**IN THE LABOUR APPEAL COURT OF SOUTH AFRICA Held in Johannesburg**

**Case no: CA 9/05**

**IN THE MATTER BETWEEN**

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| **SOLIDARITY** | **1st Appellant** |
| **R N HUTCHINGS** | **2nd Appellant** |
| **APPELLANTS AS PER SCHEDULE HERETO** | **3rd to further appellants** |

**AND**

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| **ESKOM HOLDINGS LIMITED** | **Respondent** |

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## JUDGMENT

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**ZONDO JP**

[1] I have had the benefit of reading the judgment prepared by Khampepe JA in this matter. I agree with her conclusion that the appellant's "**claim**" had not prescribed. Accordingly, I agree that the respondent's so-called first "**special plea**" fell to be dismissed and that the Labour Court was right in dismissing it. However, I am unable to agree with Khampepe JA and the Labour Court that what I refer to hereunder for convenience as the "**unreasonable delay**" rule applies in this case and that, because of that rule, the

appellants' application cannot be considered on the merits and should be dismissed. I set out my view and my reasons for it hereinafter. Khampepe JA has in her judgment adequately set out the factual background to this matter. For that reason I do not propose to deal with the factual background save to the limited extent that may be necessary for the proper understanding of this judgment.

[2] As this matter concerns what the parties have regarded as "**special pleas**" or points in limine raised by the respondent to the appellant' claim as contained in the appellants' statement of claim, the matter must be decided on the basis of the allegations of fact contained in the appellants' statement of claim. The appellants filed and served their statement of claim against the respondent in the Labour Court on the 17th April 2003. According to the appellants' statement of claim the following is what gave rise to the claim:

- **On 10 July 1998 an oral agreement was concluded between the first appellant in its own name and on behalf of all of those of its members who were employed by the respondent as licenced operators on certain matters including that the respondent would pay licenced operators a "yearly once-off non-pensionable payment equal to double his/her monthly basic salary with effect from 1998 and continue to do so to date hereof."**

- **In November 1998 consensus was reached between the**

**parties on a scheme for early retirement of licenced operators and the respondent subsequently reduced the agreement to writing in a document referred to as "Management Directive 102 Revision 2" which was signed on the 2nd November 1998.**

- **With effect from the 15th January 1999, in breach of their obligations, "Eskom and the Respondent have unlawfully refused to implement the provisions of [the Management Directive 102 Revision]" ("MD102").**

**The respondent's refusal to implement MD102 was evident from a letter dated the 15th January 1999 from the respondent's Mr Peter Prozensky in which he advised that MD102 would be "temporarily suspended" in so far as it related to early retirement for licenced operators**.

In their statement of claim the appellants sought an order declaring the respondent to be bound by the agreement relating to early retirement for licenced operators and MD 102 and that the respondent be ordered to take the necessary steps to implement such agreement and MD102 plus costs of suit.

[3] It is common cause between the parties that on the 15th January 1999 – the same day that the respondent purported to withdraw or

suspend MD102 – the first appellant or its predecessor declared a dispute on the respondent's conduct purporting to withdraw or suspend MD102. There can be no doubt that by its declaration of a dispute the first appellant conveyed to the respondent that it did not accept the respondent's conduct in so far as it purported to withdraw MD102 or in so far as it thereby sought to say it would no longer comply with its obligations under MD102 concerning early retirement for licenced operators. The message conveyed by the first appellant or its predecessor was clearly that it would hold the respondent to the agreement between the parties as reflected in MD102 in relation to early retirement for licenced operators.

[4] From the above it is beyond doubt that the dispute between the parties was on whether or not the respondent was still bound by the agreement between the parties on early retirement and would be obliged to honour those obligations at the appropriate times. Although some steps were taken between the parties to try and resolve the dispute, it had not been resolved by the 17th April 2003 which is when the appellants instituted court proceedings in the Labour Court. Having said this, it is necessary to also point out that there was a period of over two years during the period from January 1999 to 17 April 2003 when the appellants did not do anything about the dispute.

[5] In its response to the appellants' statement of claim, the respondent delivered and served a document which it said contained its "**special pleas**" to the appellants' statement of claim. For

convenience I shall refer to the points taken by the respondent as "**special pleas**" or "**points in limine**". The first "**special plea**" concerned was prescription. The respondent's point in this regard was in effect that, if the agreement alleged by the appellants existed, then their claim was, for purposes of the Prescription Act, for the payment of a debt. In this case that debt, contended the respondent, became due on the 15th January 1999 when the respondent purported to withdraw MD102 and the appellants had three years from that date to institute court proceedings which they instituted on the 17th April 12003. The period of three years from the 15th January 1999 lapsed on or about 14 January 2002 – more than a year before the appellants instituted court proceedings in the Labour Court. Because of this, said the respondent, the appellants' claim had prescribed.

