REPUBLIC OF SOUTH AFRICA

IN THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

JUDGMENT

Reportable

Case no: JR 3349/09

In the matter between:

NUMSA obo WELCOME MASIPA **Applicant**

and

GO SUSPENSIONS AND AXLES (PTY) LTD **First Respondent**

METAL AND ENGINEERING INDUSTRIES BARGAINING COUNCIL **Second Respondent**

COMMISSIONER BONGANI KHUMALO **Third Respondent**

Heard: **19 December 2013**

Delivered: **26 March 2014**

Summary: **Reinstatement is a fundamental constitutional right. An arbitration award ordering reinstatement should not be rendered nugatory by prescription.**

JUDGMENT

MTHOMBENI AJ

Introduction

[1] This is an application in terms of Section 158(1)(c) of the Labour Relations Act 66 of 1995 ("the LRA") to make an arbitration award, issued by the third respondent on 9 November 2009 under the auspices of the second respondent, an order of court.

The first respondent opposes the application on the basis that the arbitration award has prescribed.

Background

[2] The individual applicant ("Msipa") was dismissed by the first respondent on 22 June 2009 and referred a dispute to the second respondent, claiming unfair dismissal. The second respondent allocated the matter to the third respondent to arbitrate. The latter issued an arbitration award directing the first respondent to reinstate Msipa with effect from 22 June 2009 and pay remuneration due to Msipa on or before 13 November 2009.

[3] On 11 December 2009, the first respondent initiated review proceedings by way of an application in terms of Section 145 of the LRA. The application was opposed by the applicant and was dismissed with costs by Rabkin-Naicker J in a judgment handed down *ex tempore* on 23 August 2012.

[4] On the same day, NUMSA addressed a letter to the first respondent seeking reinstatement of Msipa in compliance with the arbitration award. When Msipa reported for duty, the first respondent turned him away.

[5] Dissatisfied with the outcome of the review application, on 4 September 2012, the first respondent brought an application for leave to appeal. The applicant also opposed the application which Rabkin-Naicker J dismissed on 23 April 2013.

[6] On the same day, the applicant's attorneys of record addressed a letter to the first respondent's attorneys of record advising them that Msipa would report for duty on 30 April 2013.

[7] On 29 April 2013, the first respondent's attorneys of record responded contenting that the arbitration award had become prescribed. This notwithstanding, on 30 April 2013 Msipa reported for duty, but the first respondent turned him away.

[8] On 12 July 2013, the applicant instituted these proceedings.

The parties' submissions

Applicant's submissions

[9] I may be called upon to determine whether this application is tantamount to a claim of a debt in terms of the Prescription Act 68 of 1969 ("the Prescription Act").

[10] Mr Lengane for the applicant, while making reference to *Drennan Maud and Partners v Town Board of the Township of Pennington* [1998] 2 All SA 571 (SCA) and *Boshoff v South British Insurance Company Limited* 1951 (3) SA 487 (T), contended that a debt under the Prescription Act refers to a claim and not a cause of action.

[11] Mr Lengane submitted that the court in *Drennan* (supra) stated that in order to constitute a claim, the relief sought must be:

> 'a demand for something as due-an assertion of a right to something or one's right or title thereto'.

[12] From this perspective, Mr Lengane contended, the applicant is neither making a demand for something that is due, nor is the applicant making an assertion of a right or title to anything pursuant to the award. While the ultimate objective is to use the order sought in this application to enforce the arbitration award, Mr Lengane contended, the relief sought in this application is not the enforcement of the award; it is not a claim for a debt.

[13] Mr Lengane contended further that, even if this application constitutes a debt in terms of the Prescription Act, Msipa took steps to enforce the arbitration award when he reported for duty within the timeframe set out in the award, but the first respondent turned him away because it intended to or had commenced proceedings to review the arbitration award in terms of Section 145 of the LRA. If the arbitration award constitutes a debt, Mr Lengane submitted, Msipa's attempt to report for duty should be interpreted as tantamount to an interruption of the

prescription as contemplated in Section 12(2) of the Prescription Act. In this regard, the first respondent's refusal to allow Msipa to resume his duties in terms of the arbitration award was deliberate and intentional in order to benefit itself by bringing a review application in terms of Section 145 of the LRA. Alternatively, Mr Lengane submitted, the first respondent requested Msipa not to enforce the arbitration award, but to await the outcome of the review application in terms of Section 145 of the LRA.

[14] Mr Lengane submitted that the referral by Msipa of a dispute to the second respondent concerning unfair dismissal in terms of Section 195 of the LRA did not constitute a claim for a debt, but to seek determination as to whether his dismissal was fair or unfair. Consequently, the arbitration award issued by the third respondent in favour of Msipa was not a debt in terms of the Prescription Act. Thus, the Prescription Act does not find application in this application, for the review application could not have been a challenge to the enforceability or unenforceability of a claim to a debt.

