

REPUBLIC OF SOUTH AFRICA



**IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA**

CASE NO:70809/2017

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| (1) | REPORTABLE: YES /NO |
| (2) | OF INTEREST TO OTHER JUDGES: YES /NO |
| (3) | REVISED. YES /NO |

DATE:18 January 2022


Signature

In the matter between:

PATRICK SIBUSISO SIBIYA

APPLICANT

And

MINISTER OF POLICE

RESPONDENT

JUDGMENT

MAHLANGU AJ

INTRODUCTION

- [1] This matter relates to an application instituted by the Applicant against the Respondent for the alleged wrongful and unlawful arrest, detention and termination of his employment which happened on the 10th December 2010.
- [2] The Applicant is Patrick Sibusiso Sibiya, a police officer working for the South African Police Services (SAPS) (hereinafter called "Applicant").
- [3] The Respondent is the Minister of Police (hereinafter called "Respondent").

FACTUAL BACKGROUND

- [4] The facts, in a nutshell, are that during or about the 10th of December 2010 applicant was arrested and detained until he was granted bail. Subsequent to his release the following happened:
 - 4.1 Applicant stood criminal trial for a period of thirty months, being two years and six months.
 - 4.2 During the criminal trial his employment service was terminated on June 2011, after a notice for him to attend a disciplinary hearing was issued and which hearing the applicant failed to attend. The notice to institute legal proceedings was served on the 13th October 2017, the same day the combined summons was issued.
 - 4.3 During September 2012 applicant's salary was stopped or rather terminated.

- 4.4 Allegedly on the 12th November 2014, the applicant was reinstated without any order of the court or of any bargaining council to his position as a police officer and an appointment certificate was issued on the 12th day of November 2014, and signed by the National Commissioner of the South African Police Service.
- 4.5 A notice as prescribed in terms of Section 3 of Act 40 of 2002 was served on the Respondent's National Commissioner of the South African Police Service on the 13th day of October 2017, and on the same day the Applicant issued a combined summons for damages in the amount of R8 134 714 allegedly suffered as a result of the alleged unlawful termination of his employment contract.
- 4.6 On the 24th of October 2017, the Respondent acknowledged receipt of the notice in terms of Act 40 of 2002, which was dated the 12th of October 2017 and served on the 13th of October 2017.
- 4.7 On the 13th October 2017 summons were issued and served on the Respondent on the same day. Respondent served its notice to defend on the 6th November
- 4.8 On the 22nd March 2018, the Respondent served its special plea and plea which was dated 20th March 2018.
- 4.9 Respondent raised two special pleas to wit, prescription in terms of Section 11D of Act 68 of 1969 and non-compliance with Section 3(2)(a) of Act 40 of 2002. On the 4th April, 2018 Applicant served a replica on the Respondent.

- 4.10 On the 23rd May 2018 Applicant served the Respondent with the application for condonation and on the 11th June 2018, the Respondent served its notice to the pose application.

ISSUES TO BE DETERMINED

[5] Whether this court has jurisdiction to deal with this matter?

- 5.1 Whether the claim in terms of the Prescription Act (Act 68 of 1969) has been prescribed or not?
- 5.2 Whether prescription commenced to run from the date of 12th November 2014 or from June 2011?
- 5.3 Whether the Applicant's notice issued and summons served on the 13th of October 2017 were in compliance with the provisions of Act 40 of 2002?
- 5.4 If it is found that the claim has prescribed, whether the Applicant's failure to serve a notice within the prescribed six(6) months be condoned in terms of Section 3 of the Institution of Legal Proceedings Against Certain Organs of the State Act(Act 40 of 2002) hereinafter called " Act 40 of 2002").
- 5.5 If it is found that the claim has not been extinguished by the Prescription Act (Act no. 68 of 1969) hereinafter called "Act 68 of 1969"), whether the court in its discretion can condone the late service of the notice in terms of the provisions of this Act,

- 5.6 Whether the Applicant has met the three requirements as prescribed by Act 40 of 2002?

APPLICABLE LAW.

[6] Extinction of debts by Prescription:

6.1 Section 10 of the Prescription Act (Act 68 of 1969) provides that:

- (a) Subject to the provisions of this Chapter and of Chapter IV, a debt shall be extinguished by the prescription after the lapse of the period which in terms of the relevant law applies in respect of the prescription of such debt.
- (b) By the prescription of a principal debt a subsidiary debt which arose from such principal debt shall also be extinguished by the prescription.
- (c) Notwithstanding the provisions of subsections (1) and (2) payment by the debtor of a debt after it has been extinguished by prescription in terms of either of the said subsections, shall be regarded as payment of a debt.