[6] The respondent's second "**special plea**" or point in limine was in the alternative. It was that, if the appellants' claim had not prescribed under the Prescription Act, it, nevertheless, fell to be dismissed without being considered on the merits on the basis that the appellants had delayed unreasonably in instituting court proceedings about the matter. In this regard the first respondent pointed out that the period from the 15th January 1999 to the 17th April 2003 was more than four years.

[7] With regard to the point of prescription, the appellants' response was that the second and further appellants would be entitled to

early retirement provided for in MD102 if and when each one of them reached early retirement age in terms of that agreement and none of them had reached early retirement age in terms of MD102 at the time of the institution of court proceedings in the Labour Court. Accordingly, so went the argument, they would each reach their early retirement age at different stages in the future. It would only be at that stage, contended the appellants, that it could be said that the "**debt**" had become "**due**" in terms of the Prescription Act and prescription would begin to run at that stage – and not before. Accordingly, contended the appellants, their claims had not prescribed under the Prescription Act.

[8] With regard to the "**unreasonable delay**" point, the appellants' counter was that the "**unreasonable delay**" rule does not apply in this case because this was not a review application and this case was subject to a prescription period prescribed by the Prescription Act. The appellants pointed out that the so-called "**unreasonable delay**" rule only applies to reviews in respect of which there is no statutory provision prescribing a period within which they should be brought to Court and not to those which are subject to such a statutory requirement. The appellants argued that, at any rate, even if such rule applied in this case, it could not be said that they had delayed unreasonably in instituting court proceedings.

[9] The parties subsequently agreed that the points in limine or "**special pleas**" taken by the respondent should be decided by the court prior to the Court dealing with the merits. Obviously, if the

Court upheld any one of the points in limine or "**special pleas**" raised by the respondent, the matter would not proceed to the merits. It would only reach the merits if both points in limine or "**special pleas**" were dismissed. The Labour Court subsequently made an order giving effect to this agreement of the parties.

[10] The matter was duly set down for the purpose of the hearing of the points in limine or "**special pleas**". On the date of hearing, some oral evidence was led which covered only the points in limine or "**special pleas**". In due course the Labour Court, through Waglay J, handed down its judgment. In terms of that judgment the Labour Court dismissed the respondent's point in limine on prescription but upheld the point that the appellants had delayed unreasonably in instituting court proceedings. It ordered the appellants to pay the costs. Subsequently, the Labour Court granted leave to appeal. The appellants appealed to this Court against the decision of the Labour Court on the point concerning the "**unreasonable delay**" rule. The respondent noted a cross-appeal against the Labour Court's decision on the prescription point. The appellants also appealed against the order of costs. It does not appear that the respondent obtained leave to note a cross-appeal but, to the extent that it may have been required to obtain leave, I have no doubt that it would have been granted leave if it had sought leave. At any rate, nobody made this an issue before us.

[11] In a very thorough but succinct analysis of the authorities in her judgment, my Colleague, Khampepe JA, has come to the

conclusion in effect that in terms of the Prescription Act the "**debt**" owed to the appellants by the respondent would be "**due**" when each one of the second and further appellants reach their early retirement age and that it did not become due in January 1999. She has accordingly rejected the respondent's contention on the prescription point and upheld the decision of the Labour Court in this regard. For the reasons that Khampepe JA gives in her judgment, I agree with her conclusion on this point. I do not propose to add anything to her reasons. However, with regard to the second point in limine or "**special plea**", as I have already said, I find myself unable to agree with Khampepe JA. In my view the "**unreasonable delay**" rule does not apply to this case. I give my reasons for this view hereunder.

[12] Part of my difficulty with the conclusion that the appellants delayed unreasonably in instituting court proceedings is the scope of application of the rule on which the first "**special plea**" is based. Counsel for the appellants submitted that that rule is only applicable to review applications which are not subject to any statutory requirement that they be brought within a specific period. He indicated that, except for the judgment of Conradie J in **NAPTOSA & others v Minister of Education, Western Cape & others (2001) 22 ILJ 889 (C)** (in which Jali J concurred)**,** he was not aware of any case in which the rule had been invoked and the case was not a review application that is not subject to a statutory time limit that it should be instituted within a specific time period. Counsel for the respondent was also not able to refer us to any

cases in which the rule had been invoked where there was a statutory time limit applicable for the institution of a review application except the NAPTOSA case which was not a review case. I shall deal with the NAPTOSA case shortly.

