THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Reportable

Case No: 398/2017

In the matter between:

BROMPTON COURT BODY CORPORATE SS119/2006 **APPELLANT**

and

CHRISTINA FUNDISWA KHUMALO **RESPONDENT**

Neutral citation: *Brompton Court Body Corporate v Khumalo* (398/2017) [2018] ZASCA 27 (23 March 2018)

Coram: Ponnan, Van der Merwe and Mocumie JJA and Pillay and Makgoka AJJA

Heard: 1 March 2018

Delivered: 23 March 2018

Summary: Prescription – an arbitration award generally does not create a new debt for purposes of the Prescription Act 68 of 1969 (the Act) – a claim to make an arbitration award an order of court in terms of s 31 of the Arbitration Act 42 of 1965 is not a 'debt' in terms of the Act.

ORDER

On appeal from: Gauteng Division of the High Court, Johannesburg (Mokose AJ sitting as court of first instance):

1 The appeal is upheld with costs.
2 The order of the court a quo is set aside and replaced with the following:
'Prayers 1, 2 and 3 of the notice of motion are granted, with costs.'

JUDGMENT

Van der Merwe JA (Ponnan and Mocumie JJA and Pillay and Makgoka AJJA concurring)

[1] The appellant is the body corporate of the Brompton Court sectional title scheme. At all relevant times the respondent, Ms Christina Fundiswa Khumalo, owned a sectional title unit in the scheme. Disputes arose between the parties, which, by agreement, were referred to arbitration.

[2] The respondent was the claimant in the arbitration. She claimed that her account with the appellant be credited with various amounts in respect of levies, other charges and interest that I find unnecessary to particularize. She also claimed: (a) the costs of repairs to the structure of the unit, for which she asserted the appellant was responsible; (b) damages on the basis that as a result of the conduct of the appellant, she was unable to rent out the unit for a period of three months; and (c) damages for defamation. The appellant counter-claimed for payment of the outstanding balance owed to it by the respondent in respect of ordinary levies, special levies, a security levy, consumption of electricity and interest.

[3] The arbitrator published his award on 21 December 2012. He allowed the claims for the costs of repairs (in the amount of R20 000.00) and for loss of rental income (in the amount of R27 750.00) but dismissed all of the respondent's other claims. The arbitrator found that the respondent owed the amount of R135 099.48 in respect of the counter-claim. He subtracted the aforesaid amounts of R20 000.00 and R27 750.00 from this amount and made an award in favour of the appellant for payment of the balance of R87 349.48, interest thereon and costs of the arbitration.

[4] Per notice of motion issued on 26 March 2014, the appellant applied in terms of s 31 of the Arbitration Act 42 of 1965 to the Gauteng Local Division of the High Court, Johannesburg that the arbitration award be made an order of court. The respondent opposed the application in effect only on the basis that the debt in question had prescribed in terms of the Prescription Act 68 of 1969 (the Act). (In the absence of an application to review the arbitration award, the allegations in the answering affidavit that the arbitrator was biased or exceeded his authority, did not constitute a defence to the application.) The court a quo (Mokose AJ) upheld the defence of prescription and dismissed the application with costs. She refused leave to appeal but the appellant was subsequently granted leave to appeal by this court. The issue in the appeal is whether the defence of prescription was correctly upheld.

[5] Counsel for the appellant submitted that the arbitration award constituted a new debt and that the three year period of prescription only commenced to run on the date of publication of the award, that is 21 December 2012. As the application was launched on 26 March 2014, so it was contended, the respondent's reliance on prescription was misplaced. In this regard reference was made to John Saner SC *Prescription in South African Law,* (1996) at p 3-160, where it is firstly stated, without qualification, that when a binding arbitral award is made, a new debt arises and secondly, that if an arbitral award is not made an order of court within three years of its granting, the right to do so (being a 'debt' in terms of the Act) prescribes. Similar views were expressed in *Primavera Construction SA v Government of Northwest Province & another* 2003 (3) SA 579 (BPD) p 604 paras 13 and 14 and *Prime Fund Managers (Pty) Ltd v Rowan Angel (Pty) Ltd & another* [2014] ZAGPPHC 81; [2014]

