

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG LOCAL DIVISION, JOHANNESBURG

- | | |
|-----|--|
| (1) | REPORTABLE: NO |
| (2) | OF INTEREST TO OTHER JUDGES: NO |
| (3) | REVISED: |

Date: **2 December 2021** Signature:

CASE NO: 24667/2020

DATE: 2ND DECEMBER 2021

In the matter between:

MATATIELE LOCAL MUNICIPALITY

Applicant

and

LUBBE CONSTRUCTION (PTY) LIMITED

Respondent

Heard: 23 November 2021 - The 'virtual hearing' of the Opposed Application was conducted as a videoconference on *Microsoft Teams*.

Delivered: 02 December 2021 – This judgment was handed down electronically by circulation to the parties' representatives by email, by being uploaded to *CaseLines* and by release to SAFLII. The date and time for hand-down is deemed to be 12:00 on 02 December 2021.

Summary: Arbitration – award - whether it creates new debt – right to make award order of court – whether 'judgment debt' or 'debt' in Prescription Act – an arbitration award does not create a new debt: it merely affirms and/or liquidates

the existing debt that was in dispute – applicable period of prescription based on ‘debt’ underlying the arbitration award (three years) – arbitration delays completion of period of prescription in terms of s 13(1) – review application to set aside Arbitrator’s award does not delay completion of period of prescription – section 13(1) of the Prescription Act – applicant’s claim prescribed – therefore dismissed.

ORDER

- (1) The applicant’s application in terms of section 31(1) of the Arbitration Act, Act 42 of 1965, be and is hereby dismissed with costs.
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JUDGMENT

Adams J:

[1]. In terms of its notice of motion dated 10 September 2020, the applicant (Matatiele Local Municipality or the Municipality) seeks an order to have an arbitration award of 3 October 2017 made an order of Court. The application was served on 9 October 2020 on the respondent (Lubbe Construction or Lubbe), who reacted thereto in its answering affidavit, which is dated 6 November 2020. The main complaint of Lubbe Construction is that the award ordering it to pay to the Matatiele Local Municipality an amount of R22 173 329.31, with interest and costs, is a debt, which has become prescribed in terms of the Prescription Act 68 of 1969 (the Prescription Act).

[2]. The arbitration award was based on a written construction agreement concluded between the parties on 21 August 2014 for the construction of municipal offices and council chambers in the town of Matatiele in the Eastern Cape. Because of material breaches by Lubbe Construction of the agreement, the Matatiele Local Municipality, by written notice to Lubbe Construction, lawfully cancelled the agreement on 01 July 2016 and claimed damages from

the construction company allegedly arising from its material breaches of the agreement. It is this claim for damages which formed the subject of the arbitration proceedings which were instituted during November 2016 by agreement between and at the behest of both parties. The hearing of the arbitration proceeded before the Arbitrator on 5 June 2017, and, as already indicated, the arbitration award, although dated 14 July 2017, was only published on 3 October 2017. A subsequent application by Lubbe Construction for the review and the setting aside of the Arbitrator's award was dismissed on 23 April 2020 by this Court (per Vally J).

[3]. The question to be answered in this opposed application is whether the Matatiele Local Municipality's claim to have the arbitration award made an order of this Court, has prescribed. The applicable legal principles relating to this issue – harsh as they may seem – are fairly settled. They are regulated by the provisions of the Prescription Act and the Arbitration Act 42 of 1965 (the Arbitration Act). As already indicated, in this application, Lubbe Construction raises the defence of prescription and contends that the claim by the Municipality has become prescribed in terms of s 15 (3) of the Prescription Act. The Matatiele Local Authority submits that this defence is bad in law and should be rejected.

[4]. Section 31(1) of the Arbitration Act, which provides that an arbitral award can be made an order of Court, reads as follows: -

'An award may, on the application to a court of competent jurisdiction by any party to the reference after due notice to the other party or parties, be made an order of court.'

[5]. It may be apposite at this juncture to get out of the way an issue raised by Lubbe Construction, which is vehemently disputed by the Local Authority. That relates to Lubbe Construction's contention that the award by the Arbitrator is a debt. This issue was dealt with authoritatively by the Supreme Court of Appeal in *Brompton Court Body Corporate v Khumalo*¹, in which Van der Merwe JA held as follows: -

'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

¹ *Brompton Court Body Corporate v Khumalo* 2018 (3) SA 347 (SCA).