[13] With regard to the first special plea, both the Labour Court and Khampepe JA conclude that the Prescription Act applied and that the appellants' claim had not prescribed at the time that the appellants instituted proceedings in the Labour Court. As I have already said earlier, I agree with this. It seems to me that the conclusion reached by Khampepe JA in regard to the prescription point means that prescription would effectively commence running after each affected employee had reached early retirement age in terms of MD102. It follows from this that, as the second and further appellants had not yet reached their respective early retirement ages at the time of their instituting the application for a declaratory order in the Labour Court, they could have instituted the application later than they did after they had reached early retirement age in terms of MD102 which would have been at different times in the future. It would also follow from the conclusion that the appellants had delayed unreasonably in instituting the application for a declarator that the appellants were obliged to have instituted the application much earlier than they did. These two conclusions – the first relating to the first "**special plea**", the second to the second "**special plea**" – are, to my mind, contradictory to each other and cannot both be correct.

[14] The first one is right, the second one not. In my view the answer to the respondent's second "**special plea**" is that the "**unreasonable delay"** rule does not apply in this case. Firstly, this is not a review application, and the rule applies to reviews only. Secondly, such rule does not apply to a case that is subject to a statutory limit in terms of the period within which it should be instituted. In this case the Prescription Act applies and the prescription period had not even begun to run when the appellants instituted court proceedings. That being the case, it would be a contradiction in terms to hold that the appellants had delayed unreasonably in instituting the application that they instituted in the Labour Court and, yet to also say, as it has been said in respect of the first special plea, that the appellants' claim had not prescribed in terms of the Prescription Act. To apply the "**unreasonable delay**" rule where the Prescription Act applies would, it seems to me, amount to the Court legislating another prescription period in addition to the one prescribed by the Prescription Act. In my view there is no reason or justification in law for that additional prescription period and it can only serve to sow confusion as to when the one period applies and when the other does not apply.

[15] Furthermore, the view that the "**unreasonable delay**" rule applies to a case where the Prescription Act applies will render the relevant provisions of the Prescription Act redundant. In terms of the Prescription Act, if A assaults B, B has three years within which to institute court proceedings for the payment of damages arising from the assault. The effect is that A can sit at home and not do

anything about his claim until the last minute before the expiry of the prescription period of three years. There is, in my view, no rule of law to the effect that, despite the availability to him of a period of three years within which to institute court proceedings, B must, nevertheless, institute court proceedings within a reasonable time prior to the expiry of that period of three years because, if he fails to do so, he will be barred from doing so even though the prescription period of three years prescribed by the Prescription Act has not expired. The reason why there is no such rule is because, when the Legislature prescribed three years, it regarded three years as a reasonable period within which A should be required to institute his claim for damages. There can, therefore, not be a rule that effectively nullifies the prescription period provided for in the Prescription Act. That is a rule that says A must institute court proceedings within a reasonable time before the expiry of the three years prescribed by the Prescription Act and says, if he fails to do so, he will suffer the same consequence that the Prescription Act says he will suffer if he fails to institute court proceedings within a much longer period, namely, three years. Such a rule would create a prescription period within a prescription period.

[16] In my view the same applies to this case. In terms of the conclusion relating to the first "**special plea**", the appellants' claim had not prescribed at the time of the institution of the proceedings in the Labour Court. That means that the appellants could still have waited for more time before they could institute the proceedings.

However, in terms of the Labour Court's decision on the second "**special plea**" the appellants were obliged to have instituted court proceedings despite the fact that their claim had not prescribed. The effect of that approach is that the appellants' claim was subject to two prescription periods, one in terms of the Prescription Act and the other in terms the so called "**unreasonable delay**" rule. The obvious question that arises is: when will the prescription period as prescribed by the Prescription Act apply and when will the prescription period founded upon the "**unreasonable delay**" rule apply? In other words: what is the relationship between the two?

[17] Obviously, the "**unreasonable delay**" rule can only apply prior to the expiry of the prescription period prescribed by the Prescription Act because, once the prescription period prescribed by the Prescription Act has expired, there will be no claim to which the "**unreasonable delay"** rule can apply. Once the "**unreasonable delay**" has occurred in a case prior to the expiry of the prescription period, and there is no good cause shown, the litigant is deprived of his claim in the same way as he would have been if he had delayed beyond the statutory prescription period in instituting court proceedings. In my view this would be untenable. The correct position is simply that, if a claim is subject to a prescription period prescribed by the Prescription Act or is subject to any specific statutory time frame within which it is required to be brought to Court, that is the time frame that governs it and the unreasonable delay rule has no application to it. In my view the "**unreasonable**

**delay**" rule applies to reviews that are not subject to a statutory requirement that they be instituted within a fixed period.

