

IN THE LABOUR APPEAL COURT OF SOUTH AFRICA, JOHANNESBURG

Not Reportable
Case No: JA18/2023

In the matter between:

HUDACO TRADING (PTY) LTD t/a AMBRO STEEL

1st Appellant

ROLF LUNG

2nd Appellant

DONALDSON ATTORNEYS INC

3rd Appellant

QUENTIN DONALDSON

4th Appellant

MONIQUE VAN STRATEN

5th Appellant

and

KHAZAMULA PATRICK RAMOTHWALA

Respondent

Heard: 5 March 2024

Delivered: 26 April 2024

Coram: Mlambo JP, Nkutha-Nkontwana JA and Jolwana AJA

JUDGMENT

JOLWANA, AJA

Introduction

[1] This appeal concerns the vexed issue of the prescription of an arbitration award subsequent to the institution of review proceedings. While it is so that there have been some judicial pronouncements on the issue all the way to the

Constitutional Court it would seem that prescription being determinable on the basis of the facts of a particular matter, more still needs to be said by our courts before the legal position can be regarded as trite.

[2] In this matter, the respondent obtained a judgment in the Labour Court directing the first appellant to pay into the trust account of his attorneys the amount of R210 570.24 in respect of an arbitration award within seven days of the date of the order. The third appellant was ordered to furnish the respondent's attorneys with a statement and debatement of account including all interest earned in respect of the said amount which had been paid into and held in the first appellant's attorneys' trust account as security pending review proceedings which had been instituted by the first appellant. Other ancillary relief was granted against the first and third appellants. The first appellant had contended that the arbitration award had, for various reasons and at different periods, become prescribed. The court *a quo* found that the arbitration award had not prescribed and granted the above-mentioned orders. The appeal with the leave of the Labour Court is against the whole judgment and orders. For simplicity's sake, I shall henceforth refer to the first appellant as Hudaco and to the first respondent as Mr Ramothwala. The other appellants will be referred to as cited.

The arbitration award

[3] Mr Ramothwala has been in the employ of Hudaco since January 2012 until his dismissal in June 2016 on charges of misconduct. On 12 November 2017 he obtained an arbitration award in his favour in terms of which his dismissal was found to be substantively unfair. The arbitrator thereupon issued the following award:

40. The dismissal of the applicant was substantively unfair.

41. The respondent is ordered to reinstate the applicant retrospectively without any loss of pay and benefits into the position of a driver. As a result of the retrospective reinstatement order, the respondent is ordered to pay back-pay to the applicant amounting to R154 016.92 (i.e. from 14 June 2016 – 30 November 2017 = 17 months plus 12 days x R8 773.76 = R154 016.92).

42. The amount in clause 41 shall be paid into the applicant's bank account as known to the respondent by no later than 30 November 2017. It

shall attract interest at the rate of 15.5% per annum if it is paid on any other date after 30 November 2017.

43. The applicant must return to work on 03 December 2017 at 09h00.'

[4] This matter turns on the legal framework governing review applications and whether an ostensibly defective review application interrupts the running of prescription. I consider it instructive that I give as detailed factual background as possible and to the extent that such facts are relevant which form the backdrop of the parties' contentions on the applicable legal framework.

Factual background

[5] The Commission for Conciliation Mediation and Arbitration (the CCMA) served the above-mentioned arbitration award upon Hudaco and Mr Ramothwala on 13 November 2017. It is common cause that Hudaco received the award on 13 November 2017. As directed by the CCMA commissioner, Mr Ramothwala presented himself thus tendering his services at his workplace on 3 December 2017. However, he was told that he would not be reinstated pending review proceedings which Hudaco would be instituting in terms of section 145 of the Labour Relations Act (the LRA)¹.

¹ Labour Relations Act 66 of 1995, as amended. Section 145 provides:

(1) Any party to a dispute who alleges a defect in any arbitration proceedings under the auspices of the Commission may apply to the Labour Court for an order setting aside the arbitration award –

(a) within six weeks of the date that the award was served on the applicant, unless the alleged defect involves the commission of an offence referred to in Part 1 to 4, or section 17, 20 or 21 (in so far as it relates to the aforementioned offences) of Chapter 2 of the Prevention and Combating of Corrupt Activities Act, 2004; or

(b) if the alleged defect involves an offence referred to in paragraph (a), within six weeks of the date that the applicant discovers such offence.

(1A) The Labour Court may on good cause shown condone the late filing of an application in terms of subsection (1).