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.'

[6]. It is therefore clear from this judgment that an Arbitrator's award does not create a new 'debt' as envisaged in the Prescription Act. It is simply an affirmation or a liquidation of an existing debt. This much is clear also from a reading of a further extract from *Brompton*, where Van der Merwe JA has this to say:

'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

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.'

[7]. I read the *Brompton* judgment as authority for the proposition, firstly, that an arbitration award is not a 'judgment debt' and that the thirty-year prescription period applicable to judgment debts in terms of s 11(a)(ii) of the Prescription Act, does not apply to it. The judgment says so in as many words. It held that, whilst an arbitral award, like a judgment, merely confirms and/or liquidates an existing debt, it does not carry the period of prescription of a judgment as per the Prescription Act. Second, an arbitration award is not a 'debt' as envisaged by the Prescription Act, but it merely affirms or liquidates a 'debt'. And thirdly that, subject to the provisions of the Prescription Act, the prescription period applicable to the debt underlying the arbitration award determines when the claim prescribes. I will return to this aspect later on in the judgment.

[8]. There is a preliminary issue raised by the Municipality, which relates to the authority of the deponent to the answering affidavit to represent Lubbe Construction in these proceedings. It is alleged by the Municipality that, although the deponent claims that he is authorised to depose to the affidavit, he fails to attach any such authorisation to the affidavit. The Municipality disputes that he is authorised to depose to the answering affidavit on behalf of Lubbe and accordingly requests the Court to disregard the answering affidavit and to allow the application to proceed on an unopposed basis.

[9]. In intend giving short thrift to this point as it lacks merit. The starting point, as regards this issue, is the fact that the deponent to the answering affidavit, Mr Mandla Samuel Lubbe, under oath, confirms that he had been mandated by Lubbe Construction to oppose the application by the Matatiele Local Municipality.

[10]. Moreover, as was held by Flemming DJP in *Eskom v Soweto City Council*², where an interlocutory application had been delivered under the name and signature of the respondent's attorney, if the attorney had been authorised to bring the application on the respondent's behalf, then the application was that of the respondent, irrespective of whether the deponent to the supporting affidavit had also been authorised 'to bring this application'. The Court held, further, that the deponent's evidence could not be ignored because he had not been 'authorised': if the attorney had authority to act on the respondent's behalf, then the attorney was entitled to use any witness who, in his opinion, would advance the respondent's case – a witness may testify even if (s)he has no authority to bring, withdraw or otherwise deal with the application itself.

[11]. That, in my view, is the end of the preliminary point relating to the authority of Mr Lubbe to act, which point, as I have already indicated, is void of any merit.

[12]. That brings me back to the relevant legal principles and the applicable regulatory framework. In terms of s 11 of the Prescription Act, the period of

² *Eskom v Soweto City Council* 1992 (2) SA 703 (W)

prescription in respect of a debt, such as the one which is the subject of the arbitration award *in casu*, is three years, which period shall in the normal course of events commence to run as soon as the debt is due. Applying this provision to the facts in this matter, it has to be accepted that the prescription period started running on 1 July 2016, which is the date on which the Municipality cancelled the contract. Therefore, if nothing else occurred in the interim, the debt would have become time-barred on 30 June 2019.

[13]. However, as we already know, during November 2016 the parties referred the dispute between them to arbitration and, on 24 November 2016, Attorney Terry Mahon was appointed by the parties as the arbitrator. This then raises the question whether the prescription of the debt was delayed in terms of s 13(1) of the Prescription Act, the relevant portion of which provides as follows:

'13 **Completion of prescription delayed in certain circumstances**

- (1) If –
- (a); or
-
- (f) the debt is the object of a dispute subjected to arbitration; or
- (g); 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).'