[18] The conclusion reached in Khampepe JA's judgment in respect of the prescription point that the appellants' claim has not prescribed is based on the finding that, when the respondent purported to withdraw or cancel the agreement reflected in MD102, that conduct on the part of the respondent constituted a repudiation which vested the appellants with an election to accept the repudiation and treat the agreement as at an end or to reject the repudiation and treat the agreement as alive and hold the respondent to it. It is also based on an acceptance that the appellants elected to reject the repudiation and to hold the respondent to the agreement. In my view the effect of that election was that the appellants were free to wait for the time in the future when in terms of that agreement between the parties they would be entitled to go on early retirement and when the respondent would be obliged to afford them certain benefits. They would then at that time be able to say to the respondent: the conditions which in terms of the agreement must be met before you must give us benefits A, B & C have been met and you must now give us those benefits. If the respondent gave them those benefits at that time, it would have complied with its obligations. However, if it refused to do so, they would then be able at that time to institute court proceedings. At that point the "**debt**" under the Prescription Act would become due and the prescription period would start to running. The appellants would not have been able to claim early retirement benefits prior to

the time when the conditions precedent applicable had been met. In my view if and when in the future the second and further appellants reach their early retirement age in terms of MD102, they will be entitled to require the respondent to comply with its obligations and, if the respondent fails to comply, they will be entitled to institute appropriate court proceedings. I am, obviously, not necessarily saying that they will succeed. I am saying that, if their allegations are taken as correct, they will have a claim at that time.

[19] If the appellants were entitled as a result of the election that they made to reject the repudiation and hold the respondent to the agreement as reflected in MD102 and would be entitled to wait until many years in the future to sue the respondent if it did not comply with its obligations then, the question that arises is; why must the respondent be compelled to live with the resultant uncertainty over many years on whether it is right or the appellants are right on whether or not the agreement is still binding after it purported to cancel or withdraw it?

[20] The answer to this question is, in my view, this one: the respondent is not obliged to live with such uncertainty for a long time because it is entitled to itself institute court proceedings immediately after the appellants have made the election to hold it to the agreement and in such proceedings it can ask for an order that it is no longer bound by the agreement or an order to the effect that that agreement has been validly cancelled or that it is void and of no legal effect. The appellants can also institute proceedings such as

the proceedings that they instituted for an order that the respondent is still bound by the agreement or that the purported cancellation or "**withdrawal**" of the agreement by the respondent was invalid and of no legal effect. In my view the position is that, when a dispute such as the one that arose between the parties in this case arises, each party is free to institute proceedings for an order that will ensure certainty about whether the agreement is still binding or not or to only institute proceedings later when in terms of the agreement it would have been entitled to certain benefits or performance or when it would have been obliged to make certain performance. If one says that the appellants' claim in this case had not prescribed at the time of the institution of court proceedings but also say that the appellants were obliged to have instituted court proceedings prior to the time of the institution of the proceedings that they did institute, one is forcing a duplication of proceedings on the appellants - with the attendant duplication of costs for litigation – in circumstances where all the issues that would be the subject of a court decision in the first proceedings would also have been some of the issues that would have been dealt with in the future if and when the second and further appellants would have reached their early retirement age and they would have had to institute court proceedings upon the respondent's refusal to honour its obligations in terms of the agreement. At that stage the appellants would sue the respondent under the agreement and in its defence the respondent would say that the appellants are not entitled to early retirement benefits claimed because the agreement had been validly cancelled. The appellants would say that the agreement was not validly cancelled. The court would then decide the point and, if it found for the appellants, also consider their claim to such benefits on the merits. Is there any reason why the second and further appellants should be forced to bring court proceedings earlier than when they reach early retirement age and the respondent refuses to honour its obligations? I cannot think of any.

[21] The irony about finding that the appellants must be barred from proceeding with their claim on the merits because they delayed unreasonably in instituting Court proceedings is this: if, in the future, any one of the second and further appellants reaches the early retirement age in terms of MD102 and all the conditions precedent prescribed by MD102 for him to be entitled to certain benefits have been met and he sues the respondent for performance thereunder when the respondent refuses to perform or to make certain payments, the court will not be barred from pronouncing on whether or not the agreement will still be binding on the respondent if the respondent raises that point as its defence. Accordingly, it will have been a futile exercise to say that the appellants delayed unreasonably in instituting court proceedings and to refuse to deal with the merits of the appellants' claim. Ultimately at that stage the merits of the claim will be dealt with. I now turn to Conradie J's judgment in NAPTOSA.

[22] In Naptosa's case the applicants brought an application to the High Court for a declaratory order that clause 3 of certain fixed-term

contracts of employment of certain educators was void, that the second to seventh applicants were entitled for the years 1998 and 1999 to all benefits afforded to educators in terms of certain regulations, including pension benefits of the Government Employees Pension Fund constituted in terms of the Government Service Pension Law 1973 and that the unilateral change of certain service benefits of temporary educators in 1998 and 1999 constituted an unfair labour practice in terms of sec 23(1) of the Constitution and costs.

