

IN THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not Reportable
Case No: J 1394/22

In the matter between:

KHABU THATO SIMON

Applicant

And

STONE AND ALLIED INDUSTRIES (PROPRIETARY) LIMITED

Respondent

Heard: 7 December 2023

Delivered: 2 February 2024

JUDGMENT

DIKOTLA, AJ

Introduction

[1] This is a claim that pertains to breach of employment contract, in terms of which section 77(3) of the Basic Conditions of Employment Act¹ (BCEA), provides that the Labour Court has concurrent jurisdiction with the civil courts to hear and determine any matter concerning a contract of employment. The entire claim is a contractual suit for arrear wages or salaries in respect of a period between the 1st of July 2012 until 3rd of October 2022. Meanwhile the Respondent insists that the claim should be dismissed.

¹ Act 75 of 1997.

[2] The Applicant herein referred to as (Mr Khabu) instituted an application in terms of section 77(1) and 77(3) read with Section 4 of the BCEA or in the alternative read with Rule 7 of the Labour Court Rules², as may be amended.

[3] In his application he prays for an order in the following terms:

[1] DECLARING that the Respondent is to pay the Applicant outstanding salaries for the period from 1 July 2012 to 3 October 2022 in the capital amount of R1,577,919.57 (one million five hundred and seventy-seven thousand nine hundred and nineteen Rand and fifty-seven cents);

[2] DECLARING that the Respondent is to pay the Applicant all interest due as regards his claim in Prayer 1 as per the Basic Conditions of Employment Act (the BCOEA), such claim to be limited to an amount of R400,000.00 (four hundred thousand Rand)

[3] That the Respondent is to pay the costs of this Application on the scale attorney-own-client;

[4] Further and/or alternative relief.'

[4] The application is opposed by the Respondent on the basis of numerous grounds.

Background facts

[5] The facts are clearly recorded and are also common cause. Therefore, there is no need to burden this judgment with a repetition of the factual background, unless where deemed necessary.

[6] So far, it is sufficient to record that:

6.1 On or about 3 June 1996, the Applicant entered into an employment agreement with the Respondent. Consequently, the employment relationship was formed wherein he was employed as Laboratory Assistant.

² GN 1665 of 14 October 1996: Rules for the conduct of proceedings in the Labour Court.

6.2 On 2 December 2011, the Respondent resolved to dismiss the Applicant after having found him guilty of gross insubordination.

6.3 Subsequent to his dismissal, he exercised his rights as contemplated in section 191(1)(a) of the Labour Relations Act³ (LRA), by referring his dispute to Commission for Conciliation Mediation and Arbitration herein referred to as the (CCMA).

6.4 On 12 June 2012, the CCMA issued an award in favour of the Applicant in terms of which the dismissal of the Applicant was found to be substantively unfair, whereas procedurally fair and, it provided for his reinstatement with back-pay being equivalent of his six months' salary.

6.5 As ordered by the award, the Applicant reported for duty on the 1st of July 2012, however he was advised to return on the 2nd of July 2012. Consequently, he reported for duty on the 2nd of July 2012, wherein he also served the award to the Respondent, and so was informed of the review application.

6.6 On the 2nd of August 2012, the Respondent indeed launched review application, which was dismissed as of the 19th of November 2013.

6.7 Pursuant thereto, the Respondent launched a rescission application against the same Court Order which is the subject of review application.

6.8 Thereafter, the Applicant instituted an application in terms Section 158(1)(c) of the LRA in order to promote the said award into the Court Order, and the Court on the 31st of October 2014, granted the application on his favour.

6.9 Furthermore, on the 7th of November 2014, the Applicant served the Court Order with the Respondent, coupled with attempt to report on duty, however the Respondent deliberately prevented him to comply with the Court Order due to anticipation of launching further legal proceedings.

6.10 Meanwhile on the 20th of March 2015, the Respondent launched a second rescission application against the Court Order dated 31 October 2014.

6.11 In light of the facts, the Respondent resolved to institute rescission proceedings against Court Order dated the 19th of February 2016.

