**IN THE LABOUR COURT OF SOUTH AFRICA, PORT ELIZABETH**

Reportable

Case No: P295/15

In the matter between:

**GRAHAM GOLIATH** **Applicant**

and

**ROCKLANDS POULTRY LOSS CONTROL/**
**SOVEREIGN FOODS** **Respondent**

**Heard:** **17 October 2019**
**Delivered:** **7 November 2019**

**Summary: The arbitration award in terms of which the applicant was retrospectively reinstated constitutes a debt to which the provisions of the Prescription Act 68 of 1969 are applicable. The period of prescription starts running when the applicant is dismissed and interrupted when the dismissal dispute is referred to the CCMA for conciliation. To the extent that there was no application to review the arbitration award, interruption of prescription ceased when the award was issued. The award gave rise to a new period of prescription**

**of 30 years. When the applicant filed this application, his award had not prescribed and is still enforceable**

**The respondent's challenge to the jurisdiction of this Court to hear the matter on the basis that it was not joined when the matter was referred to conciliation is without merit. The principles laid down in *NUMSA v Intervalve (Pty) Ltd and Others*[1] are not applicable in the absence of an order to review and set aside the joinder ruling and the arbitration award in terms of which the respondent was found to be the applicant's employer. Both the joinder ruling and the arbitration award are binding on the parties.**

**The award is made an Order of Court.**

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**JUDGMENT**

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**MAHOSI.J**

Introduction

[1] This is an opposed application in terms of section 158(1)(c) of the Labour Relations Act[2] (LRA), to make the arbitration award dated 13 February 2012 issued under the auspices of the Commission for Conciliation, Mediation and Arbitration (CCMA) under case number ECPE3115-11 an Order of Court.

[2] Before this Court are also the applications to condone the late filing of the respondent's answering affidavit and the applicant's replying affidavit. In the absence of the Notice of Objection to the late filing of both affidavits, there was no need for both parties to apply for condonation of the late filing of such affidavits.[3]

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[1] 2015 (2) BCLR 182 (CC) at para 40.
[2] Act 66 of 1995 as amended.
[3] See the Practice Manual of the Labour Court, Clause 11.4.2.

[3] Prior to outlining the applicant's case in detail and considering the issues that gave rise to the claim, it is necessary to summarise the facts that form the relevant background to the dispute between the parties.

Material background facts

[4] The applicant commenced employment with the respondent on 31 October 2010 and was dismissed on 12 May 2011. Aggrieved by his dismissal, the applicant referred an unfair dismissal dispute to the CCMA. In his referral, the applicant cited True Labour Concept as the employer. The matter was set down for con/arb process that was scheduled for 13 September 2011. It is not clear what transpired on the 13 September 2013. What is clear is that the respondent was joined in the proceedings in terms of the joinder ruling that was issued on 21 September 2011. The dispute could not be resolved through conciliation after which it was referred for arbitration.

[5] The arbitration was scheduled for and held on 9 February 2012. Subsequently, the arbitration award dated 13 February 2012 was issued in terms of which the applicant's dismissal was found to be procedurally and substantively unfair. In his award, the commissioner further found the respondent to be the true employer of the applicant. As a result, the respondent was ordered to reinstate the applicant restrospectively by not later than 29 February 2012 and to pay him back pay amounting to R18 841.95.

[6] To date, the respondent has not reinstated the applicant. Instead, the respondent only paid the applicant's back pay around 2014. It is the reinstatement part of the award that the applicant seek to make an Order of Court.

The applicant's submissions

[7] It is the applicant's case that he could not immediately reap the fruits of the award because the respondent failed to comply with the award and further that the respondent failed to provide adequate explanation for such failure. It is common cause that the respondent partially complied with the award, albeit some two years after the said award was issued in that it paid the compensation

amount, but failed to reinstate the applicant to its employ on the same terms and conditions as those that were applicable as at the time of his dismissal.

[8] The applicant's contention is that he attempted on several occassions to enforce the terms of the award upon the respondent, but to no avail. In this regard the applicant gives a detailed chronology of such attempts, particularly in the replying affidavit, which attempts date back as far as 24 February 2012. Despite such numerous attempts by the applicant to enforce the award and despite the partial compliance therewith by the respondent, the applicant has still not been reinstated to the respondent's employ as was ordered as early as February 2012. It is for this reason that the applicant seeks an order to make the said award an order of this Court.

