellant had shown good cause and that there were good prospects, the Labour Court granted the requested condonation and leave to appeal on 8 May 2018.

Condonation in respect of the appeal

[13] The appellant's notice of appeal, which in terms of Rule 5(1) of the LAC Rules had to be filed within 15 days of the granting of leave to appeal to this Court, was only filed later. In the application for condonation for the late filing of the notice, Mr Mvimbeli of the appellant union avers that the failure to comply with the Rule was due to the negligent or deliberate conduct of an attorney employed by its attorneys of record, who had since resigned. On resigning in December 2018, the attorney never disclosed (in his report) that the notice of appeal had not been filed. When this was discovered after the attorney had left, the notice was filed post haste.

[14] In terms of LAC Rule 5(8) the record had to be delivered within 60 days of the date of granting leave to appeal. In terms of LAC Rule 5(17) if the appellant fails to lodge the record within the prescribed period, it is deemed to have withdrawn the appeal. The record in this matter was filed late.

[15] In its application for condonation for the late filing of the record and for reinstatement of the appeal, Mr Mvimbeli, on behalf of the appellant, furnishes the same explanation as for the late filing of the notice of appeal. In addition, he avers that the appellant has excellent prospects of success; that the respondent had not been prejudiced by the delay and that the matter is of great importance.

[16] In its opposing affidavit the respondent takes issue with the adequacy of the explanation for the delay and, essentially, contends that in terms of the law as it stands the arbitration award has prescribed. The respondent argues that the appellant should not be allowed to hide behind the negligence of the attorney, and that the Union and Mr Majebe did not do enough to avoid the delay. The respondent denies that it is not prejudiced by the lateness, complaining, in effect, that it would have to deal with the dismissal dispute again after 13 years had lapsed and that it would have to expend time and resources on it.

[16] In the replying affidavit the appellant essentially denies that the union and Mr Majebe did not maintain an interest in the matter. Beside submitting that the delay could not be blamed on them personally, it contends that, if appropriate, this Court “would be at large to take that delay into account in moderating the extent of the back-pay to which Mr Majebe is entitled under the award (by, for example, reducing the back-pay by the amount pertaining to the delay in noting the appeal)”.

[17] It is trite that an applicant for condonation must show good cause for the delay, and that in respect of the grant of condonation, the court has a discretion which it must exercise judicially, taking into account all of the relevant facts and circumstances. There is no closed list of factors to be taken into account, but factors usually included are: the degree of lateness, the explanation for it, the prospects of success, the importance of the matter, and

the interests of the respondent in finalising the matter. It is also trite that, generally, a slight delay might compensate for weak prospects of success and that, on the other hand, strong prospects of success may make up for a long delay[7].

[18] The appellant has provided an explanation for the long delay in respect of both the filing of the notice of appeal and the record. The question that remains is whether it is good enough. The respondent submits that it is not. Weighing against the appellant's explanation is also the principle that generally a party is not absolved from blame when its attorney has not complied with time periods through negligence, or otherwise. Whether the general principle applies depends on the circumstances of the particular case.[8]

[19] In circumstances where the party has furnished an explanation and it is clear that it is blameless regarding the non-compliance, for example when the body had been in contact with the attorney and was not aware of the non-compliance, the principle would not apply. However, where the party itself neglects following up on the matter while being aware of the time periods and the non-compliance, the principle would apply.[9]

[20] In this instance, the appellant did follow-up on the matter and justifiably assumed that all that was necessary had been done to bring the matter before this Court. The offending attorney, even upon his resignation, seems to have actively concealed his failure in that regard. After the non-compliance was discovered, prompt action was taken to rectify matters. It is not an instance where the appellant was aware of the non-compliance all along, or remained supine after becoming aware of the non-compliance.