6.12 Meanwhile the Respondent on the 20th of March 2015, brought consolidation application in respect of its 2 (two) rescission applications.

³ Act 66 of 1995, as amended.

6.13 Furthermore, the rescission applications were set down on 15 August 2022 and judgement was delivered on the 25th of August 2022, wherein *inter alia*, application to consolidate was successful; rescission applications were dismissed and the Applicant in the interlocutory was ordered to pay First Respondent's (Applicant in the main) costs.

6.14 Pursuant to the *afore going*, the Applicant's attorneys served a letter of demand on the 29th of August 2022, with the Respondent's erstwhile attorneys demanding compliance with Court Order in favour of the Applicant's in respect of reinstatement; settlement of outstanding salaries and or back-pay thereof.

6.15 As of the 29th of September 2022, the Respondent's attorneys committed to accept the Applicant's into service on 0 October 2022, and indeed the Respondent acceded to the Court Order. Indeed, the Respondent complied with the award and or Court Order in that compensation or back-pay was settled, and whereas he was effectively reinstated.

6.16 However, the applicant insists that "*back-pay and or outstanding monies*" in form of salaries which are due and or claimable from 1 July up until 3 October 2022 are still outstanding, and that is the cause of this application.

6.17 It is against this background that the Applicant has launched this application to claim back-pay and / or outstanding salaries, and in my view are damages, which are said to be due as effective from 1 July 2012 up until 03 October 2022.

6.18 Unsurprisingly, the Respondent is opposing the application, and thereunder grounds would be ventilated.

Discussion

First special plea

6.19 That the Applicant's claim for arrear or outstanding salaries which accrued on or before 9 March 2020 has prescribed. By virtue of section 12(1) of Prescription Act⁴, having commenced to run as soon as the debt was due, and thereafter prescribed three (3) years since the correct due date.

6.20 He therefore submitted that, the Court should dismiss the Applicant's claim for the arrear or outstanding salaries which accrued before 9 March 2020.

Second special plea

⁴ Act 68 of 1969.

6.21 The Respondent is also contending that since the Respondent did not accept the Applicant's tendering of services on 2 July 2012, and only accepted him from 3 October 2022, it therefore means that the contract of employment was only reinstated 3 July 2022.

6.22 He therefore submitted that the claims which may have accrued between 2 July 2012 and 3 October 2022 should be dismissed.

Third special plea

6.23 That the Applicant should have mitigated his salary losses during the period of 2 July 2012 until 3 October 2022, and that in the absence of alleged mitigation, this application is fatally defective and should be dismissed with costs.

Fourth special plea

6.24 The Respondent further submits that the Applicant is not entitled to claim payment or double dip for periods during which he earned a salary or otherwise remunerated in the period from 2 July 2021 until 3 October 2022. He also provides that the Applicant has not set out the salary or other remuneration he may have earned for the above given period and so, this Court is unable to set-off any payment as such.

6.25 The Respondent also contends that in the absence of such allegations, this application is fatally defective and should be dismissed with costs.

Applicable legal principles

[7] Turning to the essence of the application, it is important as a point of departure, to instantly identify the relevant legal principles.

[8] First and foremost, the Respondent argues that the Applicant was never reinstated and so contended that the award merely ordered the employer to reinstate him. The contract of employment which may give rise to payment of salary, so the argument went, can only come about once the employee has tendered his services and the employer accepted the tender by allowing him to resume duties. It contends that *in casu*, the Applicant was never reinstated and therefore is not entitled to any arrear payments. Accordingly, so it was argued, the application should be dismissed.

[9] In a case of *National Union of Mineworkers SA on behalf of Fohlisa & others v Hendor Mining Supplies (A Division of Marschalk Beleggings (Pty) Ltd)*⁵ (Hendor), the Constitutional Court concluded that:

‘Back pay is only contractually owing upon the full restoration of the employment contract. This required more than a tender of services by the unfairly dismissed employees. The employer should also have accepted those employees back into its employ. If the employer failed to do so, the correct legal path was to have forced it to restore the contract of employment by means of contempt proceedings.... the judgment ordering reinstatement does not in and of itself reinstate the contract of employment; rather, it is an order directing the employer to accept those services. If the employer fails to do so, the remedy is to bring contempt proceedings to compel the employer to do so.’

