IN THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

Case Number 332/96

In the matter between

THE UITENHAGE MUNICIPALITY

Appellant

and

ALEXANDER O'NEIL MOLLOY Respondent

CORAM: Mahomed CJ, Smalberger, Howie, Scott et Streicher JJA

HEARD: 13 November 1997

DELIVERED: 27 November 1997

JUDGMENT

MAHOMED CJ/

Mahomed CJ

During February 1995 the respondent in this appeal brought an action in the court a quo against the appellant for payment of the sum of R 148 317- 98. In the particulars of claim, it was averred that during the period 22 August 1983 to 30 June 1989 the respondent was employed by the appellant. It was further alleged that the amount claimed was owed to the respondent because the appellant had, in contravention of section 9(1) and 10(2)(a)(ii) respectively of the Basic Conditions of Employment Act 3 of 1983 ("the Employment Act"), failed to remunerate the respondent for work performed by him during the relevant period on Sundays and in respect of overtime.

In addition to certain other pleas, the appellant lodged a special plea in which it was contended that the claims of the respondent were prescribed in terms of section 11 of the Prescription Act 68 of 1969 ("the Prescription Act"). By agreement between the parties the court a quo was requested to determine whether this defence was sound in law. For this purpose only, it was accepted by the parties that:

1. During the relevant period the appellant was the "employer" of the

respondent, and the respondent was an "employee" of the appellant, within the meaning of those expressions as defined in section 1 of the Employment Act.

2. The appellant had contravened the provisions of section 9(1) and 10(2)(a)(ii) of the Employment Act, by failing respectively to remunerate the respondent (in accordance with the formulae prescribed by the Employment Act), for work performed on Sundays and for overtime work.

3. These contraventions had occurred between the period 22 August 1983 to 30 June 1989.

4. At no stage prior to the issue of summons on 9 February 1995, had the respondent satisfied or taken any steps to procure the satisfaction of the conditions contained in section 30(3) (a) or (b) of the Employment Act.1

1 Section 30(3) of the Employment Act now reads as follows:

" No employee shall recover from an employer any amount due to him by virtue of a provision of section 9(1), 10(2)... unless

(a) the employee ... produces to the court a certificate by the Attorney-General stating that he has refused to prosecute the defendant for the alleged contravention of or failure to comply with a provision or condition referred to above and in terms of which that amount is due to the employee ...;

(b) the employer or the manager, agent or employee of the employer has been acquitted on a charge in respect of such contravention or failure ...

(c)the employee . . . produces to the court a certificate issued on application by the Director-General stating that the employee .. .has requested that the provisions of section 27 shall not be applied in respect of his claim."

5. The respondent had sought and obtained a certificate in terms of section 30(3) (c) of the Employment Act for the first time on 8 February 1995.

It was common cause between the parties that any remuneration for Sunday or overtime work (to which the respondent was entitled in terms of section 9(1) and 10(2)(a)(ii) of the Employment Act) was payable at the end of the month during which such work had been performed. Counsel for the parties were also agreed that in terms of section 10 of the Prescription Act read with section 11(d), any debts of the appellant to the respondent became prescribed three years after they became due; that more than three years had elapsed between the time when the remuneration became payable to the respondent in terms of sections 9(1) and 10(2)(a)(ii) and the time when the respondent instituted action for the recovery of such remuneration; and that more than three years had also elapsed between the time when the respondent became aware of the existence of his claims and the time when he so instituted action.

The court a quo held that the claims of the respondent had, in these circumstances, not become prescribed and that the special plea of prescription should therefore be dismissed.

The correctness of that conclusion depends on the proper application and meaning of section 12(1) of the Prescription Act which provides that subject to sub-sections (2) and (3) (which do not affect the debate in the present case): "...prescription shall commence to run as soon as the debt is due".

It follows that if the appellant's debts to the respondent for overtime and Sunday work became "due" at the end of each month, during which the respondent so worked on a Sunday or on overtime, they are indeed prescribed and the appeal must succeed. If on the other hand, these debts only became "due" when they were "recoverable" in terms of section 30(3) of the Employment Act they would not be prescribed and the appeal must fail because these debts cannot, in terms of section 30(3), be recoverable until section 30(3)(a) or (b) is satisfied and it is common cause that neither of these subsections were satisfied when proceedings were instituted by the respondent. (The certificate in terms of section 30(3)(c) was obtained the day before the institution of the respondent's action but it was agreed that if the debts concerned had become prescribed in the interim because of the lapse of the prescriptive period of three years, a certificate in terms of section 30(3)(c) obtained thereafter could not revive such a prescribed claim.)

The essential premise upon which the respondent's case must therefore rest is that a debt in terms of section 9 or 10(2) (a)(ii) of the Employment Act is not "due" for the purposes of section 12(1) of the Prescription Act, until it is "recoverable" in terms of section 30(3) of the Employment Act.