[21] In light of the absence of real prejudice, the excellent prospects of success, and the interests of justice, it is essential that this appeal be heard to bring about certainty concerning the extinctive prescription of awards made in terms

[7] See inter alia, *Melane v Santam Insurance Co. Ltd* 1962 (4) SA 531 (A).
[8] See and compare, inter alia, *Regal v African Superslate* 1962 (3) SA 18 (A) at 23 C-H and *Saloojee & Another v Minister of Community Development* 1965 (2) SA 135 (A) at 141 B-H.
[9] Ibid.

of the LRA. The late filing of the notice of appeal and the late delivery of the record are accordingly condoned, and the appeal is reinstated.

The law

[22] As pointed out earlier, the Constitutional Court overturned this Court's decision in *Myathaza (LAC)*. The facts there, in brief, are the following: M was employed by Metrobus as a bus driver. He was dismissed and his dismissal was referred to the Bargaining Council where an arbitrator ultimately found that his dismissal was unfair and ordered Metrobus to reinstate him with immediate effect, with back-pay. Metrobus did not comply with the order but brought an application to review the award. M opposed the review and brought an application to make the award an order of court. Metrobus contended in response that the award had prescribed.

[23] The Labour Court held that the award was a "debt" for the purposes of the Prescription Act, that the review did not interrupt prescription, that the prescriptive period (3-years) had elapsed and that, accordingly, the award had prescribed. Consequently, it dismissed the application to make the award an order of court. On the appeal, this Court confirmed the Labour Court's decision in *Myathaza(LAC).*

[24] The employee (M) appealed to the Constitutional Court, where three judgments in the matter were produced. The first by Jaftha J (Nkabinde ADCJ, Khampepe J and Zondo J, as he then was, concurring) held that as the provisions of the Prescription Act were incompatible with the provisions of the LRA it did not apply, and, accordingly, the award had not prescribed. In addition, Jaftha J stated, inter alia, that the award (even though it was for reinstatement and back-pay) could not prescribe because it was not a "debt" for the purposes of the Prescription Act – because the order of reinstatement was "not an obligation to pay money or deliver goods or render services".[10]

[25] In a concurring judgment (the third judgment[11]) Zondo J held that the Labour Court and this Court had erred in their approach; that the Prescription Act did

[10] See *Myathaza (CC)* para 59.
[11] Referred to in *Mogaila* as "the third judgment".

not apply to labour matters, and also, inter alia, disagreed with the view that a referral to the CCMA interrupted prescription (i.e. that it was "process" as contemplated in section 15(1) of the Prescription Act).[12] Zondo J also concluded that an arbitration award did not constitute a "debt" as contemplated in the Prescription Act.[13]

[26] In the second judgment Froneman J (Madlanga J, Mbha AJ and Mhlantla J concurring) held that: (a) the Prescription Act was not inconsistent with the LRA, but complimented it,[14] (b) the referral to the CCMA interrupted prescription as envisaged in section 15(1) of the Prescription Act; (c) an unfair dismissal claim sought to enforce three possible kinds of legal obligation, namely, reinstatement, re–employment and compensation and that it was a "debt" as contemplated in the Prescription Act because each of those obligations "enjoins the employer to do something positive"; (d) in the case of reinstatement it meant that the resuscitation of the employment agreement, with all the attendant reciprocal rights and obligations, was required. The employer must provide employment and remunerate in accordance with the award or order of re-instatement. Both of which fell within the meaning of "debt" as contemplated in the Prescription Act, however narrowly interpreted.[15]

[27] The second judgment also held that the referral of the dispute to the bargaining council interrupted prescription and that prescription remained interrupted until the finalisation of the review proceedings. On that basis, the second judgment held that M's arbitration award had not prescribed, i.e. essentially, because the review proceedings had not been finalised.

[28] Thus, the appeal against this Court's judgment in the *Myathaza (LAC)* succeeded but for different, and largely contradictory, reasons. There was no majority view.

[12] See *Myathaza (CC)* paras 140-141.
[13] Ibid para 119.
[14] Ibid para 43.
[15] Ibid para 79.