The respondent's submissions

[9] The respondent opposed this application on five grounds, namely: non-service of the application, prescription, settlement and non-joinder. At the hearing of the matter, the points relating to non-service of the application and settlement were abondoned by the respondent. The issues remaining for determination are whether the applicant's caim for reinstatement has prescribed and whether the applicant can seek relief against the respondent in the absence of a proper referral to conciliation against the respondent.

*Does Prescription Act apply to litigation involving unfair dismissal claims that are brought under the LRA?*

[10] The respondent's contention is that the applicant is no longer entitled to the fruits of the reinstatement award on the basis that his claim, in terms of the award, has prescribed as more than three years has passed since the award was issued.

[11] That leaves the question whether arbitration awards constitute a debt as contemplated by the Prescription Act[4] and whether the arbitration award in terms of which the applicant was reinstated has prescribed on the expiry of three years

[4] Act 68 of 1969.

from the date on which it was published. This issue was considered in *Myathaza v Johannesburg Metropolitan Bus Services (SOC) Limited t/a Metrobus and Others*[5]*( Myathaza),* but the Court was equally divided on the issue.

[12] In *Mogaila v Coca Cola Fortune (Pty) Ltd*[6] *(Mogaila),* the applicant, Ms Mogaila, sought an order that the Prescription Act is not consistent with the LRA and that an order of reinstatement granted in her favour does not constitute a "debt" for the purposes of the Prescription Act. The Court unianimously allowed Mogaila direct access, decided the application without written submissions or oral argument and found as follows:

> '[27] Because of the parity of votes in *Myathaza*, in which none of the judgments secured a majority, no binding basis of decision (ratio) emerges from the Court's decision. But, on either approach, that of Jafta J and Zondo J, or that of Froneman J, Ms Mogaila is entitled to an order declaring that the arbitration award ordering her reinstatement has not prescribed. She is entitled to secure its certification under section 143(3) of the LRA, and its enforcement under section 143(1).
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> [28] Whether the arbitration award in her favour could not have prescribed because the Prescription Act does not apply at all to LRA matters, as the first and third judgments held (or because, even if that statute were applicable, the reinstatement order was "not an obligation to pay money, deliver goods or render services"), or because, as the second judgment held, the CCMA referral interrupted prescription, persisting until the finalisation of the review proceedings in October 2013, Ms Mogaila must succeed.
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> [29] On the second judgment's approach, the arbitration award would have prescribed only in October 2016. Ms Mogaila filed her application in this Court timeously, in April 2016. Prescription was therefore interrupted, again, pending the finalisation of these proceedings. On either approach, Ms Mogaila is entitled now to proceed with the certification of the award under section 143 of the LRA.'

[5] (2017) 38 ILJ 527 (CC); [2017] 3 BLLR 213 (CC).
[6] [2017 (7) BCLR 839 (CC).

[13] It is clear from the above that the Court did not determine whether the Prescription Act is inconsistent with the LRA or that reinstatement granted in Mogaila's favour constitutes a "debt" for the purposes of the Prescription Act. Instead, the Court relied on *Myathaza* and held that "on either approach, that of Jafta J and Zondo J, or that of Froneman J, Ms Mogaila was entitled to an order declaring that the arbitration award ordering her reinstatement has not prescribed."

[14] In *FAWU obo Gaoshubelwe v Pieman's Pantry (Pty) Ltd*[7] *(Gaoshubelwe)* the Court had to determine whether the provisions of the Prescription Act apply to litigation involving unfair dismissal claims that are brought under the LRA. On the issue whether a dismissal claim constituted a debt, the Court reiterated the legal position that was held by Froneman J in *Myathaza*[8] and found as follows:

> 'If regard is had to this, then it must follow that a claim for dismissal is, as pointed out in the second judgment in *Myathaza*, a claim that seeks to enforce three possible kinds of obligations against an employer: reinstatement, re-employment, and compensation. All three obligations fit neatly within the definition of debt that *Escom* and *Makate* accepted, as they constitute either an obligation to pay or render something.'[9]

[15] On the question whether the Prescription Act is consistent with the LRA, the Court stated as follows:

> '[179] The time periods in the LRA and in the Prescription Act regulate different features of the litigation process and are not only reconcilable but can exist in harmony alongside each other.
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> [180] The application of the Prescription Act to the LRA would advance the speedy resolution of employment disputes by firstly, leaving wholly intact the mandated time periods for referrals that section 191 provides for. The application

[7] 2018 (5) BCLR 527 (CC).