[8] Periods of prescription of debts:

8.1 The periods of prescription of debts shall be the following-

- (a) 30 years in respect of-
 - i. Any debt secured by mortgage bond;
 - ii. Any judgment debt;

- iii. Any debt in respect of any taxation imposed or levied by or under any law;
 - iv. Any debt owed to the State in respect of any share of the profits, royalties or any similar consideration payable in respect of the right to mine minerals or other substances;
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- (b) 15 years in respect of any debt owed to the State and arising out of an advance or loan of money or a sale or lease of land by the State to the debtor, unless a longer period applies in respect of the debt in question in terms of paragraph (a);
 - (c) Six years in respect of a debt arising from a bill of exchange or other negotiable instrument or from a notarial contract, unless a longer period applies in respect of the debt in question in terms of paragraph (a) or (b);
 - (d) Save where an Act of Parliament provides otherwise, three years in respect of any other debt.

[9] When prescription begins to run:

9.1 Section 12 of the Prescription Act (Act 68 of 1969) provides that:

- (a) Subject to the provisions of subsections (2), (3) and (4), prescription shall commence to run as soon as the debt is due.

- (b) If the debtor willfully prevents the creditor from coming to know of the existence of the debt, prescription shall not commence to run until the creditor becomes aware of the existence of the debt.
- (c) A debt shall not be deemed to be due until the creditor has knowledge of the identity of the debtor and of the facts from which the debt arises: Provided that a creditor shall be deemed to have such knowledge if he could have acquired it by exercising reasonable care.
- (d) Prescription shall not commence to run in respect of a debt based on the commission of an alleged sexual offence as contemplated in sections 3,4,17,18(2), 20(1), 23, 24(2) and 26(1) of the Criminal Law (Sexual offences and Related Matters) Amendment Act, 2007, and an alleged offences as provided for in section 10 of the Prevention and Combating of Trafficking in Persons Act, 2013, during the time in which the creditor is unable to institute proceedings because of his or her mental or psychological condition.

[10] Section 3(1) of Institution of Legal Proceedings against Certain Organs of the State provide as follows

- “(1) No legal proceedings for the recovery of a debt may be instituted against an organ of state unless.
- (a) The creditor has given the organ of state in question notice in writing of his or her or its intention to institute the legal proceedings in question, or

(b) The organ to the of state in question has consented in writing to the institution of that legal proceedings: -

- i. without such notice, or
- ii. upon receipt of a notice which does not comply with all the requirements set out in subsection (2).

[11] Section 3(4), as amended if an organ of state relies on a creditor`s failure to serve a notice in terms of (2)

(a) The creditor may apply to a court having jurisdiction for condonation of such failure.

(b) The court may grant an application referred to in paragraph (a) if it satisfied that-

- i. The debt has not been extinguished by prescriptions;
- ii. Good cause exists for the failure by the creditor, and
- iii. The organ of state was not unreasonably prejudice by the failure.

[12] Section (a)(b)

“(1) Everyone has the right to freedom and security to the person, which includes the right-

- (a) Not to be deprived of freedom arbitrarily or without just cause;
- (b) Not to be detained without trial;

[13] In terms of Section 34 that-

“Everyone has the right to have any dispute that can be resolved by the application of law decided in a fair public hearing before a court or, where appropriate, another independent and impartial tribunal or forum”.

[14] Section 35(1) provides as follows:

“Everyone who is arrested for allegedly committing an offence has the right:

- (a) to remain silent;
- (b) to be informed promptly-
 - i. of the right to remain silent, and
 - ii. of the consequences of remaining silent;
- (c) not to be compelled to make any confession or admission that could be used in evidence against that person;
- (d) to be brought before a court as soon as reasonably possible, but not later than-
 - i. 48 hours after the arrest, or
 - ii. the end of the first court day after the expiry of the 48 hours, if the 48 hours expire outside ordinary court hours or on a day which is not an ordinary court day;
- (e) at the first court appearance after being arrested, to be charged or to be informed of the reason for the detention to continue, or to be released, and
- (f) to be released from detention if the interests of justice permit, subject to reasonable conditions.

- [15] Every accused person has a right to a fair trial, which includes the right
- (a) ...
 - (b) to adduce and challenge evidence....”