2 All SA 227 (GNP) paras 44 and 45. The correctness of each of those statements will be considered in turn.

As to the first:

[6] The first statement cannot be accepted as a principle of general application. The converse will generally be true. Even a judgment of a court of law generally does not create a new debt. It serves to affirm and/or liquidate an existing debt which was disputed. What the judgment does in relation to prescription of a debt, is to give rise to a new period of prescription of 30 years in terms of s 11*(a)*(ii) of the Act. The same must generally apply to an arbitration award, save that it does not attract a new prescriptive period in terms of s 11 of the Act.

[7] The conclusion that an arbitration award generally does not give rise to a new debt, is supported by the provisions of s 13(1)*(f)* of the Act, which provides:

'(1) If —

(f) the debt is the object of a dispute subjected to arbitration;'

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).*'

[8] Should the alleged debt that was subject to arbitration be rejected by the arbitrator, no question of delay of the completion of prescription arises. It follows that save in exceptional circumstances, such as abandonment of the arbitration proceedings before completion thereof, the 'impediment' of pending arbitration proceedings will cease to exist on affirmation of an existing debt by an arbitration award. If the arbitration award constituted a new debt, it would make no sense to provide for the delay of the completion of prescription of the original underlying debt after the award and s 13(1)*(f)* would in most cases be rendered superfluous. In my judgment the sensible and logical approach is that the delay of completion of prescription in terms of s 13(1)*(f)* is intended to enable a creditor to apply to make

the arbitration award an order of court in terms of s 31 of the Arbitration Act, before the debt on which it is based prescribes.

[9] It should be mentioned that different considerations apply to arbitrations under the Labour Relations Act 66 of 1995 (the LRA). This is illustrated by the judgments in *Myathaza v Johannesburg Metropolitan Bus Service (SOC) Limited t/a Metrobus & others* [2016] ZACC 49; 2018 (1) SA 38 (CC). There Mr Myathaza obtained an arbitration award reinstating him to his employment. When he approached the Labour Court some four years later to have the arbitration award made an order of court, the employer relied on prescription. Four Justices of the Constitutional Court held that the Act was inconsistent with the LRA and did not apply to the LRA and that even if it did, a reinstatement arbitration award under the LRA did not constitute a 'debt' in terms of the Act. The other four held that the Act was applicable to proceedings under the LRA and that a claim for unfair dismissal under the LRA was a 'debt' in terms of the Act, but that referral of the dispute to the CCMA interrupted prescription in terms of s 15(1) of the Act. See also *Mogaila v Coca Cola Fortune (Pty) Limited* [2017] ZACC 6; 2018 (1) SA 82 (CC).

[10] In conclusion on this point, reference should be made to the decision in *Blaas v Athanassiou* 1991 (1) SA 723 (W). The arbitration agreement in that matter provided that the award of the arbitrator '. . . shall be deemed to be and shall be treated as if a judgment delivered by a Judge in the Supreme Court of South Africa'. The court held, no doubt correctly, that *inter partes* the award had the status of an order of court. The judgment has been understood to hold that the prescription period of 30 years applicable to a judgment debt in terms of the Act, applied to the arbitration award in that matter. See M M Loubser *Extinctive Prescription* (1996), pp 41 and 120, J C Saner above pp 3-160 and *Primavera* above para 12. But that is not what Hartzenberg J said in *Blaas*. What he said (at 725H-I), was that the effect of the agreement was that for a 30 year period '. . . the two parties contracted themselves out of a right to rely against the other on the defence of prescription.' Thus the judgment was based on a waiver of rights and not on an application of the 30 year prescription period in terms of the Act to an arbitration award.