(2) A defect referred to in subsection (1), means –

(a) that the commissioner –

(i) committed misconduct in relation to the duties of the commissioner as an arbitrator;

(ii) committed a gross irregularity in the conduct of the arbitration proceedings; or

[6] On 30 January 2018 Hudaco filed its review application but did not provide the security referred to in section 145 (7) and (8) (a) of the LRA. Its review application was also not accompanied by an application for condonation for its late filing it being apparent that it was filed way beyond the six weeks period referred to in section 145 (1). Because Hudaco did not provide the aforesaid security, Mr Ramothwala applied to the CCMA for the certification of the award in terms of section 143 of the LRA. The certification of the award was issued on 11 December 2019. Upon the award having been duly certified Mr Ramothwala's attorneys instructed the sheriff to enforce the award. The sheriff came back with a return indicating that security in the sum of R154 016.92 was provided by Hudaco and was held in the trust account of Hudaco's then attorney Mr Jeremy Crawford.

[7] In the meantime there was a change in Hudaco's legal representation with Donaldson Attorneys Inc. (the third respondent) coming into the picture as their new attorneys. Email correspondence was exchanged between Mr Ramothwala's attorneys and the third respondent regarding the insufficiency of the security that had been furnished. That email exchange culminated in the third respondent furnishing another proof of payment and confirming that the balance of security in the sum of

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- (iii) exceeded the commissioner's powers; or
 - (b) that an award has been improperly obtained.
 - (3) The Labour Court may stay the enforcement of the award pending its decision.
 - (4) ...
 - (7) The institution of review proceedings does not suspend the operation of an arbitration award, unless the applicant furnishes security to the satisfaction of the Court in accordance with subsection (8).
 - (8) Unless the Labour Court directs otherwise, the security furnished as contemplated in subsection (7) must –
 - (a) in the case of an order of reinstatement or re-employment, be equivalent to 24 months' remuneration; or
 - (b) in the case of an order of compensation, be equivalent to the amount of compensation awarded.
 - (9) 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 No. 68 of 1969), in respect of that award.

R56 553.32 was paid to them and was held in their trust account. The total amount of security was therefore topped up to the equivalent of 24 months of Mr Ramothwala's remuneration in the sum of R210 570.24 which was held in the trust account of the third respondent as security pending the finalization of Hudaco's review application.

[8] On 28 July 2022, Hudaco's review application was dismissed by the Labour Court. In its judgment, the Labour Court concluded that the review application which, it was common cause, was only filed on 30 January 2018 should have been filed on or before 29 December 2017. Since it was filed about a month outside the six weeks period provided for in section 145 (1) of the LRA, Hudaco was required to show good cause why its late filing of the review application should be condoned in terms of section 145 (1A). As Hudaco had not done so the court concluded that it lacked jurisdiction to entertain Hudaco's review application. On 30 July 2022, Mr Ramothwala again tendered his services to Hudaco as its review application had been dismissed two days earlier. He also asked the third respondent to pay him or his attorneys the monies they were holding in their trust account as security. However, Hudaco did not allow him to resume his duties and its attorneys also refused to pay the security monies.

[9] Instead, on that very same day, 30 July 2022 the third respondent indicated that Hudaco intended to make an application to the Labour Court for the reinstatement of the review application. However, Hudaco failed to launch the said application or any other application. On 1 August 2022, Mr Ramothwala's attorneys once again demanded payment of the monies held in trust by the third respondent in respect of security, on his behalf. The third respondent indicated that the monies would not be paid until the review application had been heard and determined. They further indicated that a revival application would be filed by 22 August 2022 and that if Mr Ramothwala was ultimately successful, he would be compensated in full in terms of the arbitration award.

[10] On 8 August 2022, the third respondent initiated appeal processes by asking the Labour Court for its reasons for the order granted on 28 July 2022 in terms of which the court had dismissed the review application. They were furnished with the

said reasons on 22 August 2022. On 5 September 2022, Hudaco's application for leave to appeal against the order dismissing the review application was filed. The application for leave to appeal was dismissed on 15 September 2022. On 16 September 2022, Mr Ramothwala once again tendered his services but he was again foisted off. On 19 September 2022, the third respondent indicated that they had instructions to petition the Labour Appeal Court for leave to appeal.