APPLICANT’S VERSION

[16] Applicant contends as follows that-

- 16.1 The right to claim was not immediately enforceable before a claim in respect of it can arise.
- 16.2 The right to claim only arose of the 14th November 2014.
- 16.3 The right to claim only became due on the 12th November 2014 and therefore claim that the right to claim has not been prescribed.
- 16.4 He served the Respondent with a notice on the 13th October 2018 and such was acknowledged by the Respondent,
- 16.5 An organ of the state relies on the creditors non-compliance in terms of Section 3(4)(a) and in that event the creditor may apply to a court with competent jurisdiction for condonation.
- 16.6 The court may grant the application referred to in paragraph (a) if it is satisfied that all the three requirements have been complied with which are namely that:
 - i. the debt has not been extinguished by prescription;
 - ii. good cause exists for failure by the creditor; and
 - iii. the organ of state was not unreasonably prejudice by the failure.

[17] Applicant contends that the debt has not been prescribed and/or extinguished by prescription on the following grounds:-

17.1 He was wrongfully and unlawfully terminated on an unknown date;

17.2 His salary was terminated during September 2012;

17.3 He was reinstated on the 12th November 2014, and

17.4 He gave the respondent notice on the 13th October 2017.

[18] He contends that the prescription commenced from the 13th November 2014 not on an earlier date as pleaded by the Respondent, and further contends that the Respondent fails to give the exact date when the prescription commenced running.

[19] He contends that the Respondent fails to specifically commit to the date of dismissal, however, admits that the applicant was provided with the appointment certificate on the 12th November 2014.

[20] He contends that the prescription could not have commenced on an earlier date because the Applicant stood trial for a period from the date of his arrest until the date of his acquittal being the 18th May 2018.

[21] He contends that it is inconceivable that the constitution will provide in Section 35(3)(i) a right that is automatically limited by prescripts of time.

[22] He contends that Section 12(1) of the Prescription Act (Act no.68 of 1969) provides that a prescription commence running when the debt becomes due.

- [23] Applicant further contends in its Founding Affidavit that the matter would have been extinguished by prescription on 11 November 2017 and therefore, he contends that the matter has not been extinguished by Prescription hence the application for condonation.

RESPONDENT'S VERSION

- [24] The Respondent contends that these heads of argument were filed as the Respondent's opposition of the Applicant's application for condonation for non-compliance with Act 40 of 2002 and in support of the respondent's application to strike out matters in the applicant's founding and replying affidavits and to permit the filing of a supplementary answering affidavit by the Respondent.
- [25] He contends that the Applicant issued a combined summons on 13 October 2017, for damages in the amount of R8 134 714 allegedly suffered as a result of the alleged unlawful termination.
- [26] He contends that the Applicant's contract was terminated in June 2011 after a notice for him to attend a disciplinary hearing was issued and which hearing the Applicant failed to attend. The notice to institute legal proceedings in this regard was only served on the 13th of October 2017 on the same day the summons was issued.
- [27] Respondent contends that the period of prescription of the applicant's debt is three years as set out in the Prescription Act. He contends further that Prescription Act states that prescription begins to run as soon as the debt is due. It further provides that "a debt shall not be deemed to be due until the creditor has knowledge of the identity of the debtor and of the facts from which the debt arises: Provided that creditor shall be deemed to have such knowledge if he could have acquired it by exercising reasonable care"

- [28] He contends that section 3(4)(a) of the Institution of the Legal Proceedings against Certain Organs of State Act (Act No. 40 of 2002) hereinafter referred to as “the Act” provides that the creditor may apply to a court having jurisdiction for condonation for such failure. It further provides that the court may grant condonation only if the debt has not been extinguished by prescription, good cause exists for failure, and the organ of state was not unreasonably prejudiced by the failure.
- [29] The Respondent contends that the above provisions of the Act is indicative that the court does not have the discretion to grant condonation for failure to serve a notice if the debt has been extinguished by prescription. He further contends that the court will hear a motion for condonation for failure if such a court has jurisdiction.
- [30] He contends that in the light of the facts discussed above that the applicant was dismissed in June 2011 and had only issued a combined summons on the 13th October 2017 after three years had elapsed, he contends that the applicant's debt has been extinguished by prescription and therefore according to the respondent condonation should not be granted.
- [31] Concerning the good cause for failure to issue a notice on time, the respondents contend that no good cause exists and further that has not been proven.
- [32] To illustrate that no good cause has been shown or proven by the Applicant, the Respondent relates the following facts: that the Applicant took more than six years to issue a notice in terms of the Act, whereas the Act requires the notice to be issued within six months of the debt becoming due. Respondent contends that the Applicant blames the delay in bringing the notice on his alleged psychiatric issues, which according to him are not clearly explained.