In my view this is an erroneous premise because section 30(3) itself distinguishes between the amount which is "due" to an employee (or employer) "by virtue" of the relevant provisions of the Employment Act (which include sections 9 and 10(2)(a)(ii)) and the conditions in the sub-section which have to be satisfied before the amount so "due" may be "recovered".

Section 12(1) of the Prescription Act and section 30(3) of the Employment Act postulate two different and distinct enquiries. The enquiry in terms of section 12(1) of the Prescription Act is: When does a debt become "due" for the purposes of determining the date when prescription commences to run? The answer to that question is: "When the time arrives for the performance by the debtor of the obligation to pay the creditor in terms of the Employment Act". The enquiry in terms of section 30(3) of the Employment Act is: When may a debt in terms of the Employment Act be "recovered"? The answer to that enquiry is: "After one of the requirements of section 30(3)(a),(b)

or (c) is satisfied".

Where there is no difference between the date when the debtor is required to perform this obligation to pay the creditor and the date when the creditor can recover that debt, the answer to both enquiries might yield the same result, but the nature of the two enquiries remains different.

On this approach it accordingly follows that in respect of each of the claims of the respondent, prescription commenced to run from the end of the relevant month during which the respondent performed the work on Sunday or on overtime.

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 section 15 of the Prescription Act through the service of "any process, whereby the creditor claims payment of the debt". Does section 30(3) of the Employment Act preclude a creditor in the position of the respondent from doing so? I do not think so. In the case of Willows v National Industrial Commercial Workers Union 1991 (3) SA 546 (D) at 551E it was held that the "conditions prescribed [in section 30(3) of the Employment Act] must

be in existence before any action may be instituted". I do not agree with that conclusion. As the court in Willows' case recognised, the word "recoverable" can bear different meanings. Depending on the context of the statute in which it is used and its objects, "it may refer to the whole process of recovery comprising all steps from the institution of action to its conclusion" or it may be "confined to the obtaining of the judgment in which it culminates" (Willows, supra, at 549C). In my view the latter meaning must have been intended by the legislature. The section itself distinguishes between the amount which is "due" to an employee by an employer in terms of the Employment Act and the right which an employee acquires to "recover" the amount so due to him or her. Section 30(3) of the Employment Act only precludes an employee from "recovering" from any employer any amount "due" to him or her by virtue of the provisions of the sections specified in section 30(3) (including sections 9(1) and 10(2)(a)(ii)), if one of the conditions referred to in section 30(3)(a), (b) or (c) have not been satisfied. It does not provide that such an employee is precluded from serving "any process whereby the creditor claims payment of the debt" and thus interrupting prescription in terms of section 15(1) of the Prescription Act. It is also of some significance that section 30(3) (a) (and section 30(3) (c)) which require certificates from the Attorney-General and the Director-General respectively, only require such certificates to be produced to

the court. The section does not provide that they must "exist" before proceedings are instituted. For these reasons section 30(3) of the Employment Act should not be interpreted so as to preclude an employee from instituting proceedings for the recovery of debts to such employee before one or other of the conditions prescribed by section 30(3) have been fulfilled. Conditions which might have the effect of clogging access to the courts must be restrictively construed (Benning v Union Government (Minister of Finance) 1914 AD 180 at 185).

I am aware of dicta in a number of cases which suggest that a debt becomes "due" when the creditor acquires the right to institute action or when the creditor has "a complete cause of action" in respect of such debt (HMBMP Properties (Pty) Ltd v King 1981 (1) SA 906 (N) at 909D-E; The Master v IL Back & Co Ltd and Others 1983 (1) SA 986 (A) at 1004F-G; Deloitte Haskins & Sell Consultants (Pty) Ltd v Bowthorpe Hellerman Deursch(Pty) Ltd 1991 (1) SA 525 (A) at 532H). These cases, however, do not deal with section 30(3) of the Employment Act or with the time when a debt claimable under the Employment Act becomes "due" within the meaning of section 12(1) of the Prescription Act. Indeed the distinction between a debt which is "due" and one which is recoverable was not at all in issue in these cases. Nor was it an issue in

the line of cases which explain that a cause of action becomes "complete" when it gives rise to an "enforceable claim" (Evins v Shield Insurance Co Ltd 1980 (2) SA 814 (A) at 838D-G, Abrahamse & Sons v SA Railways and Harbours 1933 CPD 626).