[23] It is not apparent from Conradie J's judgment when the applicants in the Noptosa case brought their application to Court. It seems to have been heard in August 2000. It seems that the events which had given rise to the application had occurred at the end of 1997 and in 1998. In NAPTOSA's case Conradie J dealt with a number of issues. One of them was that the applicants in that case had failed to establish their entitlement to specific benefits. Another one was that there had been a "**substantial delay**" on the part of the applicants in bringing their application for a declaratory order. Conradie J said at 900 F:

> "**I consider that the substantial delay in bringing these proceedings is another reason for exercising our discretion against the grant of a declaratory order. It is well-established law that undue delay may be taken into account in exercising a discretion as to whether to grant an interdict or a mandamus or to grant relief in review proceedings. The declaratory order, being as flexible as it**

> **is, can be used to obtain much the same relief as would be vouchsafed by an interdict or a mandamus. Where it is not necessary that a record of proceedings be put before the Court, a declaratory order could serve as a review. A court, in exercising its discretion whether to grant a declaratory order should accordingly, in an appropriate case, weigh the same considerations of 'justice or convenience' as it might do in the case of an interdict or a review.**"

[24] It is clear from the above passage that in NAPTOSA the Court did not rely only on the "**unreasonable delay**" rule for its decision to dismiss the applicants' application for a declarator. Conradie J said so in so many words when at 901B he said: "**I do not say that any one of the above considerations by itself would have been decisive. Taken together, they constitute in my opinion a formidable hurdle in the way of the exercise of a discretion favourable to the applicants**." Actually, a careful consideration of Conradie J's judgment reveals that he was taking into account the delay in instituting proceedings as one of a number of factors – not to non-suite the applicants but in the exercise of his discretion whether or not to grant the declaratory order on the merits of the case before him. That is different from the case before us. In this case the Labour Court was not asked to take into account the delay in the exercise of its discretion to grant or refuse the declaratory order on the merits but it was asked to uphold the point as a

"**special plea**" so that the appellants' claim could not be considered on the merits. In fact the parties had agreed effectively to separate the "**special pleas**" from the merits of the case and an order of the Labour Court effecting such separation was granted.

[25] In the light of all of the above I am of the opinion that the appellants' appeal must succeed and the respondent's cross-appeal stands to be dismissed. The appeal was in respect of the Labour Court's decision on the second "**special plea**" whereas the respondent's cross-appeal was in respect of the decision of the Labour Court on the first "**special plea**".

[26] With regard to costs I am of the opinion that the requirements of the law and fairness dictate that there should be no order as to costs. There is a continuing employment relationship between the parties in this matter and the matter which is the subject of the present proceedings is of great importance to all parties concerned. Even in the Labour Court no order as to costs ought to have been made. It was made against the appellants. The appellants have appealed against that cost order. In the premises I make the following order:

1. The appellant's appeal against the decision of the Labour Court in respect of the second "**special plea**" is upheld.
2. The respondent's cross-appeal in respect of the first "**special plea"** is dismissed.
3. There is to be no order of costs on appeal.

4. The order of the Labour Court in respect of the second "**special plea**" and the order of costs are hereby set aside and, for them are substituted the following orders:

   **"(a) The second special plea is hereby dismissed.**

   **(b) There is to be no order as to costs."**

ZONDO JP

I agree.

JAPPIE JA.

Appearance

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| For the appellant | : | Adv MSM Brassey SC |
| Instructed by | : | De Lange Attorneys |

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| For the respondent | : | Adv Schippers SC |
| Instructed by | : | J Ramages Attorneys |
| Date of judgment | : | 20 February 2008 |

**IN THE LABOUR APPEAL COURT OF SOUTH AFRICA**

**APPEAL CASE NO: CA9/05**
**LC CASE NO: C207/2003**

In the matter between:

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| **SOLIDARITY** | First Appellant |
| **R N HUTCHINGS** | Second Appellant |
| **APPELLANTS AS PER SCHEDULE HERETO** | Third to Further Appellants |

and

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| **ESKOM HOLDINGS LIMITED** | Respondent/Cross Appellant |

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**J U D G M E N T**

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**KHAMPEPE, AJA:**

**INTRODUCTION**

[1] This is an appeal, with the leave of the court *a quo*, against an order granted by Wagley J on 19 January 2005, in the Labour Court in which he dismissed the appellants' application for a declaratory order seeking to bind the respondent to an agreement (Management Directive 102) allegedly entered into on 10 July 1998 with the appellants. The application was dismissed on the basis that the appellants had delayed unreasonably – some four and a half years – before launching the proceedings. The court *a quo* also dismissed the respondent's special plea of

prescription, in respect of which it has noted a cross-appeal.

[2] The first appellant is a trade union registered in terms of the Labour Relations Act (‘*the LRA*”). The second to further appellants are licensed reactor operators, employed at the respondent’s Koeberg Power Station. They are members of the first appellant union.

[3] In the court *a quo* the appellants sought an order declaring that the respondent was bound by an agreement entered into between the first appellant and the respondent. In terms of that agreement, the appellants claimed that the parties had agreed to implement an early retirement scheme for licensed operators. Accordingly, they claimed an order directing the respondent to take the necessary steps to implement the early retirement scheme.