- [33] He contends that a psychiatric report dated 29 August 2017 of Dr K. Lubulu which has been attached to the founding affidavit as to the basis for the explanation of the delay deals amongst other things with the history of the applicant's psychiatric report evaluation and counselling from 2007 and 2011. He contends that it is not clear how this report could explain the Applicant's delay in issuing the notice within six months from June 2011, more so that the Applicant's attorneys were at all material times from June 2011 in contact with Respondent's officials whereby they were writing to request reinstatement of the Applicant. To substantiate this contention the respondent refers to the case of **Minister of Agriculture and Land Affairs v CJ Rance (Pty)Ltd [2010] 3 All SA 537 (SCA)**³⁵, where the Supreme Court of Appeal held that *"an explanation for condonation is required to set out fully the explanation for the delay, the explanation must cover the entire period of the delay and must be reasonable"*.
- [34] He contends that the legal principle expressed in **CJ Rance** (*supra*) has not been overruled by another subsequent case. He further contends that in this current case the entire period of the delay is not fully explained. He contends further that the prior years to 2011 on which the Applicant consulted with his Psychiatric are neither here nor there in so far as the delay is concerned. He contends that the only period which is relevant of which the delay is supposed to have been explained is from June 2011. He contends that this period is not covered in the applicant's explanation, nor is it covered by the psychiatric report that purports to be the basis for the delay. He contends that the explanation by the applicant is unreasonable and insufficient to deserve condonation particularly when a notice of more than six years is considered.
- [35] The Respondent contends further that the applicant has not covered the entire period for the delay in his application and that the report by Dr Lubulu allegedly does not explain why the Applicant did not issue the notice on time. He contends that this is so, particularly because the report does not cover the year 2011 on which allegedly the debt became due.

- [36] He further contends that when regard is had to the Applicant's psychiatric report, he had consultations with the psychiatrist in 2009 and again in 2016. He contends that the year 2009 is two years before his arrest, detention and termination of employment. He contends the year 2016 is four years post his arrest, detention and termination of employment. He contends that due to these facts just mentioned he concludes that the applicant's psychiatric assessments cannot be the reasons why he delayed in bringing the notice within six months from the debt being due.
- [37] It is further contended by the Respondent that the applicant has not been declared incapable of managing his affairs. He contends that the applicant has been employed throughout and this fact on its own, tends to show that he has, at all material times, been mentally capable of instructing attorneys to issue a notice and to write to the employer requesting reinstatement.
- [38] He contends that the applicant further relies on a clinical Psychological Assessment Report by Naledi Mqhayi. He contends that according to this report, the Applicant was only assessed on 28 March 2017 which was more than 72 months after the debt became due. The Respondent contends that both the report and the date still does not explain why the notice was not brought within six months after it became due.
- [39] He further contends that CJ Rance case illustrates that the concept of "good cause" has not been defined but may include several factors that will vary from case to case. He contends that prospects of success of the intended claim play a significant role in applying for condonation. Therefore, he contends that in the present case applicant has no prospects of success based only on the fact that the claim according to him has been prescribed.

[40] The Respondent further contends that the few details of what transpired within the six months from the debt being due and between such period and the period the notice was served make the matter worse for the Applicant. He contends that in 2011 applicant was able to instruct attorneys to write letters to the respondent demanding that he be reinstated. He contends that the mental capacity that was required for the instruction is the same mental capacity that is required for the instruction to issue a notice.

[41] Respondent further contends it is trite that condonation must be applied for as soon as the party concerned realizes that it is required. He contends that the debt in the case became due when the applicant's employment was terminated which date was June 2011. He contends that the applicant has dismally failed to show good cause for the delay in issuing a notice to institute legal proceedings. He contends that failure to show cause by the applicant encompasses failure to show that he has prospects of success in the claim and to also show good cause for failing to apply for condonation as soon as he realized that he needed to.

[42] It is contended by the Respondent that the allegation that the cause of action arose on the 12th November 2014 are superficial because according to the respondent debt becomes due when the cause of action arises. Respondent contends that the courts have on numerous occasions explained the period of the debt becoming due as it was held in the SCA case of **Truter and Another v Deyssel 2006(4)SA 168(SCA) 16-21** where it was held that:-

“A debt is due in this sense when the creditor acquires a complete cause of action for the recovery of the debt, that is, when the entire set of facts which the creditor must prove in order to succeed with his or her claim against the debtor is in place or, in other words, when everything has happened which would entitle the creditor to institute the action and to pursue his or her claim”.