[15] In *SA Transport and Allied Workers Union obo Hani v Fidelity Cash Management Services (Pty) Ltd* (2012) 33 ILJ 2452 (LC), Bhoola J, as she then was, stated that it is trite that prescription starts to run when the debt becomes due. She continued to hold that an arbitration award constitutes a debt and becomes due when it is made and, accordingly, the period of the running of prescription concerning the debt commences on the date when the arbitration award is made. Mr Lengane contended that Bhoola J's statement is clearly incorrect and wrong in law, for the law in this regard is not trite.

[16] Mr Lengane made reference to *Prof AR Coetzee and 48 Others v The Member of the Executive Council of the Provincial Government of the Western Cape* Case No: C751/2008 (Unreported) and submitted that in this matter, to buttress his contention that the law is unsettled in this regard, Rabkin-Naicker J said that the proposition that for the purpose of the Prescription Act prescription only begins to run once an arbitration award is made an order of court or is certified, while thus far accepted as established or even trite in decisions of this Court, deserves further consideration.

[17] It was submitted on behalf of the applicant that the relief sought in this application is not to enforce a debt, but an aid to enforce a debt arising from the making of an arbitration award an order of court in terms of Section 158(1)(c) of the LRA. It is only after Msipa has secured such an order that the first respondent could raise the special defence envisaged by Section 11 of the Prescription Act.

[18] Mr Lengane contended that this Court, as a court of equity, should not allow the first respondent to succeed in raising the special defence and should be estopped from relying therefrom.

First respondent's submissions

[19] Mr Botha submitted that the applicant did not take any further steps after the receipt of the arbitration award on 17 November. Thus, this application is opposed on the basis that the arbitration award, which was issued on 9 November 2009, has become prescribed.

[20] In this respect, Mr Botha invoked Section 15 of the Prescription which stipulates that:

> '(1) The running of prescription shall, subject to the provision of subsection (2) be interrupted by the service on the debtor of any process, whereby the creditor claims payment of the debt…
>
> "(2) For the purpose 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.'

[21] Mr Botha submitted that this Court held in *Solidarity and Others v Eskom Holdings Limited* (2005) 26 ILJ 338 (LC) and *PSA obo Khaya v CCMA and Others* (2008) 29 ILJ 1546 (CCMA) that three year prescription period applies to arbitration awards.

[22] Mr Botha relied on *Frans v PPC Cement (Pty) Ltd and Others* (2011) 12 BLLR 1189 (LC) and *POPCRU obo Sifuba v Commissioner of the SA Police Services* (2009) 30 ILJ 1309 (LC) to contend that this Court lacks jurisdiction to enforce an arbitration

award after the claim has become prescribed in terms of the Prescription Act and that a review application does not interrupt the running of prescription.

Evaluation of submissions

[23] In various decisions, this Court has held that, and it is regarded as trite, that an arbitration award constitutes a debt as contemplated in the Prescription Act. (See *Mangegene v Pretoria Portland Cement and Others* (2011) 32 ILJ 2518 (LC); *NUMSA and Another v Espach Engineering* (2010) 31 ILJ 987 (LC); *CEPPWAWU and Another v Le-Sel Research (Pty) Ltd* (2009) 30 ILJ 1818 (LC); *PSA obo Khaya v CCMA and Others* (2008) 29 ILJ 1546 (LC); *SATAWU obo Phakathi v Ghekko Services SA (Pty) Ltd and Others* (2011) 32 ILJ 1728 (LC). I, with respect, differ with these decisions for the reasons I will advance hereinbelow.

[24] This notwithstanding, the Labour Appeal Court in *Solidarity and Others v Eskom Holdings Limited* CA 9/05 [2007] ZALAC 19 (21 December 2007) agreed that the Prescription Act was applicable to the appellant's claim in relation to the benefits that would flow from the early retirement agreement. However, the court did not determine what constituted a debt or whether reinstatement falls within a meaning of s debt. (See *Prof AR Coetzee* (supra) at paragraph [13] *and Circuit Breakers Industries Ltd v NUMSA obo Hadebe* Case No: JR1958/08 at paragraph [15]).

[25] While I disagree with the decisions that hold that an arbitration award does constitute a debt, I am not persuaded by Mr Lengane's approach that the applicant is neither making a demand for something that is due, nor is the applicant making an assertion of a right to anything pursuant to an award, but his ultimate objective is to use the court order sought in this application as an aid to enforcing the award. In my view, this contention is not helpful as it does not address the issues in a legally sound manner in a way that recent decisions of this Court do as I will set out hereinbelow.

[26] Interruption of prescription in terms of the Prescription Act is in accordance with "process" envisaged by Section 15. For this reason, I am not persuaded by Mr Lengane's contention that Msipa's offer to tender his duties interrupted prescription.

His overture in this regard could be, in my view, taken into consideration when determining whether arbitration award ordering reinstatement constitutes a debt as I will demonstrate hereinbelow. This notwithstanding, my view regarding Mr Lengane's contention will not influence my decision in this application.