[8] 2017 (4) BCLR 473 (CC).

[9] At para 156.

> of the Prescription Act cannot have as an unintended consequence the implied extension of those time periods to coincide with the period of prescription. Secondly, subjecting claims under the LRA to an outer time limit would considerably enhance the efficiency of the dispute resolution process. Placing an outer limit beyond which the litigation process simply cannot continue prevents employment disputes from being litigated after a considerable passage of time. This may impact negatively on both the quality of adjudication as well as the important policy considerations that relate to the quick and speedy resolution of employment related disputes, the ability of workers to continue to earn a living, as well as the ongoing ability of businesses to continue operating.
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> [181] For these reasons, I must also conclude, regard being had to section 210 of the LRA, that the provisions of the LRA are not in conflict with the provisions of the Prescription Act. It must follow that if there is no inconsistency then, *a fortiori* (with stronger reason), there can be no conflict. The definition of conflict is a considerably higher bar to meet than the consistency evaluation which I have undertaken. I also conclude that the existence of conflict between the two statutes has not been established.'

[16] In light of the above, it follows that a claim for dismissal is a debt as it seeks to enforce three possible kinds of legal obligations against an employer, namely: reinstatement, re-employment and compensation. Therefore, the applicant's award in terms of which he was reinstated is a debt and the provisions of the Prescription Act are applicable thereto. That being the case, the next enquiry is whether the prescription period was interrupted.

*When does the prescription period begin to run and what interrupts it?*

[17] Section 15 of the Prescription Act deals with the judicial interruption of prescription and it reads:

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

(2) Unless the debtor acknowledges liability, the interruption of prescription in terms of subsection (1) shall lapse, and the running of prescription shall not be deemed to have been interrupted, if the creditor does not successfully prosecute his claim under the process in question to final judgment or if he does so prosecute his claim but abandons the judgment or the judgment is set aside.

(3) 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 the 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.

(4) If the running of prescription is interrupted as contemplated in subsection (1) and the creditor successfully prosecutes his claim under the process in question to final judgment and the interruption does not lapse in terms of subsection (2), prescription shall commence to run afresh on the day on which the judgment of the court becomes executable.

(5) If any person is joined as a defendant on his own application, the process whereby the creditor claims payment of the debt shall be deemed to have been served on such person on the date of such joinder.

(6) For the purposes of this section, "process" includes a petition, a notice of motion, a rule *nisi*, a pleading in reconvention, a 30 party notice referred to in any rule of court, and any document whereby legal proceedings are commenced.'

[18] In *Gaoshubelwe*, the Court considered whether the commencement of proceedings before the CCMA constitutes the service of a process as contemplated in section 15(6) of the Prescription Act and held that:

'[203]… it matters not that the process that constitutes a referral to conciliation does not result in a judgment. It may still, and does indeed, constitute the commencement of proceedings for the enforcement of a debt.

[204] For these reasons, I would conclude that, although prescription began to run when the debt became due on 1 August 2001, it was interrupted by the

> referral of the dispute to the CCMA on 7 August 2001 and continued to be interrupted until the dismissal of the review proceedings by the Labour Court on 9 December 2003. Accordingly, when the dispute was referred to the Labour Court for adjudication on 16 March 2005, it clearly had not prescribed. It is for these reasons that the appeal must succeed.'

[19] From the above, it is apparent that the legal position is that prescription begins to run when the applicant is dismissed and it is interrupted by the referral of the dispute to conciliation and continues to be interrupted until the dismissal of the review proceedings by the Labour Court. However, this matter is distinguishable from *Gaoshubelwe* as the latter related to a dismissal claim. It is further distinguishable from *Myathaza and Mogaila* as the award, in the current matter, was not taken on review.