[4] The respondent raised two special pleas, namely prescription and unreasonably delays.

[5] On 9 February 2004, pursuant to an agreement between the parties, it was ordered that the points *in limine* be heard on 23 September 2004. On that day the respondent adduced evidence in the court *a quo* regarding prescription and unreasonable delay.

**FACTUAL BACKGROUND**

[6] On 2 November 1998 Eskom, Koeberg, issued Koeberg Management Directive 102 Revision 2 (“*MD 102*”), which contained *inter alia* an early retirement scheme for licensed operators. In essence, the scheme provided that such operators would qualify for additional condoned service according to a formula in terms of which the operator would be credited with 1, 5 years’ service for each one year of active licensed duty. According to the scheme, licensed operators would have been able to retire earlier, without forfeiting the benefits that they would have received, had they worked to the normal retirement age of 65.

[7] On 14 January 1999 the respondent withdrew MD 102. On the same day Mr Douglass and Mr Wilczewski, officials of the first appellant's predecessor, the Mine Workers' Union ("*MWU*"), declared a dispute on behalf of the licensed operators at Koeberg. They described the dispute as follows:

> "*An agreement has been reached, between Koeberg management, all affected staff & all trade unions willing to participate, for the early retirement of operating personnel. This has now been withdrawn.*"

[8] On 15 January 1999 Mr Peter Prozesky ("*Prozesky*"), the manager of Koeberg Power Station, advised the operating training staff that there had been a misunderstanding by Koeberg management regarding corporate approval (by the respondent) to proceed with the implementation of MD 102, and that it had been withdrawn completely.

[9] On 15 January 1999 Koeberg management and all the then recognised trade unions signed a staff briefing notice confirming that MD 102 had been withdrawn and that MWU had declared a dispute.

[10] On 22 January 1999 an Internal Conciliation Committee was convened but did not resolve the dispute.

[11] On 13 October 1999 MWU addressed a letter to Prozesky advising him that on 14 January 1999, it had raised a dispute regarding the decision to withdraw MD 102, and requested the respondent to state its position.

[12] Between 22 January 1999 (the date of the meeting of the Internal Conciliation Committee) and 5 August 2002, the appellants did not take any steps to resolve the dispute.

[13] On 5 August 2002 the second appellant, on behalf of licensed operators at Koeberg, the bulk of who are members of the first appellant, lodged a grievance that the respondent had breached MD 102. The first appellant's members described their grievance as follows:

> "*WE THE UNDERSIGNED HAVE A GRIEVANCE WITH KOEBERG MANAGEMENT DUE TO A BREACH IN CONTRACT WITH REGARD TO PAYMENTS AGREED TO UNDER MD 102*."

[14] On 7 August 2002 the second appellant's grievance on behalf of the members of MWU was dealt with at the next level, but was not resolved.

[15] On 4 September 2002 Eskom, Koeberg, completed Grievance Investigation Form III but the grievance remained unresolved.

[16] On 25 November 2002 a meeting was held between members of the first appellant (assisted by their attorney and counsel) and Prozesky. The parties agreed to meet again on 15 January 2003 to attempt to resolve the dispute. It was also recorded that it was open to the first appellant to launch proceedings in the Labour Court or in the High Court in the meantime.

[17] Subsequent meetings were held with a view to resolving the dispute but without success.

[18] On 17 April 2003 the appellants served and filed their statement of claim.

I now turn to consider the issue of prescription.

[19] In the court *a quo* the respondent argued that the declarator sought by the appellants was an equivalent of a claim for the payment of debt (in this case the claim for the pension benefits in terms of the agreement) which had become prescribed at the very least on 15 January 1999 when the withdrawal of the benefits was communicated to the applicants. In dismissing this argument the court held that the appellants' right to claim early retirement benefits had not become prescribed. The court *a quo*, quite rightly, held that the respondent's contention that the appellants' claim for early retirement benefits, fell due at the very least on 15 January 1999 when the withdrawal of the early retirement scheme was communicated to the appellants was incorrect. It found that on 15 January 1999 only the right to the retirement scheme had been withdrawn.

[20] Mr Van der Riet who appeared on behalf of the respondent, argued before us, that the court *a quo* erred in failing to find that the appellants' claim for early retirement benefits under MD 102, was based on an acknowledgement by the appellants that the respondent had allegedly breached MD 102 on 14 January 1999. It contended that prescription began to run on 14 January 1999 when the breach of MD 102 was communicated to the applicants. It was therefore contended that when the respondent withdrew MD 102 on 14 January 1999, the right to claim early retirement benefits fell away and with it any future claim to those benefits.

[21] Mr Brassey, who appeared on behalf of the appellants, however argued that according to MD 102, the appellants only became entitled to claim early retirement benefits when in each of their respective cases, the debt fell due. It was therefore argued that, since at the date of application for a declarator, none of the appellants had retired, the debt owing to each of the beneficiaries had not arisen and their claim for the retirement benefits had not become prescribed.