[27] Mr Lengane contended that this Court, as a court of equity, must not refuse this application on the basis that the arbitration award, as a debt, has become expired. In this regard, in *Hadebe* (supra) at paragraph 14, this Court stated the following:

> 'The views expressed in *Sifuba* are similar to those expressed by Pillay J in Mpazama where the learned judge commented that
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> > "It was submitted that as a court of equity, the Prescription Act should not be applied to oust jurisdiction of the court and thereby deny the applicant's claim.
> >
> > Equity must be applied even-handedly to both employer and employees. The employee had three years in which to prosecute the claim. The respondent had persistently denied liability for the debt. The respondent did not obstruct the applicant in instituting proceedings."'

[28] I agree with the sentiments expressed in the above passages. In this application, the applicant did not commence proceedings within three years, while the first respondent had always disputed the debt. In this regard, I agree with Chetty AJ who stated in *Hadebe* (supra) at paragraph 14that:

> '…It is a trite principle of our law of prescription that a party cannot profit from his own inaction. On a point of law, however, I am unable to disagree with the views expressed in the various judgments to which I have referred to (sic) above. Despite its harsh consequences and the injustice that results from a plea of prescription being upheld it operates as a matter of law.*'* (See *Sifuba* supra)

[29] Despite my agreement with the above passage from a legal perspective, I am, however, of the view that recent decisions of this Court, as it will be indicated hereinbelow, demonstrate that it is no longer a general approach that an arbitration award constitutes a debt as contemplated in the Prescription Act and that such a

debt becomes prescribed if it not certified by the CCMA or respective bargaining council within three years of it has been issued.

[30] Mr Kruger's contentions are correctly predicated on this jurisprudence. However, as I had made allusions hereinbefore to recent decisions of this Court in this regard, I am persuaded to depart from the general trend.

[31] First, I agree with Rabin-Naicker J's dicta in *Coetzee* (supra) where she said that:

> '[13] In my judgment this proposition thus far as established or even trite in decisions of this court deserves further consideration. Is the Prescription Act consistent with the LRA? The LAC has found that the Prescription Act does apply to contractual claims. It has not dealt with the issue in as far as unfair dismissal claims under the LRA are concerned…
>
> [15] First respondent's case in respect of prescription relies on the submission that 'all claims under the LRA fall under the Prescription Act'. In my judgment the LRA, in its design, is inconsistent with such a submission. Instead of any reference to prescription or the inclusion of a prescription clause, the LRA includes specific time periods for the referral of claims and underscores the use of the tool of condonation by this court when such periods are exceeded in the text of the statute; rather than in the court rules…
>
> [16] Further, if the Prescription Act did apply, there should be no distinction as regards its application between the different routes by the LRA i.e. those that go to conciliation and then to arbitration, and/or those which are adjudicated in the Labour Court after conciliation. This lack of distinction would accord with our constitutional values, particularly the right to equality and of access to justice. The LRA does not proscribe a hierarchy of dismissal claims litigants may claim…
>
> [19] Another obstacle to the proposition that the Prescription Act applies to all claims under the LRA is the following: a litigant who has to go the arbitration route and gets an award in her favour will not be able to enforce that award after three years. Another litigant who must go the adjudication route in terms of the LRA will obtain a "judgment debt "in this court which in terms of the Prescription Act prescribes only after 30 years after it is handed down…

> [21] In my opinion, for at least the above reasons, I find that the Prescription Act is inconsistent with the LRA. Its application to LRA claims would create inequalities between litigants using different routes for their disputes and furthermore will be unworkable where disputes move between tribunal and court and vice versa.'

[32] Second, I am also persuaded by Chetty AJ'S dictum in *Hadebe* where, after a survey of this Court's decisions relevant to this application, said:

> '[23] The right of reinstatement, in my view, falls into a similar category of fundamental rights contemplated by the constitution under the rubric of the right to fair labour practices. **This must be distinguished from those cases where an award of compensation has been determined as the appropriate remedy dismissal. In such instance, I accept that where a party has taken no steps to make** for unfair **such award an order of court within three years, such claim would prescribe similarly to any other debt. An award for reinstatement (with or without backpay) must be seen in a different light**. Our courts have accepted that reinstatement is the primary remedy in the case of an unfair dismissal. It could have never been the intention of the legislature to make the remedy of reinstatement open to being up-ended by a plea of prescription. For this reason too, I am inclined to take the view that a right of reinstatement as a remedy granted by the CCMA does not constitute a "debt" for the purpose of prescription…' (My emphasis)

[33] From this perspective, in my view, the arbitration award of reinstatement in favour of Msipa, who has always tendered his services to the first respondent unsuccessfully, constitutes an unassailable constitutional fundamental right which should be immune from the Prescription Act. For this reason, I am inclined to lean towards the views expressed by the decision of Chetty AJ.

[34] In the result, I make the following order:

(1) The application in terms of Section 158(1)(c) is granted; and

(2) There is no order as to costs.

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Mthombeni AJ

Acting Judge of the Labour Court

APPEARANCES:

FOR THE APPLICANT:	Adv K Lengane
Instructed by	Phungo Incorporated
FOR THE FIRST RESPONDENT:	Adv J Botha
Instructed by	MD Swanepoel Attorney