[14]. The answer to the above question depends on the correct interpretation of ss (1)(i) – in particular what constitutes 'the relevant impediment referred to in paragraph (f)' – and the application of such interpretation to the facts in the matter before me. If it is accepted that the debt is 'subjected to the arbitration', in accordance with ss (1) (f), only until the arbitration award is handed down, then the position is that the Municipality's claim would still have prescribed by 30 June 2019. This is so because, with the arbitration award published on 3

October 2017 and the debt prescribing on 30 June 2019, it cannot be said that the relevant period of prescription would have been completed within one year after the day on which the impediment had ceased to exist. In other words, in order for ss 1(f) to find application *in casu*, the debt ought ordinarily to have prescribed on or before 2 October 2018. Therefore, in this matter and on the assumption that the 'impediment' ceased to exist when the award was published, the arbitration proceedings and the subsequent arbitration award have no effect on the period of prescription which ran from 1 July 2016 to 30 June 2019.

[15]. It therefore follows that on the foregoing interpretation and construction, as contended for by Lubbe Construction, the Municipality's claim to have the arbitrator's award made an order of court, had become prescribed by the time the application in terms of s 31(1) of the Arbitration Act, was issued and served on Lubbe on 9 October 2020.

[16]. Conversely, if it is to be accepted that the debt became the 'object of a dispute subjected to arbitration' on 24 November 2016, when the Arbitrator was appointed, and the 'impediment', being the arbitration, ceased to exist on the date on which the application by Lubbe Construction to review and set aside the arbitration award, was dismissed by Vally J, that being 23 April 2020, then the position would be as follows. In the ordinary course, the debt would have become prescribed on 30 June 2019, which falls squarely within the period mentioned in ss (1)(i), which, in turn, means that the prescription of the debt would have been delayed by one year from 23 April 2020, which means that the Matatiele Local Municipality would have had until 22 April 2021 to launch its application to have the award made an order of Court. They did that well before the due date. Therefore, on this scenario – which is the one contended for by the Municipality – the prescription point raised *in limine* by Lubbe Construction would be bad in law.

[17]. In its answering affidavit, Lubbe Construction avers that s 15(3) of the Prescription Act finds application in that, on 30 November 2016, an amount of R5 824 245.96 was paid on their behalf on account of their indebtedness to the

Matatiele Local Municipality. This, so the argument goes on behalf Lubbe Construction, amounts to an admission of liability by it, which in turn means that the prescription would have started to run anew from 30 November 2016 and the Municipality's claim would have become prescribed on 29 November 2019.

[18]. Section 15(3) provides as follows:

'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 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.'

[19]. There are a number of difficulties with this contention on behalf of Lubbe Construction. Firstly, there is no evidence before me that even begins to suggest that Lubbe Construction admitted liability for the debt. On the contrary, the evidence is overwhelmingly in support of a conclusion that the liability was strenuously denied throughout. So much so that when the Arbitrator awarded damages in favour of the Municipality, Lubbe took that decision on judicial review. Secondly, even if I am to accept that the prescription period was to commence running afresh on 30 November 2019, it would make no difference to the conclusion reached by me when applying s 13(1) of the Prescription Act on either of the above two possible postulations. The prescription point would be good in the first scenario and bad in the second scenario.

[20]. The simple question remains. Did the impediment, namely 'the debt [being] the object of a dispute subjected to arbitration', cease to exist on 7 October 2017 (the date on which the arbitration award was published) or on 23 April 2020 (the date on which the review application was dismissed by Vally J)? The answer to this question depends on whether one accepts or not that the review proceedings form part of the arbitration.

[21]. Lubbe contends for the interpretation that the review application is not part of the arbitration and therefore did not constitute an 'impediment' as contemplated in ss (1)(i). This construction appears to me to be supported by the wording and the context of the relevant provision. The wording of the

subsection is clear and unambiguous that an impediment is constituted by a 'dispute subjected to arbitration'. It does not, for example, make reference to a review of the arbitration award or to related legal proceedings or to litigation arising from or related to the review. If it was the intention of the Legislature that review proceedings and litigation subsequent to and arising from the arbitration award should delay the completion of the period of prescription, it most certainly would have said so.