The basic fallacy in the contention advanced on behalf of the respondent, is that an employer's debt arising from overtime work or work performed on Sundays, and which is payable at the end of the month in which such work was performed, nevertheless ceases to be "due" for the purposes of section 12(1) of the Prescription Act, merely because some procedural conditions prescribed in section 30(3) have to be satisfied before that debt is recoverable. If that contention was correct the employee concerned could simply wait for up to twenty years before seeking to fulfil for the first time any of the conditions specified in section 30(3) of the Employment Act. An employer in the position of the appellant could, after the lapse of so many years, find itself presented with a claim for work allegedly done on some Sunday many years ago, without any effective means of counteracting such allegations. Material witnesses might have died in the interim and no records might be available to investigate the claims, because in terms of section 20(3) of the Employment Act an employer is only obliged to retain such records for a period of three years.

This kind of anomaly also supports an alternative approach to the dispute which would lead to the same result in this appeal. It is this. Assuming in favour of the respondent, that his claims against the appellant only became "due" within the meaning of section 12(1) of the Prescription Act, after one of the conditions in section 30(3)(a), (b) or (c) of the Employment Act are satisfied, can he rely on the fact that they were not so satisfied if he himself took no steps to procure such satisfaction?

In my view, he cannot do so. Section 30(3)(c) of the Employment Act, for example, is a condition which can easily be satisfied on the initiative of the respondent himself. It requires simply a certificate from the Director General stating that the respondent has requested that section 27 of the Employment Act shall not be applied in respect of his claim.[2]

An employee who elects not to apply for a certificate in terms of section 30(3)(c), cannot contend that his or her claim in terms of sections 9(1) or 10(2)(a)(ii) was not "due" because such a certificate had not been issued. The

[2] Section 27 creates machinery in terms of which the court convicting such an employer for a contravention of certain sections of the Employment Act (including section 9(1) and 10(2)(a)(ii)) is directed to determine the difference between the amounts paid to the employee and the amounts which should have been paid. Sections 28 and 29 thereafter provide for an order directing the employer to pay that difference to a designated officer, and for this difference to be paid to the employee concerned in whole or in part depending on the circumstances.

remedy lies in the employee's own hands. Such an employee cannot profit by his or her own inaction. As was stated by Van den Heever J in Benson and Another v Walters and Other 1981 (4) SA 42 (C) at 49G:

> "Our Courts have consistently held that a creditor is not able by his own conduct to postpone the commencement of prescription."

This approach was confirmed by the court in the case of The Master v IL, Back & Co Ltd, supra, at 1005G when Galgut AJA endorsed the following assertion:

> "If all that is required to be done to render the debt payable is a unilateral act by the creditor, the creditor cannot avoid the incidence of prescription by studiously refraining from performing that act."

Section 30(3) (c) was only introduced into the Employment Act by section 18 of Act 104 of 1992 which came into operation on 1 May 1993. It was therefore not possible for the respondent to cause that condition to be fulfilled but there was nothing which precluded the respondent from taking steps to procure the fulfilment of the conditions specified in section 30(3)(a) or (b).

It is perfectly true that the fulfilment of the conditions specified in section 30(3)(a) or (b) did not lie within exclusive competence of the respondent - in order to satisfy section 30(3)(a) the Attorney General had to issue a certificate stating that he had refused to prosecute the employer, and in order to fulfil the conditions set out in section 30(3)(b) the court had to acquit the employer. But in both cases the respondent prevented the possibility of having the relevant condition fulfilled by failing or refusing to make the complaint or to prefer charges, or initiate any other steps which could have lead to the prosecution of the appellant.

The rationale in the cases which have held that a creditor cannot "by his own conduct postpone the commencement of prescription" by refraining from satisfying the condition which would render a debt due and payable, apply equally where the creditor has failed to take or initiate the steps which fall within his or her power to make it possible for such a condition to be satisfied. Were it otherwise, an employee seeking to pursue an old claim in terms of the Employment Act, who fears that the claim may be defeated in court by the production of the employer's records, could overcome this difficulty by waiting to pursue that claim civilly until those records had been destroyed in terms of section 20(3) of the Employment Act.

One of the main purposes of the Prescription Act is to protect a debtor from old claims against which it cannot effectively defend itself because of loss of records or witnesses caused by the lapse of time. If creditors are allowed by their deliberate or negligent acts to delay the pursuit of their claims without incurring the consequences of prescription that purpose would be subverted.

For these reasons I am of the view that even if the debt claimed by the respondent was not "due" until one of the conditions articulated in section 30(3) was satisfied, and even if none of these conditions were in fact satisfied, the case sought to be made on behalf of the respondent must fail because he himself failed to take or initiate any steps to procure the satisfaction of any of these conditions.

It follows that the court a quo erred in dismissing the special plea of prescription upon which the appellant relied in the court a quo.

It is ordered that:

1. The appeal is upheld.

2. The order made by the court a quo is substituted by the following:

"The plaintiff's claims are dismissed with costs, such costs to include the costs attendant upon the employment of two counsel".

3. The respondent is directed to pay the appellant's costs of appeal.

I Mahomed
Chief Justice

Smalberger JA} Howie JA}
Concur Scott JA}
Streicher JA}