[11] On 21 September 2022, they filed the petition for leave to appeal with the Labour Appeal Court. The said petition was struck off the roll on 8 November 2022. On 10 November 2022, Mr Ramothwala once again tendered his services to Hudaco. He was again turned away. On 14 November 2022, the third respondent wrote to Mr Ramothwala's attorneys indicating that as Hudaco's petition had been struck off the roll it was not finalized and Hudaco intended to pursue it further and that counsel's opinion was being sought in that regard. However, nothing happened until 13 December 2022 when Mr Ramothwala's attorneys sent an email to the third respondent demanding payment of the security monies they held in their trust account together with all interest earned thereon. On 14 December 2022, the third respondent advised Mr Ramothwala's attorneys that in their view the award had since prescribed. They therefore regarded the matter as closed. They further indicated that they had already paid the money they had been holding in their trust account in respect of the security back to Hudaco.

[12] In their answering affidavit, the appellants raised a number of points in *limine*. The three points in *limine* were that the arbitration award had since prescribed, that there was no basis set out for urgency and finally they contended that the relief sought was not competent. However, it is the issue of prescription that seems to be the main bone of contention. The issue of the incompetency of the relief sought appears to have been raised on the basis that it inherently depended on a disputed but certified award and that Mr Ramothwala was not specifically seeking to enforce the award and further that since the relief sought was not competent it was not appropriate for Mr Ramothwala to enforce the award. What Hudaco did not say in their papers was why the relief sought was not competent or was not appropriate as a means for the enforcement of the arbitration award. It seems that Hudaco's contention in this regard was that the arbitration award was enforceable only through

a contempt of court application. They however did not say why the arbitration award could not be enforced through an application such as the one instituted by Mr Ramothwala. The proposition that contempt of court proceedings are the only way in which an arbitration award can be enforced is fundamentally misconceived as it has no basis either in law or logic.

Has the arbitration award prescribed?

[13] Hudaco's case was that the arbitration award was served on the parties on 13 November 2017. Therefore, that is the date from which prescription was to be reckoned. To bolster the argument on prescription a number of scenarios were raised. With regard to the first scenario, Hudaco said that its review application was not launched within six weeks as required in terms of section 145 (1) (a) of the LRA. It was also not accompanied by an application for condonation for having been filed outside the prescribed six weeks period. On these bases, Hudaco contended that its failure to file a condonation application rendered its own review application void *ab initio*. In the final analysis, Hudaco contended that its review application could not have interrupted prescription as it was, for all intents and purposes, void *ab initio*. The point being made, as I understood the submission, seemed to be that in the circumstances there was no review application to speak of and therefore, prescription started running from 13 November 2017 when the award was served. On 12 November 2020, the award became prescribed as the three year prescription period elapsed.

[14] The second scenario was that even if it was not correct that its review application was void *ab initio*, in his Rule 11 application Mr Ramothwala had argued that the review application was deemed withdrawn on 3 March 2018 in terms of clauses 11.2.1, 11.2.2 and 11.2.3 of the Labour Court Practice Manual². In terms of the Practice Manual Hudaco was required to file the record of the arbitration proceedings within 60 days of it being made available by the CCMA. Furthermore, contended Hudaco, Mr Ramothwala had, in that Rule 11 application, also argued that the review application lapsed with the consequence that its status was that it

² Practice Manual of the Labour Court of South Africa, effective 1 April 2013.

was dismissed in terms of clause 16.3 of the Practice Manual. On these bases Hudaco contended that the review application was either deemed to be withdrawn in terms of Clause 11 of the Practice Manual or had the consequence of having been dismissed on 3 March 2018 in terms of clause 16.3 of the Practice Manual. Prescription of the arbitration award would therefore have started running from 3 March 2018 and would have prescribed on 2 March 2021.

[15] The third scenario date for the award having prescribed was the 28 January 2022 which was also based on Mr Ramothwala's Rule 11 application. In this regard Hudaco submitted that Mr Ramothwala had contended that Hudaco did not comply with clause 11.2.7 of the Practice Manual in that it had failed to ensure that all the review papers were filed within 12 months from the 30 January 2018. The twelve months period would have elapsed on 29 January 2019 on which date prescription would have started running. The award would therefore have become prescribed on 28 January 2022 which was a three year period reckoned from 29 January 2019.