[22]. A further consideration relevant to the interpretation of ss 1(f) and (i) is s 11(d) of the Prescription Act, which provides that, save where an Act of Parliament provides otherwise, the period of prescription of 'any other debt' shall be three years. The Arbitration Act does not have a provision relating to the prescription of an arbitral award being made an order of Court. The point is this: If the Legislature intended for the review of awards to delay the completion of the period of prescription, it would have done so either by writing same into the Prescription Act or by making provision therefore in the Arbitration Act. This has not been done by the Legislature, and the ineluctable conclusion to be drawn is that the intention was simply to exclude the review proceedings as an 'impediment' which would delay the completion of the prescription period.

[23]. A comparable situation is to be found in relation to the Labour Relations Act 66 of 1995 ('the LRA'), albeit in the context of the interruption of prescription by the issue of a review process. Previously, there was no provision that a review application would interrupt prescription and this was interpreted as a review application not interrupting prescription in terms of s 15(1) of the Prescription Act. An amendment to s 145 of the LRA inserted *inter alia* a new s 145(9) which provides that: -

'An application to set aside an arbitration award in terms of this section interrupts the running of prescription in terms of the Prescription Act, 1969 (Act 68 of 1969) in respect of that award.'

[24]. The point is that, unless the Legislature makes it clear that a particular legal process, such as a review application, shall delay the completion of the prescription period, it should be accepted that the said process does not delay

prescription. If needs be, the Legislature will specifically provide for such inclusion by amending the legislation.

[25]. I reiterate that s 13(1)(f) and (i) of the Prescription Act is unambiguous and it is plain that a review to set aside an arbitration award is not an 'impediment' as envisaged by ss 1(i) and such a review, therefore, does not delay the completion of the period of prescription. It therefore appears to me that the wording and the context of the relevant provisions, lend itself to such an interpretation.

[26]. Moreover, in support of the foregoing stance, Mr Van der Wath, who appeared on behalf of Lubbe Construction, relied on *SA Transport & Allied Workers Union on behalf of Hani v Fidelity Cash Management Services (Pty) Ltd*³, which, according to Mr Van der Wath, has conclusively decided that review proceedings are not an impediment to an applicant to apply to court to have an arbitration award made an order of court. I was specifically referred to para 26 of the judgment, in which Bhoola J held as follows: -

'Mr Hani's right to reinstatement in terms of the arbitration award (in other words the debt) came into existence on 2 May 2007. This was when the debt became due and when prescription began to run. The predominant approach in the Labour Court is that prescription is not interrupted by a review and given the applicant's failure to issue any "process" as envisaged in the Prescription Act the debt would accordingly have prescribed three years later, i.e. on 2 May 2010. This application was brought a year and two months after the claim had prescribed. Although the applicant opposed the review the first steps it took to enforce the award were taken four years and 2 months later, on 1 July 2011. Nothing in the respondent's attempts to set aside the award prevented the applicant from simply filing this application at any stage after the award was issued. This and nothing more would have interrupted prescription and avoided this unfortunate consequence for Mr Hani. In *Solidarity obo Prins and 10 others v Gijima AST (Pty) Ltd* (judgment of Van Niekerk J in JS 333/08 dated 31 March 2010) Van Niekerk J indicated that this was very simply all the applicant needed to do. In dispensing with the argument that a letter from the respondent "suspended" prescription, Van Niekerk J held: -

³ *SA Transport & Allied Workers Union on behalf of Hani v Fidelity Cash Management Services (Pty) Ltd* (2012) 33 ILJ 2452 (LC).

[11] There is no merit in this argument. The fact remains that nothing stood in the way of the applicants simply instituting process to stay prescription, as some of them in fact did. As a matter of law, the applicants cannot rely on any explanation, or any allegation about the conduct of the respondent for their inaction and in particular, their failure to file proper and prescribed process to stay prescription. In this instance, the claim having prescribed as a matter of legal consequence (see *Phasha v Southern Metropolitan Local Council of the Greater Johannesburg Metropolitan Council* 2000 (2) SA 455 (W) 469-473). All that was required was a unilateral act by the applicants, in the form of the issuing and service and filing of process, to interrupt prescription.

In *Uitenhage Municipality v Malloy* (1998) 19 ILJ 757 (SCA), Mahomed CJ said the following in the context of an employment law dispute, a statement that can equally be applied in this instance having regard to the defence raised by the applicants:

“A creditor against whose claim prescription commences to run, may protect himself or herself from its consequences, by causing the interruption of prescription in terms of s 15 of the Prescription Act through the service of ‘any process, whereby the creditor claims payment of the debt.’” (at 760E- 761G).’