[22] Section 12 of the Prescription Act[1] provides that:

> "*12* ***When prescription begins to run –***
>
> *1)* *Subject to the provision of subsections (2) and (3), prescription shall commence to run as soon as the debt is due.*
>
> *2)* …
>
> 3) *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.*"

[23] The issue whether the appellants' claim for the retirement benefits has become

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1 68 of 1969.

prescribed depends on whether the debt had become "*due*" when the application for a declarator was launched.

[24] In submitting that the debt had become due, the respondent placed much reliance on the appellants' written declaration of dispute on 14 January 1999 in which the respondent's withdrawal of the retirement benefits was recorded. It was therefore argued that prescription began to run on the day of repudiation.

[25] The meaning of what the term "*debt due*" denotes in terms of section 12(1) of the Act, has received the attention of the courts in many judicial pronouncements. It has authoritatively been determined to mean that "*there has to be a debt immediately claimable by the debtor* [sc 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*"[2].

[26] 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[3].

[27] The due date of the debt arising from breach of contract is usually determined by the particular wording of the contract[4]. In terms of MD102 this was when each of

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2 See *Deloite Haskins & Sells Consultants (Pty) Ltd v Bowthorpe Hellerman Deutsch (Pty) Ltd* 1991 (1) SA 525 (A) 532; *Santam Ltd v Ethwar* 1999 (2) SA 244 (SCA) at 253; *Cape Town Municipality and Another v Allianz Insurance Co Ltd* 1990 (1) SA 311 (C) at 321;

3 See *Evans v Shield Insurance Co Ltd* 1980 (2) SA 814 (A) 838D-H; *HMBMP Properties (Pty) Ltd v King* 1981 (1) SA 906 (N); *Uitenhage Municipality v Molloy* 1998 (2) SA 735 (SCA) at 741A; *List v Jingers* 1979 (3) SA 106 (A) 121; *Benson and Another v Walters and Another* 1981 (4) SA 42 (C) at 48F-G; *Santam v Athwar supra*.

4 Christie on *The Law of Contract in South Africa* 5th edition page 486 and cases cited in footnote 434. See also *Santam v Athwar supra* at 253A.

the appellants reached retirement.

[28] The respondent's argument in paragraph [20] above has lost sight of the fact that in the event of a breach of contract including an anticipatory breach, the party in breach may become liable for different kinds of debts, in respect of which prescription will not necessarily begin to run at the same time. Upon breach of contract the debtor may become liable for specific performance (or declaratory order) in terms of the contract or for damages arising from the breach of contract[5].

**DUE DATE OF DEBT ARISING FROM BREACH OF CONTRACT**

[29] In my view the respondents have failed to appreciate the significant distinction between a breach of contract and an anticipatory breach in regard to the determination of when prescription commences to run. The significance of this distinction was eloquently articulated in *HMBMP Properties (Pty) Ltd v King*:

> "*Where a party to a contract repudiates in advance his obligation under the contract to render performance at some future date such repudiation by itself has no effect in law, save that it*
>
> > *'places the other party in a position to elect whether to treat such conduct as a breach of contract, or to persist in the contract and hold his opponent to all its terms when the due date should arrive'.*
>
> *De Wet v Kuhn 1910 CPD 263 at 267. If the innocent party elects not to treat the repudiation as a breach of contract but to await the arrival of the date fixed for performance, then the repudiation is a nullity and both parties remain bound by their obligations under the contract. Geldenhuys and Neethling v Beuthin 1918 AD 426 at 444; De Wet and Yeats Kontraktereg 4th ed at 155. If however the innocent party elects to treat the repudiation as a breach and cancels the contract, he treats the contract as at an end from the date of his election; so much so that he can, after cancellation, still enforce rights under the contract which have accrued and have become due and*

5 Loubser on *Extinctive Prescription* page 68 paragraph 4.5.

*enforceable before cancellation. Crest Enterprises (Pty) Ltd v Rycklof Beleggings (Edms) Bpk 1972 (2) SA 863 (A) at 870. The innocent party is given a reasonable time after repudiation within which to make his election, failing which he loses his right to cancel on account of the repudiation. De Wet and Yeats (supra at 196). The party who has repudiated is entitled to withdraw his repudiation before the other party has made his election. Cole v Stuart 1940 AD 399 at 414.*

*In our law, therefore, an anticipatory repudiation only becomes a breach of contract if and when, as a result of such repudiation, the innocent party, in the exercise of the election which the repudiation gives him, cancels the contract. Novick v Benjamin 1972 (2) SA 842 (A) at 861; De Wet and Yeats (supra at 155).*