[16] The fourth scenario was that section 145 (5)³ of the LRA required Hudaco to apply for a date for the hearing of its review application within six months of the filing of the review application. It did not do so. Therefore, its review application could be regarded as having lapsed on 30 July 2018 which was the six months period reckoned from the 30 January 2018. On 30 July 2018 prescription would therefore have started running. In that situation the arbitration award would have prescribed by 29 February 2021. The fifth proposed scenario was based on clause 16 of the Practice Manual in terms of which a review application is archived if a period of six months has elapsed without any steps being taken by an applicant for review reckoned from the date on which the review application was filed. In this regard Hudaco contended that it filed its supplementary affidavit in the review application on 13 August 2018. Therefore, its review application was deemed dismissed in terms of clause 16.3 of the Practice Manual on 12 February 2019. If prescription started running on 12 February 2019 the arbitration award would have prescribed on 11

³ Section 145 (5) reads: Subject to the rules of the Labour Court, a party who brings an application under subsection (1) must apply for a date for the matter to be heard within six months of delivery of the application and the Labour Court may, on good cause shown, condone a late application for a date for the matter to be heard.

February 2022. The issue that Hudaco raised in the court *a quo* based on all these scenarios was that the award was unenforceable on account of it having prescribed hence its attorneys refunded to it all the monies paid to them as security pending the review application.

The Labour Court judgment

[17] In his judgment in the Labour Court Van Niekerk J (as he then was) analysed a number of judgments on the basis of which he concluded that the award granted by the CCMA had not prescribed. I quote copiously from that judgment whose conclusions are being assailed in this appeal:

[12] [I]t would similarly be a travesty of justice to deny [Mr Ramothwala] relief in circumstances where [Hudaco] seeks to rely on its own ineptitude (if not gross negligence) in the prosecution of the review application, so as to deprive [Mr Ramothwala] of the benefits of the arbitration award granted in his favour.

[13] The law is that in circumstances such as the present, prescription is interrupted until any review proceedings are finalized. In *Myathaza*, Froneman J stated:

‘The manifest injustice of depriving the applicant of the arbitration award in his favour by first avoiding its implementation by way of instituting review proceedings and then crying prescription on the back of the time wasted by the review can be met by application of the principle that prescription should not run until court proceedings are finalized.’

In *Pieman’s Pantry*, the majority of the court confirmed not only that prescription was interrupted by the referral of an unfair dismissal dispute to the CCMA, but that prescription continued to be interrupted until the finalization of the review application.

[18] In short, whether the period of prescription is three years or thirty, the arbitration award issued in favour of [Mr Ramothwala] has not prescribed. Despite the shortcomings identified by [Hudaco] in the prosecution of the application, the application for review was finalized by the LAC’s dismissal of [Hudaco]’s petition for leave to appeal on 8 November 2022. The provisions of the Practice Manual to

which [Hudaco] appears to contend for prescription did not have the effect, as [Hudaco]’s attorney put it in the answering affidavit, of ‘visiting a nullity’ on the review application. The review application was filed late, with no application for condonation. As my colleague Moshoana J pointed out, that has the consequence, where no application for condonation is filed, that the court has no jurisdiction. That does [not] mean that the application is void *ab initio*, as [Hudaco] contends. It means no more [than] that unless and until any application for condonation is filed, the court has no jurisdiction. The same principle applies in respect of [Hudaco]’s breaches of the Practice Manual. It was [Hudaco] that pursued the review application to the stage of an application for leave to appeal and a petition to the LAC – the last word was spoken by the LAC on 8 November 2022.

[19] For these reasons, the award that is the subject of these proceedings has not prescribed and remains capable of enforcement.’

Hudaco’s submissions on appeal

[19] Mr Hulley who appeared on behalf of Hudaco made what appeared to be slightly nuanced submissions on the basis of which Hudaco’s case for prescription was argued as opposed to what I understand to have been its case in the Labour Court. The genesis of Hudaco’s case is articulated as follows in its heads of argument:

‘1. This appeal concerns primarily the proper interpretation of s 145 (9) of the Labour Relations Act, 66 of 1995 (“the LRA”). That subsection 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 the award”-

2. The appeal raises the question whether an application to review an award, that is brought outside the six-week period prescribed in s 145(1) and which is not accompanied by a condonation application interrupts the running of prescription. In particular, it raises the question whether such an application is one “*in terms of this section*”.

3. Secondly, the appeal concerns the basis upon which an order was granted against the attorneys (the third to fifth appellants) representing the employer.'