[27]. There are also a number of other cases, albeit in the context of the Labour Relations Act, which support the legal conclusion that the review proceedings do not delay the completion of the period of prescription. One example of such a case is the Labour Appeal Court judgment in *Myathaza v Johannesburg Metropolitan Bus Service SOC Ltd t/a MetroBus*⁴, in which Coppin JA held that an application to review and set aside an arbitration award does not interrupt prescription as contemplated in s 15 of the Prescription Act because it does not say so.

[28]. Applying the foregoing principles to the present matter and having regard to the aforementioned authorities, I can come to no conclusion other than one to the effect that the review application by Lubbe Construction did not delay the completion of the period of prescription.

[29]. There is also no merit in the contention by Matatiele Local Municipality that the arbitrator’s award is a ‘judgment debt’ as contemplated in the

⁴ *Myathaza v Johannesburg Metropolitan Bus Service SOC Ltd t/a MetroBus* 2016 (3) SA 74 (LAC).

Prescription Act. This in fact seems to be the bastion of the case of the Municipality. However, this contention is misguided. In that regard, I have already referred to the *Brompton* case (supra), which is authority for this legal principle. Furthermore, in *Myathaza*, Coppin JA dealt with this issue – again albeit in the context of the LRA, the principles are the same – as follows:

[46] The period is dependent on whether an arbitration award constitutes “a judgment debt”, in which case a 30-year prescription period would be applicable, or a simple ‘debt’, in which case a three-year prescriptive period would be applicable.

... ..

[52] Furthermore an arbitration award in terms of the LRA is not subject to an appeal like a judgment or order of the Labour Court, but it is subject to review. In contrast, an order of judgment of the Labour Court is not subject to review. A court order or a judgment also does not require certification for its execution.

[53] Unequivocal confirmation that an arbitration award is not equal to (or equivalent to) an order or judgment of the Labour Court is provided by s 158(1)(c) of the LRA, which empowers the Labour Court to make “any arbitration award an order of court”. If they were the same thing, s 158(1)(c) would be totally superfluous.

[54] In the circumstances, to give the term “judgment debt” in the Prescription Act a meaning which includes “arbitration awards” made under the LRA, would unduly strain the language of the Prescription Act. Orders or judgments of the Labour Court would clearly fall within that meaning, but not arbitration awards made under the LRA, which differ from Labour Court orders and judgments in significant respects.’

[30]. In the context of this matter and the provisions of the Arbitration Act, the question to be asked, borrowing from Coppin JA, is this: If a ‘judgment debt’ and an ‘arbitration award’ were the same thing, why does s 31(1) empowers this Court to make an arbitration award an Order of Court? If they were the same thing, s 31(1) would be superfluous.

[31]. In the circumstances, I am of the view that the prescription legal point raised by Lubbe Construction in the application has merit. The Municipality’s claim to have the arbitrator’s award made an Order of Court is time-barred. The debt, which is the subject of the award, prescribed on 30 June 2019, which

preceded the date on which the proceedings in this application were instituted. Matatiele Local Municipality's application therefore stands to be dismissed.

[32]. As regards costs, the general rule that same should follow the result and that a successful party should be granted his costs, should be applied. The costs of this application will therefore be awarded against the applicant in favour of the respondent.

Order

[33]. Accordingly, I make the following order: -

- (1) The applicant's application in terms of section 31(1) of the Arbitration Act, Act 42 of 1965, be and is hereby dismissed with costs.

L R ADAMS

Judge of the High Court

Gauteng Local Division, Johannesburg

HEARD ON:	23 rd November 2021 – in a 'virtual hearing' during a videoconference on <i>Microsoft Teams</i>
JUDGMENT DATE:	2 nd December 2021 – judgment handed down electronically
FOR THE APPLICANT:	Adv Sinethemba Isaac Vobi
INSTRUCTED BY:	Matthew Francis Incorporated, Pietermaritzburg.
FOR THE RESPONDENT:	Attorney S J Van der Wath
INSTRUCTED BY:	Roelf Nel Incorporated Attorneys, Pretoria.