- [43] Respondent further contends that in the matter of **Makhwelo v Minister of Safety and Security [2015] JOL 32869(GJ)53**, the court noted that “ a debt is due only when the material facts from which the debt arises are known, or when they ought reasonably to have been known and provided it is immediately claimable and the debtor is obliged to perform immediately”.
- [44] He contends that reliance on a lack of knowledge that the notice should be issued within six months of the debt becoming due or that a notice must be issued before suing certain organs of the state is, in his submission inexcusable.
- [45] The respondent contends that the allegation that the applicant did not know that he can sue the respondent for unfair dismissal has never been an excuse or reason for the court to grant condonation.
- [46] He contends that it trite that the existence of prejudice in an application for condonation is also a requirement to allege and prove. He contends that the respondent will suffer great prejudice if condonation is granted. He further contends that he will suffer prejudice because the applicant`s claim has been prescribed. He contends that even if it has not been prescribed, the issue in question is purely a labour matter and the Labour Court has exclusive jurisdiction to determine the issue.
- [47] The Respondent contends that Act 40 of 2002 provides that the creditor may apply to a court having jurisdiction for condonation for failure to issue a notice in terms of section 3 on time or at all.

- [48] He contends that of importance in this matter, is that the High does not have jurisdiction to adjudicate on the issue of unfair dismissal as he alleges that the issues are exclusively labour matters and falls squarely within the Labour Court's jurisdiction. He contends that the above discussions on the matter tend to show that the applicant has no prospects of success in the matter, which prospects play a significant role when applying for condonation.
- [49] He contends that Section 193 of the Labour Relations Act (Act No.66 of 1995), prescribes remedies for unfair dismissals and unfair labour practices. He further contends that is apparent from the reading of section 193 that the law allows for only three remedies in case of unfair labour practice being reinstatement, re-employment or compensation. He contends these remedies are qualified further by other provisions of the LRA.
- [50] The Respondent contends that no court or forum has previously declared the applicant's dismissal unfair for the applicant to now claim damages as a result, which damages are not provided for in the LRA and by the labour laws.

Jurisdiction - Does the High Court has Jurisdiction in this matter?

- [51] It is a common cause that jurisdiction as a legal concept refers to the power of a court to adjudicate a particular matter definitively, meaning whether is able to decide the competing rights of the parties in the given matter as opposed to merely inquiring on the issue of jurisdiction. This means that where a court decides a matter on its merits, by implication, it means it accepts that it has jurisdiction to hear the matter, otherwise a court that does not have jurisdiction has no entitlement to decide the merits of the case. Due to the manner in which various courts have approached this matter, it is necessary that the above points is made in order to take issues back to basics. Therefore, a court that

does not have jurisdiction does not have the power to decide the merits of the matter. This issue of jurisdiction will be illustrated by looking at the three cases which will be mentioned hereinbelow.

- [52] Without any waste of time it is prudent to first consider whether this court has jurisdiction or not, which is the matter which was raised by the two parties before this court being the Applicant and Respondent. The Counsel for the Applicant contends that the High Court has jurisdiction but Counsel for the Respondent has a contrary contention indicating that this court does not have jurisdiction. The question is whether does the High Court has jurisdiction in labour-related disputes? The controversy relating to the jurisdiction of the High Court in labour matters had many legal practitioners being careful, sometimes too careful to the extent not to take matters concerning labour disputes before the High Court was discussed in 3 different cases which were before the Constitutional Court(CC). (i) Firstly it was discussed in the decision of **Chirwa v Transnet Limited and others 2008(3) BCLR251(CC)**.(ii) Secondly, it was also discussed in the case of **Frederick and others v MEC for Education and Training , Eastern cape and Others 2002(2)SA 693(CC)**. The legal principle was discussed in **Frederick s case** which illustrated the lucid analysis of the Labour Relations Act 66 of 1995(hereinafter referred to as “the LRA”) was confirmed by the Supreme Court of Appeal (SCA) in the case of **Fedlife Assurance Ltd v Woolfaardt 2002(1)SA 49(SCA)**.Both decisions agree that the High Court has concurrent jurisdiction with the Labour Court (LC)in matters which are dealt with in section 157(2) of the LRA. Both decisions also accept that section 157(1) does not deal with all labour matters, instead the High Court loses jurisdiction on the strength of s157(1) of the LRA which specifically assigns the jurisdiction in respect of such matter to the Labour Court. But in the case of Chirwa, the jurisdiction of the High Court was ousted in labour disputes.(iii) Thirdly, the principle was discussed in **Gcaba v Minister of Safety and Security and others 2010(1)SA 238(CC)**. In Gcaba it was held that jurisdiction must be understood from the pleadings themselves.

- [53] Since the High Court derives its jurisdiction from the Constitution, one has to look at the Constitution in order to answer this question of whether the

jurisdiction of the High Court in labour matters is ousted as a matter of general principle. This is so because any statute that tends to deprive the High Court of jurisdiction must do so in agreement with the Constitution. Section 169 of the Constitution provides that:

“A High Court may decide-

- a. any constitutional matter except a matter that-
 - i. only the Constitutional Court may decide, or
 - ii. is assigned by an Act of Parliament to another court of a status similar to a High Court, and
- b. any other matter not assigned to another court by an Act of Parliament.