[10] The argument advanced by the Respondent overlook the most important step, being the fact that the Respondent reported for duty and effectively tendered his services, *albeit* could not be granted permission to resume duties on the basis of anticipated review. Therefore, the employee played his part of the contract, as it was then up to employer to accept him in accordance with terms and conditions of employment. Since the employer did not accept him into service, the Applicant would as a matter of right be entitled to exercise viable options such as contempt proceedings, suing for damages as a result of breach of contract.

[11] Meanwhile, the jurisdiction of this Court was re-confirmed in *Rand Water v Stoop and others*⁶, where the Labour Appeal Court held that the Labour Court has the requisite jurisdiction to adjudicate a claim for damages in terms of section 77(3) of the BCEA, where such damages are linked to the employment contract.

[12] Flowing directly from the breach of contract is the term repudiation which was defined in *Van Rooyen v Minister van Openbare Werke en Gemeenskapsbou*⁷, as a situation where one party to a contract, indicates to the other party in words or by

⁵ (2017) 38 ILJ 1560 (CC); [2017] ZACC 9.

⁶ [2013] 2 BLLR 162 (LAC); [2012] ZALAC 32.

⁷ 1978 (2) 835 (A) at 835.

conduct a deliberate and unequivocal intention to no longer be bound by the contract.

[13] In *Council for Scientific & Industrial Research v Fijen*⁸, it was held that material breach of contract constitutes repudiation where it evinces an intention on the part of the guilty party not to continue with the contract.

[14] As held in *Transport & Allied Workers Union & others v Natal Co-operative Timber Ltd*⁹, repudiation on its own does not in itself terminate the contract.

[15] Repudiation therefore is a form of breach of contract, and the aggrieved may elect to enforce specific performance or accept repudiation and proceed with cancellation and consequently claim damages.

[16] However in invoking section 77 of BCEA proceedings, the parties will be on alert in considering the Labour Appeal Court position as held in *Pilanesburg Platinum Mines (Pty) Ltd v Ramabulana*¹⁰, that in seeking relief in terms of the BCEA and not approaching the CCMA, the Respondent had renounced all reliance on the LRA. It held that the Respondent relied on law of contract as opposed to equity and fairness.

[17] So briefly conclusive is that the Applicant in this case is bound by the above LAC position as the dictates of principle of *stare decisis*.

[18] Meanwhile for consensus seeking purpose, a contract of employment can be defined as:

‘A contract employment is an agreement between two parties in terms of which one of the parties (the employee) undertakes to place his or her personal services at the disposal of the other party (the employer) for an indefinite or determined period in return for a fixed or ascertainable remuneration, and which entitles the employer to

⁸ (1996) 17 ILJ 18 (A); [1995] ZASCA 143.

⁹ (1992) 13 ILJ 1154 (D).

¹⁰ [2019] ZALAC 60; (2019) 40 ILJ 2723 (LAC).

define the employee's duties and to control the manner in which the employee discharges them.'¹¹

[19] In the same breath, the LRA route has its distinguishable characters, requirements and remedies in comparison with claims in terms of BCEA.

[20] Unlike the LRA approach, the claimant using the BCEA ought to prove the existence and even associated breach of employment contract, whereas, the other approach is primarily concerned fairness.

[21] Whilst on same analysis, the Labour Appeal Court (LAC), once more provided judicial precedent in a case of *Archer v Public School — Pinelands High School and Others*¹², where it held that "... the appellant has both an unfair dismissal claim and a contractual claim arising from the termination of his employment contract. This entitled him to pursue a claim in the CCMA and an independent contractual claim in either the High Court or the Labour Court which have concurrent jurisdiction to determine a contractual claim in terms of section 77 of the BCEA ...".

[22] So far in my view, the CCMA, correctly exercised its vested powers in terms of section 193 of the LRA, by reinstating the Applicant with back-pay, whereas damages are recoverable under section 77 of the BCEA. In a nutshell, that confirmed the distinguishable characters of the above remedies and approach from each other.