[20] The issues raised above bring into sharp focus some of the provisions of section 145 of the LRA with specific reference to some of the provisions of subsections (1) and (9) juxtaposed with some of the provisions of the Prescription Act⁴, particularly certain provisions of section 11 thereof. In particular, whether a review application which is not one in terms of section 158 (1) (g)⁵ of the LRA is a review application in terms of section 145 if it is not accompanied by a condonation application where it is apparent that it was instituted outside the period of six weeks. It is to the interpretation of these provisions that I now turn to section 145 (1) (a), in part, provides:

'Any party to a dispute who alleges a defect in any arbitration proceedings under the auspices of the Commission may apply to the Labour Court for an order setting aside the arbitration award –

(a) within six weeks of the date that the award was served on the applicant, ...'

[21] It is trite that once an employer or an employee has been served with an arbitration award, the six weeks period within which he is required to apply to the Labour Court for the review and setting aside of the arbitration award, if so minded, starts running. The six weeks period is the time afforded to an employer or an employee to consider the award and if she/he/it feels that it is a reasonable award or one which a reasonable commissioner could make based on the material that was before her/him, may very well accept it if there is no other basis to allege any defect in the award. The six weeks period referred to in section 145 (1) (a) is subject to the provisions of section 145 (1A) in the event that for whatever reason the review application could not be made within that period. Section 145 (1A) provides that *"[t]he Labour Court may on good cause shown condone the late filing of an application in terms of subsection (1)".*

⁴ Act 68 of 1969.

⁵ Section 158(1)(g) of the LRA reads: The Labour Court may –

(g) subject to section 145, review the performance or purported performance of any function provided for in this Act on any grounds that are permissible in law.

[22] It goes without saying that the only time an applicant is required to apply for condonation is when the application for the review of the arbitration award is filed outside the six weeks period referred to in section 145(1)(a). When a litigant who institutes a review application in terms of section 145 chooses not to avail her/him or itself of the remedy provided for in subsection (1A), it can only be because rightly or wrongly they are satisfied that the application was made within the prescribed period of six weeks. In the event of an honest oversight about the computation of the six weeks period, one would expect the condonation application to be made as soon as it comes to the attention of the litigant concerned that their review application may not have been filed within six weeks from the date of service of the award on that litigant. It would, in that case, be required of that litigant to make out a case about the date on which the arbitration award was served in a condonation application and explain how it came about that the review application was not filed timeously.

[23] I am making these observations to make the point that not all review applications have, as a matter of necessity, to be accompanied by a condonation application. Therefore, as a general principle, there was nothing untoward in Hudaco launching the review application without a condonation application depending on the case they sought to make in the review application about when they were served with the arbitration award. When they did not avail themselves of the provisions of subsection (1A) even when their attention was drawn to the need to apply for condonation, it cannot be assumed that there was malice in their failure to do so or that their failure to do so was contrived. They just ran the risk that in the event that on the issue of the condonation application being required, the court could very well find against them as it happened in this case with Moshwana J dismissing the review application for want of jurisdiction.

[24] In the unlikely event that Hudaco and its attorneys were acting somewhat maliciously or in contrivance in deliberately not applying for condonation at any time knowing fully well that they were out of time, it would mean that they approached the Labour Court with dirty hands as their failure to apply for condonation would, in that event, amount to a spiteful stratagem to frustrate Mr Ramothwala and abuse the court process in order to delay the implementation of the award until it prescribed. As

a corporate citizen of this country with the duty to comply with all laws including the labour legislation and to do so diligently, as Van Niekerk J pointed out, I would want to believe that Hudaco did not behave in that fashion and has not been deliberately abusing court processes maliciously for any ulterior motives. Having said that, I however, struggle with Hudaco's failure to apply for condonation even after the issue of the prescribed six weeks period was raised and forging ahead in blindly pursuing the review application whose outcome would then have been a forgone conclusion even to a lay person who cared to take the time to read section 145 of the LRA.

[25] This brings me to section 145 (9) of the LRA which provides that “[a]n 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”. Mr Hulley submitted that the review application must be one in terms of section 145 as against it being in terms of any other legislation or provision such as section 158 (1)(g) of the LRA. There is no suggestion in the papers that Hudaco's application was anything but a review application in terms of section 145. This is how the proposition that Hudaco's review application may not have been an application under section 145 is couched in its heads of argument:

‘51.4 [T]he phrase “in terms of this section” means that it must be an application having the characteristics of an application under s.145.

51.5 This means that:

51.5.1 It must be an application in which the employer alleges a “defect” in the proceedings.

51.5.2 The employer must apply to the Labour Court to have the award set aside because of the defect.

51.5.3 It must be an application instituted within six weeks of the publication of the award or, though not instituted in that time, is accompanied by an application for condonation.