As to the second:

[11] I am also unable to agree with the second statement, namely that the claim to make an arbitration award an order of court is a debt that prescribes after three years. A claim that an arbitration award be made an order of court is not a 'debt' in terms of the Act. In this regard the Constitutional Court has clearly endorsed the decision of this court in *Electricity Supply Commission v Stewarts & Lloyds of SA (Pty) Ltd* 1981 (3) SA 340 (A) at 344E-G, namely that a debt in terms of the Act is an obligation to pay money, deliver goods or render services. See both the majority judgment (paras 85-93) and the minority judgment (paras 187-187 and 195) in *Makate v Vodacom Ltd* [2016] ZACC 13; 2016 (4) SA 121 (CC). See also *Off-Beat Holiday Club and another v Sanbonani Holiday Spa Shareblock Limited and others* [2017] ZACC 15; 2017 (5) SA 9 (CC) paras 44 and 48. The appellant's claim to make the arbitration award an order of court did not require the respondent to perform any obligation at all, let alone one to pay money, deliver goods or render services. The appellant merely employed a statutory remedy available to it. This is not entirely dissimilar to a claim for rectification of a contract, which this court has held not to constitute a 'debt' in terms of the Act. See *Boundary Financing Limited v Protea Property Holdings (Pty) Limited* [2008] ZASCA 139; 2009 (3) SA 447 (SCA) paras 12-14.

[12] It follows that to the extent that contrary views have been expressed in the judgments of *Primavera* and *Prime Fund Managers*, they should not be followed.

[13] As there is no basis for holding that the arbitration award in this matter created a new debt and prescription did not commence running on date thereof, the appellant cannot succeed on this point. There is, however, another reason why the court a quo erred in upholding the defence of prescription.

[14] The respondent raised prescription in the following terms:

'1. The matter between parties has since been prescribed in terms of Section 13(1)(f) of the prescription Act 68 of 1969, which provides that the completion of prescription will be delayed until one year after the Arbitration proceedings came to an end, for the

Applicant to make an arbitration award an order of court in terms of Section 31 of the Arbitration Act, 42 of 1965. The Applicant has failed to do so in time.

2. The arbitration process took place on the 25th of September 2012 and the **award** was published on the 21st of December 2012.
3. The period of [o]ne year has lapsed since the date of publication, to make the award an order of court in terms of Section 31 of the Arbitration Act, 42 of 1965.'

[15] It is immediately apparent that prescription was raised as if s 13(1)*(f)* of the Act provided for a one year period of prescription in respect of an arbitration award. This proposition formed the basis of the judgment of the court a quo. The proposition is of course clearly wrong. Section 13(1)*(f)* provides nothing of the sort. It deals with the delay in the completion of the running of prescription. The requisite periods of extinctive prescription in terms of the Act are to be found in s 11 thereof. Applied to the facts of this case, s 13(1)*(f)* provides that if the relevant period of prescription in respect of a debt would, but for the provisions of the subsection, have been completed before or on within one year of the date of publication of the award on 21 December 2012, the completion of the period of prescription in respect of such debt would be delayed for one year after 21 December 2012.

[16] As I have said, the appellant's counter-claim related to ordinary levies, special levies, a security levy and consumption of electricity. It can be accepted that the counter-claim encompassed a variety of separate debts. It follows that for the respondent to succeed she had to prove that one or more of these separate debts would have prescribed before or on or within a year of the arbitration award. This entailed proof of the date on which each debt became due. See *Gericke v Sack* 1978 (1) SA 821 (A) at 827H-828A.

[17] The respondent made no attempt to satisfy this onus. The various debts clearly became due on different dates and at least some of them would have become due from month to month. The respondent presented no evidence as to when any of these debts became due. The uncertainty is compounded by the fact that it is not possible on the evidence to make any appropriation of the substantial payments that the respondent made to the appellant prior to the arbitration.

[18] It follows that the defence of prescription had to fail. Counsel for the respondent properly conceded that in such event, the order of the court a quo must be replaced with an order granting the appellant's application with costs.

[19] The following order is issued:

1 The appeal is upheld with costs.

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

'Prayers 1, 2 and 3 of the notice of motion are granted, with costs.'

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C H G van der Merwe

Judge of Appeal

APPEARANCES

For Appellant:	A Granova
	Instructed by:
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	Rossouws Attorneys, Bloemfontein
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