[23] Meanwhile, in terms section 77 of BCEA, the employee would have the burden of proving loss suffered, as well as also demonstrating how the damages were mitigated, consequent to development of common law principles in the employment law of contract context.

[24] It is conclusive that after considering both the factual and legal matrix, the Applicant's has proved both the existence of employment contract, breach, damages, *albeit* failed on a mitigation point.

¹¹ Grogan *Workplace Law* 10 ed (Juta, 2009) 29.

¹² [2019] ZALAC 70; (2020) 41 ILJ 610 (LAC) at para 16.

[25] On the other hand, the Respondent pleads prescription as envisaged.

[26] The primary purpose of prescription is *inter alia* to confirm certainty, finality etc.

[27] In *Food and Allied Workers Union on behalf of Gaoshubelwe v Pieman's Pantry (Pty) Ltd*¹³, the Court said the following:

‘... our courts have, on occasion, pronounced on the importance of labour disputes to be conducted with expedition. For example, in *National Research Foundation* the Labour Court held:

“It is now trite that there exists a particular requirement of expedition where it comes to the prosecution of employment law disputes...”

[28] In determining prescription, then the starting point is section 16(1) of the Prescription Act¹⁴, which reads in the following:

‘Subject to the provisions of subsection (2) (b), the provisions of this chapter shall, save in so far as they are inconsistent with the provisions of any Act of Parliament which prescribes a specified period within which a claim is to be made or an action is to be instituted in respect of a debt or imposes conditions on the institution of an action for the recovery of a debt, apply to any debt arising after the commencement of this Act.’

[29] Section 10(1) reads in the following:

‘Subject to the provisions of this Chapter and of Chapter IV, a 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.’

[30] Section 11 concerns itself with relevant period of prescription of debts and in terms of section 11(d) it provides that the period of prescription is “*save where an Act of Parliament provides otherwise, three years in respect of any other debt*”.

¹³ [2018] ZACC 7; (2018) 39 ILJ 1213 (CC) at para 187.

¹⁴ Act 68 of 1969.

[31] Section 12 seems to be concerned with the running of prescription, in that it provides the following:

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

[32] Section 15 (1) with respect to judicial interruption provides that:

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

[33] Section 15 of the Prescription Act provides that the running of prescription shall be interrupted by the service on the debtor of any process whereby the creditor claims payment of the debt, and “process” in terms of section 15(6) includes any document whereby legal proceedings are commenced. A debt need to be defined in order to reach acceptable conclusion, and so the Court in *Electricity Supply Commission v Stewarts and Lloyds of SA (Pty) Ltd*¹⁵, it held that a “debt” is :

‘... that which is owed or due; anything (as money, goods or service) which one person is under obligation to pay or render to another.’

[34] Pursuant to determination of the debt, is the collateral question of when is it due, to that effect, the Court in *Solidarity & others v Eskom Holdings Ltd*¹⁶, 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 action and to pursue his or her claim.’

[35] As for the ease of reference, the Court in *Truter and Another v Deyse*¹⁷, confirmed debt with similar precision as:

‘... 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,

¹⁵ 1981 (3) SA 340 (A) at 344E-G.

¹⁶ (2008) 29 ILJ 1450 (LAC) at paras 26.

¹⁷ [2006] ZASCA 16; 2006 (4) SA 168 (SCA) at para 15.

in other words, when everything has happened which would entitle the creditor to institute action and to pursue his or her claim.’

[36] The definition of “debt” refers to complete cause of action for the recovery of debt, and therefore it is against the same background that the term cause of action be outlined, even if briefly so. As to what constitutes a “cause of action” for this purpose, The Supreme Court of Appeal herein referred to (SCA) in *Santam Ltd v Ethwar*¹⁸, decided that: “... a cause of action is the entire set of facts which a plaintiff must prove to succeed”.

[37] Whereas in *Murray & Roberts Construction (Cape) (Pty) Ltd v Upington Municipality*¹⁹, it was clarified and adopted with confidence that the rationale behind section 15 is that where a creditor takes judicial steps to enforce the particular debt, prescription should be suspended pending finalization of such proceedings.