If one analyzes this section the understanding is that the High Court has jurisdiction in respect of any other matter except a matter which has been assigned to another court, irrespective of the status of such a court. Therefore just on the basics reading of s169 of the Constitution it is not possible for the High Court to lose jurisdiction to any institution or forum that is not a court of law including the Commission for Conciliation, Mediation and Arbitration (CCMA) on the basis of the above constitutional framework.

Frederick's case

[54] Briefly the facts in **Frederick case** concerned a refusal of the Education, Eastern Cape to approve severance packages in respect of certain of its employees. Consequently, these employees approached the High Court seeking review of the refusal and other consequential relief. The High Court per White J refused to hear them on the basis that their claim was a labour matter and thus the High Court lacked jurisdiction. The Constitutional Court on appeal took a different view reasoning that the High Court has concurrent jurisdiction with the Labour Court in respect of the dispute. The Court held further that there was no general jurisdiction afforded to the Labour Court in employment matters and that the jurisdiction of the High Court was not ousted by section 157(1) of

the LRA simply because a dispute is one that falls within the overall sphere of employment relations. It said that High Court's jurisdiction would only be ousted in respect of matters that "are to be determined" by the Labour Court in terms of the LRA. The Court further said that a matter to be determined by the Labour Court as contemplated by section 157(1) means a matter that in terms of the LRA is to be decided or settled by the Labour Court. The conclusion was that the High Court was incorrect in holding that it lacked jurisdiction to entertain the matter. Of significance in this decision is the fact that the CC arrived at its decision anchored by s169 of the Constitution and held that since the CCMA is not a court in terms of s169 the High Court's jurisdiction is only ousted where the matter is assigned to the Labour Court in terms of s157(1). This decision was distinguished in the Chirwa case and was not overruled which means it is still good law. The decision of various courts to the effect that the Chirwa case has been overruled by the Fredericks case has been unpersuasive in their decision.

Chirwa's case

- [55] The facts in Chirwa's case are briefly a dismissal of an employee for incapacity. She referred the matter to the CCMA whose proceedings she abandoned midway and approached the High Court for a review of the decision arguing that it constitutes an administrative narrow majority. Similarly in this case, the CC did likewise, the majority decision of the CC differentiated the Chirwa case from the Frederick's case did not.

Gcaba's case

- [56] The facts in Gcaba are briefly that Mr Gcaba applied for the position of the Station Commander, which he did not get as someone else was appointed. Aggrieved by this appointment he challenged the failure to appoint him to the position, by the way of review at the High Court contending that the decision not to appoint him to the position constituted administrative action in terms of PAJA. His case was one of review of administrative action. The High Court held that for its part that in the light of the Chirwa case, the High Court does not have

jurisdiction since is a labour matter. On appeal to the CC framed the issue before it as being whether the failure to appoint Mr Gcaba constituted administrative action contemplated in PAJA. The court then proceeded to answer this question in the negative, which means that the court said the dismissal did not constitute administrative action. In this case Mr Gcaba failed to make a case for the relief he sought. Everything of what the court said in this case was by the way of an *obiter dictum*.

[57] From the above discussion one can come to the conclusion that the jurisdiction of the High Court in all these matters is no longer a matter of common law, s169 of the Constitution clearly takes that responsibility. If the Constitution tells us that the High Court has jurisdiction in all matters, except when such jurisdiction is assigned to another court in terms of legislation, we must wait for such legislation before we take away constitutionally awarded authority from the High Court. It seems that section 157(1) does not take away the jurisdiction of the High Court in labour matters. Instead, the section tells us of the general approach applicable when assigning the jurisdiction to Labour Court. This approach can be expressed simply as meaning that where the LRA says a particular dispute is assigned to the LC, the latter has exclusive jurisdiction only in respect of that particular matter, surely not in all labour matters. This is the best meaning of s157 (1). Both the *Fredericks* and *Chirwa* cases have accepted this meaning.

[58] After the above deliberations, I am therefore of the view that this High Court has jurisdiction to deal with this matter before it.

Prescription Act,(Act 68 of 1969) - Whether the claim has prescribed or not?

[59] It is not in dispute that the period of prescription of the applicant's debt is 3 years as set out in the Prescription Act. Section 12(3) of the Prescription Act provides that prescription begins to run as soon as the debt is due. It provides further that "a debt shall not be deemed to be due until the creditor has knowledge of the identity of the debtor and of the facts from which the debt

arises: Provided that a creditor shall be deemed to have such knowledge if he could have acquired it by exercising reasonable care”.