51.6 It also means that an application for review of an arbitration award under another section (for example, s.158(1)(g) of the LRA), will not interrupt the running of prescription.

51.7 Thirdly, it is clear that prescription is interrupted only in respect of “*that award*”.

51.8 This means that, irrespective of whether the underlying claim (based on unfair dismissal) is extinguished and replaced with a claim based on the arbitration award, the review application does not interrupt the running of prescription in respect of the underlying claim (based on unfair dismissal).'

[26] It appears that the point sought to be made with the allusion that the review application might not have been one in terms of section 145 was being made so as to bolster Hudaco's contentions on prescription. In essence the point being contended for was that because the review application was launched outside the six weeks period and no condonation application was made, therefore it could not have interrupted prescription. I disagree with this proposition which, in my view, is meritless. Furthermore, it is the Labour Court that must determine whether or not, in the first instance, the application was made outside of the six weeks period despite either party's contentions or even silence on the issue as it is a jurisdictional issue which the court may raise *mero motu*. Where the review application is made after six weeks, it would depend on whether a condonation application for the late filing of the review is made. If condonation is sought the court would have to determine whether or not good cause was shown for it to exercise its discretion and grant condonation.

[27] If Hudaco's contention was that its review application was not or may not have been one in terms of section 145 it would have been expected to make that case in the pleadings. It did not do so. Despite Hudaco's own ambivalence, its application was evidently an application in terms of section 145 and it was filed out of time and it failed to file a condonation application. That review application was consequently dismissed by Moshwana J on 28 July 2022 for want of jurisdiction. When that application was launched on 30 January 2018, it interrupted prescription. Hudaco, as it was perfectly entitled to do so, filed an application for leave to appeal after the dismissal of the review application. Moshwana J dismissed the application for leave to appeal on 15 August 2022. That application for leave to appeal further interrupted the running of prescription. Again as it was perfectly entitled to do so, Hudaco petitioned the Judge President of the Labour Appeal Court for leave to appeal Moshwana J's judgment. On 8 November 2022, the petition for leave to appeal was struck off the roll. As Van Niekerk J aptly put it, the last word on that review

application was spoken by the Labour Appeal Court on 8 November 2022 when it was struck off the roll.

The Prescription Act

[28] Section 11 of the Prescription Act⁶ provides for periods of prescription for various types of debts. It reads:

- ‘11. The periods of prescription of debts shall be the following –
- (a) Thirty 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 profits, royalties or any similar consideration payable in respect of the right to mine or other substances;
 - (b) fifteen 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.’

[29] It was contended on behalf of Hudaco that the 30 year prescription period which was dealt with in *Myathaza*⁷ by the Constitutional Court in respect of arbitration awards does not apply in this matter because in *Myathaza* the Constitutional Court was dealing with an arbitration award which was made in terms

⁶ Act 68 of 1969.

⁷ *Myathaza v Johannesburg Metropolitan Bus Services (SOC) Limited t/a Metrobus and Others* (2017) 38 ILJ 527 (CC); [2017] 3 BLLR 213 (CC).

of an arbitration agreement which was said to have the status of a court order between the parties. It is important to bear in mind that the court in *Myathaza* specifically decided not to express itself on section 145 (9) on the basis that when the award was issued, section 145 (9) had not yet come into force as it did so only in January 2015. In this matter, we are not confronted with an arbitration award which was only sought to be enforced outside the three year period or even the thirty year period. Here Mr Ramothwala presented himself at the premises of Hudaco and tendered his services on numerous occasions and on each one of them he was turned away. The response of Hudaco was the relentless pursuit of the review application even after it was dismissed as already indicated above. Mr Ramothwala tendered his services on each occasion the review application was unsuccessful at the Labour Court which included the appeal processes. I fail to understand how the award could have become prescribed while the review application was still being pursued.

[30] I am in respectful agreement with Van Niekerk J in the Labour Court that whether the prescriptive period is three years or thirty, the arbitration award did not and could not have prescribed until the review proceedings were concluded. This much is also clear from the principle set out in *Myathaza* where at paragraph [69] the Constitutional Court said:

‘Prescription under the Prescription Act is “interrupted by the service on the debtor of any process whereby the creditor claims payment of the debt”. Once the judicial process commences it proceeds in terms of the court rules and any delays within that process do not affect the statutory interruption of prescription. Interruption lapses if, for whatever reason, the judgment is not pursued to become a “final judgment”. The interruption lasts until the “final” judgment becomes executable. Pending an appeal the judgement is not usually executable in terms of court rules. Even if it becomes executable if special application is made, that does not make the judgment finally executable, because if the judgment on appeal is unfavourable the execution cannot stand. Hence, the judgment only becomes final and executable when the appeal is finally disposed of.’