[20] As aforesaid, the respondent in this matter partially complied with the arbitration award, albeit two years later, by paying the applicant his back pay, but failed to reinstate him.

[21] That leaves the question; when does the prescription period begin to run and what interrupts it, in a case where the award was not challenged on review? In *Motsoaledi and Others v Mabuza*[10] *(Motsoaledi),* although the issue relating to an unfair labour practice, the Court considered the prescription period of the arbitration award which was not taken on review and stated as follows:

> '[27] The reasoning in *Myathaza* suggests that the interruption of prescription ceases when the award is published because the publication of the award gives rise to a new prescription period of 30 years. This follows from the observation made in the judgment at para 71:
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> > 'Where a debt is the object of a dispute subjected to arbitration the period of prescription is delayed. The award of an arbitrator in terms of an arbitration agreement has the status of a court order between the parties and the applicable prescription period is that which is applicable to a judgment debt.

[10] [2019] 1 BLLR 21 (LAC); (2019) 40 ILJ 117 (LAC).

> There seems little reason why parties subjected to statutory arbitration should not enjoy similar protection in respect of arbitration awards in their favour.'
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> [28] It follows that on the application of Froneman's judgment in *Myathaza* to the facts of this appeal the award gave rise to a new period of prescription of 30 years. This period had not expired when the respondent's application to hold the appellant in contempt of court was served.

[22] The above judgments are binding on this Court. On the application of the *Myathaza, Mogaila, Gaoshubelwe* and *Motsoaledi* to the facts of this case, the prescription began to run when debt became due, which is when the applicant was dismissed on 12 May 2011 and was interrupted by the referral of the dispute. In the absence of the review proceedings, the award in terms of which the applicant was retrospectively reinstated gave rise to a new prescription period of 30 years. It follows that, when the applicant filed this application, his award had not prescribed and is still enforceable.

[23] I have had regard to Advocate Grobler's reference and reliance on the judgment in *PTAWU obo Xoloani and Others v Mhoko's Waste and Security Services (Xoloani)*[11] where the Court held that the award that was issued on 29 April 2012 had prescribed after three years, as it was published prior to the 2015 LRA amendments. Be that as it may, the legal approach to which this Court is bound is that stated in *Myathaza, Mogaila, Gaoshubelwe and Motsoaledi* judgments.

*Non-joinder*

[24] The respondent challenged the Court's jurisdiction to adjudicate this matter on the basis that the applicant failed to cite it as a party when the dispute was referred to conciliation. It was the respondent's contention that it could not have been joined to any of the proceedings without a proper and separate referral by the applicant against it. The respondent further contends that in the absence of such referral, the CCMA erred in issuing a ruling in terms of which it was joined

[11] C202/15 at para 22-23.

as a party to the proceedings and further finding, in the award dated 13 February 2012, that it was the applicant's employer.

[25] To support its contention, the respondent referred to *NUMSA v Intervalve (Pty) Ltd and Others*[12] *(Intervalve)* in which the Court held that:

> 'Referral for conciliation is indispensable. It is a precondition to the Labour Court's jurisdiction over unfair dismissal dispute.'

[26] The respondent's reliance on the judgment of *Intervalve* is misplaced as it is distinguishable from the current matter. In *Intervalve*, NUMSA referred the dismissal dispute first to conciliation and then to the Labour Court citing only *Steinmuller* and it then later attempted to join *Intervalve* and *BHR* to the pending proceedings, which is not the case in the current matter.

[27] In the current matter, it is not disputed that although the respondent was not cited as a party when the matter was referred to conciliation, the CCMA subsequently issued a joinder ruling dated 21 September 2011 in terms of which it ruled as follows:

> '5. That Rocklands Poultry Loss Control (Kruisrivier) be joined as a second respondent.
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> 6. That all the relevant documentation on the file be served on the second respondent, by the CCMA.
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> 7. That the matter was to be re-scheduled for a further hearing on a date to be determined by CCMA.
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> 8. That the notice of set down be served on the applicant and both respondents.'