- [60] The Prescription Act (Act 68 of 1969) states that Section 10 of the Prescription Act debt shall be extinguished by prescription after the lapse of the period which in terms of the relevant law applies in respect of the prescription of such debt.
- [61] Of great significance to be taken cognizance of, is that the court does not have the discretion to grant condonation for failure to serve a notice if the debt has been extinguished by prescription.
- [62] Section 3(4)(a) of the Institution of the Legal Proceedings against Certain Organs of State Act(hereinafter referred as the “ the Act” provides the creditor may apply to a court having jurisdiction for condonation for such failure. It further provides that the court may grant condonation only if the debt has not been extinguished by prescription, good cause exists for failure and the organ of state was not unreasonably prejudiced by the failure.
- [63] It is common cause that the applicant was dismissed in June 2011 and the combined summons was issued on 13 October 2017.
- [64] It is clear that before any issue of condonation can be looked at, this court has to make a decision whether the matter has been prescribed or not.
- [65] Section 3(1)(a) of the Institution of Legal Proceedings Against Certain Organs of the State Act, 40 of 2002(the Act)provides that no legal proceedings may be instituted against an organ of state unless a notice of intention to do so is given.
- [66] Section 3(2)(a) provides that the notice must-
- (a) Within six months from the date on which the debt became due, be served on the organ of state and
 - (b) Briefly set out-
 - i. The facts giving rise to the debt, and

- ii. Such particulars of such debt are within the knowledge of the creditor.

[67] In terms of section 3(3) of the Act the debt becomes due when the creditor has knowledge of the identity of the organ of state and the facts giving rise to the debt when with the exercise of reasonable care, he or she could have acquired such knowledge, unless the organ of state wilfully prevents the creditor from acquiring such knowledge.

[68] *Truter v Venter*(*supra*) dealt with the distinction courts have drawn between facts on the one hand and evidence or conclusions of law on the other in determining when a debt is due for purposes of prescription. In that case, Van Heerden JA explained it as follows in paras 16-21-

“(16) “For the purpose of the Act, the term ‘debt due’ means a debt including a delictual debt which is owing and payable. A debt is due in this sense when the creditor acquires a complete cause of action for the recovery of the debt, that is , when the entire set of facts which the creditor must prove in order to succeed with his or her claim against the debtor is in place or, in other words, when everything has happened which would entitle the creditor to institute the action and to pursue his or her claim”.

(17) “A cause of action means the combination of facts that are material for the plaintiff to prove in order to succeed with his action. Such facts must enable a court to arrive at certain legal conclusions regarding unlawfulness and fault, the constituent elements of a delictual cause of action being a combination of factual and legal conclusions regarding unlawfulness and fault, the constituent elements of a delictual cause of action being a combination of factual and legal conclusions, namely a causative act, harm, unlawfulness and culpability or fault”.

(18).....

(19) ‘Cause of action’ for the purpose of prescription thus means-

‘.....every fact which it would be necessary for the plaintiff to prove, if traversed, in order to support his right to the judgment of the court. It does not comprise every piece of evidence which is necessary to prove each fact, but every fact which is necessary to be proved.’

(20) As contended by Counsel of Drs Truter and Venter, Section 12(3) of the Act requires knowledge only of the material facts from which the debt arises for the prescriptive period to begin running-it does not require knowledge of the relevant legal conclusions (i.e. that the known facts constitute negligence) or of the existence of an expert opinion which supports such conclusions.

(21) ‘The debt must be immediately claimable for it to be due for the purpose of prescription. In Deloitte Haskins & Sells Consultants (Pty)Ltd v Bowthorpe Hellerman Deutsch(Pty) Ltd 1991 SA 525(A) at 532H the court said, this means that there has to be a debt immediately claimable by the creditor or stated in another way, that there has to be a debt in respect of which the debtor is under an obligation to perform immediately’.

[69] In summary:

- a. A debt is due only when-
 - i. the material facts from which the debt arises are known, or when they ought reasonably to have been known and provided
 - ii. it is immediately claimable and the debtor is obliged to perform immediately.

[70] Now that we have analyzed and outlined the different sections of the law applicable and legal principles applied in the different cases, one should be able to find out when prescription starts to run in the present case before us.

[71] In the present case, it is common cause that the unlawful termination of the Applicant’s employment contract took place in June 2011 and the combined

summons was issued on 13 October 2017 which is three years after the unlawful termination of his employment contract.