[31] The above principle is not neutered by the fact that on the facts in *Myathaza*, the arbitration award was one in terms of an arbitration agreement which was agreed to have the status of a court order which has a thirty year prescription period in terms of section 11(a)(ii).

The interest earned on the amount held in the trust account.

[32] The LRA makes no reference to the security having to be an amount of money that must be deposited in a bank account. Section 145 (7) which deals with review proceedings not having the effect of suspending an arbitration award specifically provides that the security that may be provided or furnished must be to the satisfaction of the court. Whether it is cash paid into an attorney's trust account or a bank guarantee for the amount payable or any other form of security that the court may, in its discretion accept, clearly points to an applicant not being obliged to furnish security in the form of cash which must be deposited in a bank account. Therefore, where the security furnished was in the form of cash paid into an attorney's trust account any interest earned from that amount is as it must be for the benefit of that applicant and is a matter between that applicant and his attorney.

[33] I am emboldened in this view by the provisions of section 143 (2) of the LRA. Section 143 (2) provides:

'If an arbitration award orders a party to pay a sum of money, the amount earns interest from the date of the award at the same rate as the rate prescribed from time to time in respect of a judgment debt in terms of section 2 of the Prescribed Rate of Interest Act, 1975 (Act No. 55 of 1975), unless the award provides otherwise.'

[34] Axiomatically in terms of section 143 (2) when an arbitration award is issued which entitles an employee to a payment of a sum of money, that amount is with interest from the date of the award at the rate prescribed in terms of the Prescribed Rate of Interest Act⁸. It is not subject to the security being in the form of cash and the interest rate offered by the bank in which the money is deposited. It is the applicant,

⁸ Act 55 of 1975.

usually the employer in the review application who is held liable for the amount so awarded plus interest at the rate prescribed in terms of the Prescribed Rate of Interest Act. Section 143(2) was clearly designed to provide cushion to all employees who are the weaker party in the employer/employee relationship. Furthermore, in the event of the employer electing to have the award reviewed by the court, this provision ensures that that should not be at the expense of the employee when the time finally comes for him to be paid by ending up being paid an amount that was ordered in the award years down the line but which could be far less than what its value initially was having been eroded by the inflationary forces over which an employee would have no control.

[35] In this matter the commissioner also awarded an amount of money and interest at 15.5 per cent on that amount which is in terms of the rate prescribed by the Prescribed Rate of Interest Act. That is the interest Mr Ramothwala was and is entitled to being in terms of section 143 (2). Therefore, the order of the court *a quo*, to the extent that it directed that the interest earned in the amount paid into Hudaco's attorneys' trust account should be accounted for to him or his attorneys, it erred. The provisions of the Legal Practice Act⁹ dealing with the handling of the trust monies and the interest earned therefrom are of no relevance to Mr Ramothwala. The third respondent's obligation is to account for those monies and any interest earned therefrom is a matter between an attorney and his client and is regulated in terms of the Legal Practice Act.

Costs

[36] The last issue that I have to deal with is that of costs. Costs in a matter such as this one are governed in terms of section 162 of the LRA and are specifically granted on considerations of law and fairness depending on the facts of the matter. In relation to costs the court *a quo* reasoned thus:

[21] Finally in relation to costs, section 162 provides that the court may make orders as to costs according to the requirements of law and fairness. [Mr Ramothwala] has been forced to approach this court to enforce his rights, in the face of inexplicable recalcitrance from [Hudaco]. For a period of more

⁹ Act 28 of 2014.

than five years, [Hudaco] has resisted every effort by [Mr Ramothwala] to enforce the arbitration award granted in his favour in November 2017. In terms of the award, [Mr Ramothwala] was to have reported for work on 3 December 2017, some five years and two months ago. His repeated tenders to return to work have been repeatedly rejected. As I have indicated, what is particularly galling is that Hudaco's attorney has sought to rely on what amounts to its negligent prosecution of the review application to deny justice to Mr Ramothwala. In these circumstances, there is no reason to deny Mr Ramothwala his costs, nor is there any reason not to hold [Hudaco and his attorney] jointly and severally liable for those costs. [Hudaco] is part of a listed company, and has ethical obligations in terms of instruments regulating matters of corporate governance to comply with the spirit and purpose of labour legislation and ensure the welfare of its employees. While a genuine dispute between employer and employee is a matter that must be resolved according to the applicable laws and the interests of justice, the history of this matter is one in which [Hudaco and/or its attorneys] have sought by every possible means to frustrate and avoid a just outcome...'