[29] In *Mogaila,* the Constitutional Court acknowledged that "because none of the judgments in [*Myathaza(CC)*] secured a majority, no binding basis of decision (ratio) emerges from [there]." With reference to the facts before it, instead of deciding the matter afresh, the Constitutional Court opted to apply "an either/or" approach, effectively, with respect, treating the judgments in *Myathaza(CC)* as if they had each produced a ratio. Applying this less than ideal approach it found that on either of the judgments in that matter the appellant in *Mogaila* was entitled to an order declaring that the arbitration award, ordering reinstatement, had not prescribed and that she was entitled to certification in terms of section 143(3) of the LRA and its enforcement under section 143(1) of that Act.[16]

[30] This court adopted "the *Mogaila* approach" in *Van Tonder*. It was considered not to be ideal, but to be practicable at the time. With hindsight, that approach did not assist to elucidate the uncertainty that prevailed in this area of the law. It is trite that certainty is an essential aspect of the rule of law. Those who are required to comply with the law, and those charged with enforcing it, should have reasonable certainty about what it is.

[31] Even though it dealt with a slightly different scenario, the Constitutional Court's decision in *Pieman's* has since clarified the position. There is no scope for the continued application of the *Mogaila* approach, because the Constitutional Court has now decided in *Pieman's* that the Prescription Act is not inconsistent with the provisions of the LRA and that claims under the LRA do prescribe.

[32] While the minority of the Constitutional Court in *Pieman's* held, in essence, that the Prescription Act did not apply to unfair dismissal claims in terms of the LRA and that the provisions of the Prescription Act were inconsistent with those of the LRA, the majority held that the two Acts were not inconsistent or incompatible. While the Prescription Act deals with periods that would result in the extinction of a claim, the LRA does not necessarily deal with such periods. The majority, essentially, thereby confirmed the views expressed in the second judgment in *Myathaza (CC).*

[16] See *Mogaila* paras 27-29.

[33] *Pieman's* has produced a ratio and essentially establishes the following: (a) the Prescription Act is applicable to claims in terms of the LRA ; (b) a claim for reinstatement (with or without back-pay), re-employment, or compensation, is a "debt" as envisaged in the Prescription Act; (c) the applicable prescriptive period is 3-years; (d) the referral of an unfair dismissal claim to the CCMA interrupts prescription and prescription remains interrupted until any review proceedings in relation to that process, are finalised.

This matter

[34] In this matter, the appellant contended for the adoption of the *Mogalia* (*Van Tonder*) approach on the basis that the facts in *Pieman's* are distinguishable in that there the court was dealing with the prescription of claims for unlawful dismissal, whereas this matter concerns the prescription of an arbitration award.

[35] The respondent, on the other hand, submitted essentially the following: in *Pieman's* the applicability of the Prescription Act to claims in terms of the LRA was finally determined; *Myathaza(CC)* did not yield any ratio; that, instead, this Court should apply the decision of the Supreme Court of Appeal in *Brompton Court* [17] (which established that an arbitration award prescribed after 3-years) and this Court's decision in *Motsoaledi*[18] (which established that an alleged unfair labour practice constitutes a "debt" as envisaged in the Prescription Act, and that an application to a bargaining council to certify an award was not "process" as envisaged in section 15(1) of the Prescription Act and does not interrupt prescription).

[36] According to the respondent, since the appellant had taken the view that the award was due and payable on 13 May 2013, or within seven days of that date, and since the last step in the review application was taken on 7 February 2008, the 3-year period had prescribed by the time the appellant brought the application in the Labour Court, to make the award an order of court.

[17] *Brompton Court Body Corporate v Khumalo* [2018] ZASCA 17; 2018 (3) SA 347 (SCA) (23 March 2018).
[18] *Motsoaledi and Others v Mabuza* [2018] ZALAC 43; [2019] BLLR 21 (LAC).