- [72] It is also common cause that the applicant was reinstated to his employment on 12 November 2014.
- [73] As stated in the aforesaid paragraphs, section 12(3) of the Prescription Act provides that prescription begins to run as soon as the debt is due. It provides further that “a debt shall not be deemed to be due until the creditor has knowledge of the identity of the debtor and of the facts from which the debt arises: Provided that a creditor shall be deemed to have such knowledge if he could have acquired it by exercising reasonable care”.
- [74] If we analyze section 12(3) of the Prescription Act with respect to the present case of the applicant, the debt was due when the unlawful termination of the employment contract took place and the creditor who is the applicant, in this case, was fully aware and knowledgeable of the unlawful act which has been committed by the respondent (i.e. Minister of police) but the applicant did nothing, except that he instructed his lawyers to request the employer to reinstate him alleged by the Counsel for the respondent. This fact or rather allegation by the counsel for the respondent was not contested or refuted by the applicant's counsel.
- [75] Without getting into the merits of the matter the question is if the applicant was able to instruct his attorneys to write letters to the Minister/Commissioner of Police for his reinstatement when the unlawful termination of his employment took place, why was it difficult for him to issue a notice within six months of the debt becoming due.
- [76] During that time of the unlawful termination of his employment contract(i.e. specifically in June 2011 or during the whole of that year, nothing was said that he was mentally incapable of managing his affairs or understanding or appreciating what is taking place around him, hence he was able to instruct his attorneys with ease to write letters to the employer on his behalf. This state of

affairs is worsened by the fact that he was employed throughout without any problems until his employment was terminated in June 2011. If there was a problem with his mental abilities during his employment period or duration, at least the employer was supposed to have been informed or reasonably appraised of such facts.

- [77] The difficulty arises when the applicant was able to write the letters to his lawyers, been aware that his employment contract has been terminated unlawfully but at the same time alleging that he could not, due to his mental capacity have managed to issue the notice to his employer when he became aware that his employment right has been infringed upon. The question to be asked is whether was the mental capacity that was required for the instruction to the attorneys not the same mental capacity to issue notice to the employer?
- [78] From the facts given in this case, it is my view that the debt became due when his employment was unlawfully terminated, and he was fully aware or knowledgeable of the identity of the person who has terminated his employment contract.
- [79] As stated in the aforesaid paragraphs, section 12(3) of the Prescription Act provides that prescription begins to run as soon as the debt is due, it does not require knowledge of the relevant legal conclusions. I am of the view that the debt became due when the termination of the employment contract took place.
- [80] It is further said that the fundamental principle of prescription is that it will begin to run only when the creditor is in a position to enforce his right in law, not necessarily when that right arises. If one looks at the facts of this particular case nothing suggests that the applicant was not able to enforce his right at that particular point in time.
- [81] As stated before, the courts have on several occasions indicated that the debt becomes due when the cause of action arises. In Truter and Another v Deyssel 2006(4), SA 168(SCA) the court held that “ *A debt is due in the sense when the creditor acquires a complete cause of action for the recovery of the debt, that*

is, when the entire set of facts which the creditor must prove to succeed with his or her claim against the debtor is in place or, in other words, when everything has happened which would entitle the creditor to institute the action and to pursue his or her claim”.

Therefore what is alleged by the applicant that the cause of action arose on 12 November 2014 cannot be correct.

[82] There is no reasonable explanation by the Applicant in this case why he contends that the debt became due on 12 November 2014, leaving the question open for various interpretations.

[83] In **Makhwelo v Minister of Safety and Security [2015] JOL 32869 (CJ)53,**

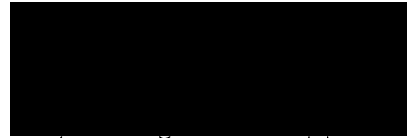
The court held that “the debt is due only when the material facts from which the debt arises are known, or when they ought reasonably to have been known and provided it is immediately claimable and the debtor is obliged to perform immediately”.

[84] Without getting into the merits of the case, the Applicant contends that it was a lack of knowledge that the notice should be issued to the employer within six months of the debt becoming due or that a notice must be issued before suing certain organs of the state is, this it is inexcusable for the Applicant to such utter such a statement.

[85] It is my view that the applicant`s debt has been extinguished by prescription and as such condonation cannot even be considered at this stage.

[86] I accordingly make the following order-

- a. That the application be dismissed with costs.
- b. That the action be dismissed with costs.



MAHLANGU AJ
ACTING JUDGE OF THE HIGH COURT
GAUTENG DIVISION, PRETORIA.

APPEARANCES

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REF: 7629/17/Z18

ENQ: Mr D Scrooby

Date of hearing: 06 May 2021

Date of judgement: 18 January 2022

**JUDGEMENT ELECTRONICALLY TRANSMITTED TO THE PARTIES ON THE 18TH
OF JANUARY 2022**