[37] I am in full agreement with these sentiments. Hudaco and its attorneys have clearly caused extreme injustice and hardship to be visited upon Mr Ramothwala in how the review application was prosecuted and relentlessly pursued. It is now three years shy of a decade and Mr Ramothwala has yet to reap the fruits of the arbitration award despite his tireless persistence in trying to enforce it. This is a complete miscarriage of justice which cannot and should not be countenanced. The answering affidavit in this matter was deposed to by the fourth appellant, Mr Quentin Ian Donaldson who described himself as the director of the Donaldson Attorneys Incorporated, the third appellant in these proceedings. He says in his answering affidavit, among other very shocking averments:

'14.5 Moreover, Mr Agbarakwe is well-aware of why we are no longer in possession of this security, having been advised in the aforementioned email from our offices that we had advised our client that the Award had prescribed and therefore were directed to refund them their security deposit.'

[38] The reading of this part of the answering affidavit lends itself to the interpretation that once Hudaco's attorneys held the view that the award had, in their view, prescribed, they advised Hudaco accordingly who accepted the advice. While the third respondent was instructed by Hudaco to refund the security deposit based on their advice, they seem not to have even considered the fact that the security deposit was required and issued so that if their client lost the review application Mr Ramothwala would be paid without delay or the need for further litigation. They seem to have understood it as having been security that was provided so that when they were successful in the review application, they would not struggle to get a refund or as it happened here, when they reached a stage in which in their opinion, the award had prescribed the monies would be refunded to Hudaco without further ado. That approach is not supported by any reading of the applicable legislative provisions.

[39] Furthermore, they seem to have been oblivious to the fact that they had both a legal and ethical responsibility to warn Mr Ramothwala's attorneys that they have been directed by their client to refund the money held in their trust account for his benefit back to Hudaco and that unless they were interdicted from doing so within a certain period of time, they would have no basis not to do so and would therefore be obliged to comply with those instructions. They chose not to do so and exercised a form of self-help for the benefit of their client by unilaterally deciding to return the security monies back to Hudaco based on their own opinion on prescription without, at the very least, affording Mr Ramothwala or his attorneys a hearing on a decision that was clearly prejudicial to him. This conduct was not only illogical but was also evidently not in the spirit of the applicable provisions of the LRA and appears to have been craftily conjured up with no regard to Mr Ramothwala or his interests. It would be remiss of this court not to express its disquiet in that regard.

[40] In all these circumstances there was a clear basis for the appellants to be cited and the court *a quo* correctly exercised its discretion in holding the first and third appellants liable for costs. However, the costs of appeal stand on a different footing. This is so because the appellants have been partially successful in their appeal. That being the case the appropriate order for the costs of appeal would be that each party must pay its own costs. The appeal must therefore succeed but only to the extent indicated below.

[41] In the result the following order is made:

Order

1. The appeal is upheld in part.
2. The order of the Labour Court is set aside and substituted with the following order:
 - 2.1 The first respondent (HUDACO TRADING (PTY) LTD T/A AMBRO STEEL) is ordered to pay into Mr Ramothwala's attorneys' trust account the amount of R210 570.24 within seven calendar days after delivery of this judgment.
 - 2.2 Mr Ramothwala's application to be furnished with the statement and debatement of account in respect of the security monies that were held in the third respondent's trust account is dismissed.
 - 2.3 The first and third respondents (HUDACO TRADING (PTY) LTD T/A AMBRO STEEL and DONALDSON ATTORNEYS INC) are directed to pay the costs of the application jointly and severally the one paying the other to be absolved.
3. Each party shall pay its own costs of appeal.

JOLWANA AJA

Mlambo JP *et* Nkutha-Nkontwana JA concur

APPEARANCES:

FOR THE APPELLANTS

: G.I. Hulley SC

Donaldson Attorneys Incorporated

FOR THE RESPONDENT :

M.D. Maluleke

Agbarakwe Attorneys