Discussion

[37] This Court's decision in *Motsoaledi* and that of the Supreme Court of Appeal in *Brompton Court* are clearly distinguishable on the facts, but, in any event, none of them detracts from the reasoning, rulings, or findings, of the majority judgment of the Constitutional Court in *Pieman's.*

[38] On the authority of *Pieman's,* the review brought by the respondent is "process" as contemplated in section 15(1) of the Prescription Act and it interrupts the running of prescription in respect of the award. Accordingly, the appellant's award (for reinstatement and backpay, which is a "debt" as contemplated in the Prescription Act) has not yet prescribed because the respondent's application to review that award has not been finalised.

[39] While the facts in *Pieman's* were slightly different from those in the present matter, they are similar in material respects. To reiterate, there the majority of the Constitutional Court concluded that a claim in terms of the LRA for reinstatement, or re-employment and/or compensation was a "debt" as contemplated in the Prescription Act and the prescriptive period was 3-years. While a claim for such relief and an award granting such relief are conceptually different, it is rather artificial to conclude that such a claim is a "debt" in terms of the Prescription Act, but that an award, in terms of which such a claim is granted, is not. In any event, an award made pursuant to a claim for reinstatement (or for re-employment, or compensation) also seeks to enforce a legal obligation and enjoins the employer to do something positive. In this instance, to essentially, resuscitate Mr Majebe's employment agreement with it and to pay him back-pay. A quintessential "debt", and as contemplated in the Prescription Act.

[40] More importantly, the Constitutional Court in *Pieman's* held that a referral to the CCMA interrupts prescription, and prescription remains interrupted until the finalisation of the processes relating to it, which would include the review proceedings of the award made consequent to the referral.

[40] In the second judgment in *Myathaza(CC),* the correctness of which was clearly accepted in the majority judgment in *Pieman's*, Froneman J,

disagreeing with this Court's finding in that matter that the review there did not interrupt prescription, expressed the view that statutory reviews under s 145 of the LRA are to be included as judicial process that interrupts prescription until the review proceedings are finalised.[19] Froneman J, with respect, correctly concluded that an interpretation that protects the right of access to court is preferable to one that does not, and that "[t]his can be achieved by allowing the right of review to play the same role of finality as the right of appeal does in ordinary matters."[20]

[41] That view is confirmed in the amendment to section 145 of the LRA. Section 145(9) provides, in essence, that a review application does interrupt the running of prescription in respect of an award made in terms of the LRA.

[42] Thus, while the Labour Court was correct in applying this court's decision in *Myathaza(LAC*), it erred in its conclusion, as this court erred, that the review application brought by the respondent did not interrupt prescription. In the circumstances, the decision of the Labour Court cannot stand.

[43] Unfortunately this Court is not in the position to deal with the merits of the application brought by the appellant in terms of section 158(1)*(c)* of the LRA to make the award an order of the court, because we were not addressed in that regard. It is therefore necessary to refer the matter back to the Labour Court for the determination of the merits of that application. A referral is appropriate for the further reason that the review application that is still pending in the Labour Court might also be relevant to that determination, although that point is still open to debate and decision.

[44] Taking all facts and circumstances, as well as the law and fairness, into account, there shall be no cost order.

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

1. The late delivery of the notice of appeal and of the record are condoned and the appeal is reinstated on the roll.

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[19] See Second judgment in *Myathaza(CC)* para 86.
[20] Ibid.

2. The appeal is upheld.

3. The order of the Labour Court, dismissing the appellant's application to make the award an order of the court on the basis that the award has prescribed, is set aside and is substituted with the following order: *"The point of prescription raised by the respondent is dismissed."*

4. Unless they agree otherwise, or the appellant elects not to proceed with its application to make the arbitration award an order of court, the parties are referred back to the Labour Court for that court to deal with the merits of that application.

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P Coppin

Judge of the Labour Appeal Court

Phatshoane ADJP and Kathree-Setiloane AJA concur in the judgment of Coppin JA.

APPEARANCES:

FOR THE APPELLANT: Mr Riaz Itzkin

Instructed by Wesley Pretorius & Assoc. Inc.

FOR THE RESPONDENT: Mr M Grobler

Instructed by Bowes McDougall Inc.