[28] In addition, in the arbitration award, the commissioner found the respondent to be the true employer of the applicant. Therefore, the respondent's submission that the joinder ruling makes no mention of conciliation does not take its contention

[12] 2015 (2) BCLR 182 (CC) at para 40.

any further because it has chosen not to seek an order to review the joinder ruling nor has it sought an order to review the arbitration award. Without an order to review and set aside the joinder ruling and the award, both decisions are binding on the parties.

Conclusion

[29] Froneman J's judgment in *Myathaza*, the majority judgment in *Gaoshubelwe, Mogaila* and *Mabuza judgments* are binding on this Court. A claim for dismissal is a debt as it seeks to enforce reinstatement, re-employment and compensation. Therefore, the arbitration award in terms of which the applicant was retrospectively reinstated constitutes a debt to which the Prescription Act is applicable. The period of prescription starts running when the applicant is dismissed and interrupted when the dismissal dispute is referred to the CCMA for conciliation. To the extent that there was no application to review the arbitration award, interruption of prescription ceased when the award was issued. The award gave rise to a new period of prescription of 30 years.

[30] It is regrettable that the respondent's avoidance of implementing the reintatement part of the award and then crying prescripting on the back of the time wasted by attempting to reinstate the applicant with another company has an effect of an apparent injustice of depriving the applicant of the fruits of an award that was issued in his favour. Thus depriving him of his livelihood. The respondent's avoidance is, however, met with the principle that the award has the status of a court order between the parties and that the applicable prescription period is that which is applicable to a judgment debt, being 30 years. As such, when the applicant launched an application to make the award an Order of this Court, the award had not prescribed.

[31] The respondent's challenge to the jurisdiction of this Court to hear the matter on the basis that it was not joined as a party to the proceedings when the matter was referred to conciliation is without merit. In the absence of an order to review and set aside the joinder ruling and the arbitration award in term of which the

respondent was found to be the applicant's employer, both the joinder ruling and the arbitration award are binding on the parties.

[32] There is, therefore, no reason why this Court should not make the arbitration award an Order of this Court.

Costs

[33] The Constitutional Court has reiterated in *Zungu v Premier of the Province of Kwa-Zulu Natal and Others*[13] that the rule of practice that costs follow the result does not apply in Labour Court matters and further that costs orders should be made in accordance with the requirements of law and fairness. In *Zungu*, the Court referred with approval to *Member of the Executive Council for Finance, KwaZulu-Natal v Wentworth Dorkin N.O.*[14] where it was stated as follows:

> 'The rule of practice that costs follow the result does not govern the making of orders of costs in this Court. The relevant statutory provision is to the effect that orders of costs in this Court are to be made in accordance with the requirements of the law and fairness. And the norm ought to be that costs orders are not made unless the requirements are met. In making decisions on costs orders this Court should seek to strike a fair balance between on the one hand, not unduly discouraging workers, employers, unions and employers' organisations from approaching the Labour Court and this Court to have their disputes dealt with, and, on the other, allowing those parties to bring to the Labour Court and this Court frivolous cases that should not be brought to Court.'

[34] In this matter, the respondent failed to fully comply with the award of the CCMA. Instead, it appears from the pleadings that the respondent paid the applicant back pay two years after the award was issued and offered him employment with True Labour Concept. Seven years later, the respondent has not reinstated the applicant, nor has it advanced a reason why it failed to do so. The respondent has further not reviewed the joinder ruling and the arbitration award, but simply

[13] (2018) 39 ILJ 523 (CC) at para 24.
[14] [2007] ZALAC 41 at para 19.

opposed this application on technical grounds by advancing a meritless prescription point and the issue of non-joinder. This cannot be seen to be fair to the applicant. In the premise, the requirements of law and equity prompts me to exercise my discretion in favour of the applicant and to order the respondent to pay the applicant's costs.

[35] In the circumstances, I make the following order:

Order

1. The arbitration award dated 13 February 2012 issued under the auspices of the Commission for Conciliation, Mediation and Arbitration under case number ECPE3115-11 is made the Order of this Court.

2. The respondent must pay the applicant's costs.

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D Mahosi

Judge of the Labour Court of South Africa

Appearances

For the applicant: Advocate B. Ndamase

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| Instructed by: | Maci Incorporated Attorneys |
| For the respondent: | Advocate M Grobler |
| Instructed by: | Kirchmannns Incorporated Attorneys |