[38] As the prescription provides for mandatory period within which the creditor shall claim his or her debt in order to avoid it, it equally implies that the creditor must accede to prescribed time-frames.

[39] To some significance, by refusing him access into service, as dictated by terms and conditions of employment, the Respondent has committed material breach of contract in a form of repudiation and debt became due, immediately.

[40] That being the case, the Respondent in my view, deliberately reserved the rights subsequent to repudiation, as review could not hinder his next appropriate proceedings, this was also confirmed in *Snyders and Others v De Jager and Others*²⁰, that save where there is a statutory provision to that effect or an order of Court, a review does not suspend the operation of the order of Court.

[41] On the other hand, it is worth mentioning, that even though judgment debt as contemplated in section 11(a)(ii) of the Prescription Act, would be prescribed in a

¹⁸ 1999 (2) SA 244 (SCA); [1998] ZASCA 102 at 252I-J.

¹⁹ 1984 (1) SA 571 (A) at 578H.

²⁰ [2016] ZACC 55; 2017 (3) SA 545 (CC) at para 37.

period of 30 years, in my view it does not find application with this Applicant's claim as the cause of action is independent of each other.

[42] In essence, it is only correct to conclude that the Applicant's case depends on elements of the breach of contract in employment context as entrenched in Section 77 of BCEA, and developed from time to time like accommodating the principle of mitigation as envisaged in Section 39 (2) of the Constitution.²¹

Conclusion

[43] Against this background, I conclude in the following:

[44] Section 12(1) of Prescription Act, commenced to run and became due, effective from July 2012, whereas prescription was never interrupted by the 2014 Court Order as the cause of action was distinguishable.

[45] The debt has since prescribed by July 2015, and even the principle of "continuous wrong" which in a case of *Slomowitz v Vereeniging Town Council*²², was accepted as a wrong which "*is still in the course of being committed and not wholly past*", could not assist Applicant's case.

[46] Nevertheless, the Applicant did not mitigate his damages and so, failed to prove the developed *essentialia* requirement of employment contract.

[47] The Applicant's application stands to be dismissed.

Costs

[48] In terms of the provisions of section 162(1) of the LRA, which regulates orders for costs in this Court, I have a wide discretion when it comes to the issue of costs, having regard to the requirements of the law and fairness after taking into account all of the relevant facts and circumstances.

²¹ Act 108 of 1996.

²² 1966 (3) SA 317 (A).

[49] The Labour Appeal Court has since confirmed the sentimental approach in a matter of *MEC for Finance: Kwazulu-Natal and Another v Dorkin NO and Another*²³, per Zondo JP (as he then was), held that “*the relevant statutory provision is to the effect that orders of costs in this Court are to be made in accordance with the requirements of the law and fairness*”.

[50] In exercising its judicial discretion, the Constitutional Court in *Long v South African Breweries (Pty) Ltd and Others*²⁴, reaffirmed the principle set in *Zungu v Premier of the Province of KwaZulu-Natal and Others*²⁵, with regard to costs in employment disputes and stated that “*when making an adverse costs order in a labour matter, a presiding officer is required to consider the principle of fairness and have due regard to the conduct of the parties*”.

[51] Taking account all the relevant facts and circumstances, as well as the requirements of the law and fairness, I do not consider it appropriate to make a costs order, and I ultimately exercises my discretion as to costs accordingly.

[52] In the premises, I make the following order:

Order

1. The application is dismissed.
2. There is no order as to costs.

B. J. Dikotla

Acting Judge of the Labour Court of South Africa

Appearances:

For the Applicant:	A.J. Nel
Instructed by:	Goldberg Attorneys

²³ [2007] ZALAC 34; (2008) 29 ILJ 1707 (LAC) para 19.

²⁴ [2019] ZACC 7; (2019) 40 ILJ 965 (CC) at para 30.

²⁵ [2018] ZACC 1; (2018) 39 ILJ 523 (CC) at para 25.

For the First Respondent: M.J. Van As

Instructed by: Schoeman Steyn Attorneys Inc

LABOUR COURT