In the case of a breach of a contractual obligation which has fallen due for performance, a right of action generally accrues immediately on such breach; differing in this respect from an anticipatory breach. In the case of an anticipatory breach - which is described by JANSEN JA in Novick's case as a novel form of breach - the innocent party becomes entitled to sue the defaulting party immediately for damages resulting from his repudiation of an obligation the time for performance of which has not yet arrived - but only immediately after the innocent party has cancelled the contract in the exercise of his right to elect whether to treat the contract as at an end."[6]

[30] Wessels[7] also state that:

"*The aggrieved party however is not compelled to regard the repudiation as a breach and forthwith sue for damages; he is entitled to refuse to accept the repudiation and to await the arrival of the date of performance of them to bring his action.*"

[31] There are other authoritative academic authors who state the law in broadly the same terms.[8]

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6 @ 910

7 The *Law of Contract in South Africa* 2nd edition Volume II page 795 paragraph 2938.

8 Kerr on *The Principles of the Law of Contract* 6th edition at paragraph 561, dealing with extinctive prescription. Loubser on *Extinctive Prescription* page 71; Christie on *The Law of Contract*page 87. He emphasises the need for the innocent party to exercise his election within a reasonable time.

[32] Repudiation therefore only becomes a breach of contract if and when the innocent party in the exercise of the election which repudiation affords him\her cancels the contract. As stated by Mthiyani JA in Ndlovu v Santam an unaccepted repudiation is a "*thing writ in water*".[9]

[33] The debt of the repudiating party arising from the election of the innocent party to treat the contract as at an end becomes due when the election is made. In that event prescription begins to run from that time.

[34] Whether an election has been exercised is a question of fact to be deduced from the circumstances of each case.[10]

[35] To the extent that the respondent's reliance on the written declaration by the appellant on 14 January 1999 can be construed to constitute an election on the part of the appellant, it appears to me to be out of step with the general trend of authority that the election must be unequivocal and/or the kind to be inferred from the conduct of the creditor.[11]

[36] Quite to the contrary, the appellants' written declaration on 14 January 1999 is in my view, clearly indicative of their non-acceptance of the breach.

For these reasons I would therefore dismiss the respondent's appeal with costs including the costs of two counsel.

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9 2006 (2) SA 239 (SCA) at page 248 paragraph C; *Culverwell and Another v Brown* 1990 (1) SA 7 (A) at 28B-F.

10 Kerr on *Principles of the Law of Contract* 6th edition at 563-4; *Consol Ltd t/a Consol Glass v Twee Jonge Gezellen* 2005 (6) SA 23 at page 40.

11 *Segal v Mazzur* 1920 CPD 634 at 644-5 approved in *Du Plessis and Another NNO v Rolfes Ltd* 1997 (2) SA 354 (A) at 364H.

**UNREASONABLE DELAY**

[37] The remaining issues arise from the appellants' challenge of the court *a quo's* finding that the appellants had delayed unreasonably by approximately 4½ years in launching an application for a declaratory order.

[38] The appellants sought a declaratory order in terms of section 158(1) (a) (IV) of the LRA. The provisions of the relevant section do not prescribe the period within which to launch such an application. The court *a quo* took the view, quite correctly so in my view, that it had an inherent power to dismiss the application on account of unreasonable delay.

[39] The approach to be adopted by our courts when faced with the issue of unreasonable day and the legal principles applicable thereto, were well articulated by Brand JA in *Associated Institutions Pensions Fund and Others v Van Zyl and Others*[12] as follows:

> "*It is a longstanding rule that courts have the power, as part of their inherent jurisdiction to regulate their own proceedings, to refuse a review application if the aggrieved party had been guilty of unreasonable delay in initiating the proceedings. The effect is that, in a sense, delay would 'validate' the invalid administrative action (see eg Oudekraal Estates (Pty) Ltd v City of Cape Town and Others 2004 (6) SA 222 (SCA) ([2004] 3 All SA 1) at para [27]). The raison d'être of the rule is said to be twofold. First, the failure to bring a review within a reasonable time may cause prejudice to the respondent. Secondly, there is a public interest element in the finality of administrative decisions and the exercise of administrative functions (see eg Wolgroeiers Afslaers (Edms) Bpk v Munisipaliteit van Kaapstad 1978 (1) SA 13 (A) at 41).*
>
> *[47] The scope and content of the rule has been the subject of investigation in two decisions of this Court. They are the Wolgroeiers case and Setsokosane Busdiens (Edms) Bpk v Voorsitter, Nasionale Vervoerkommissie, en 'n Ander 1986 (2) SA 57 (A). As appears from these two cases and the numerous decisions in which they have been followed, application of the rule requires consideration of two questions:*
>
> *(a) Was there an unreasonable delay?*
> *(b) If so, should the delay in all the circumstances be condoned?*
> *(See Wolgroeiers at 39C - D.)*

12 2005 (2) SA 302 (SCA) 321 paragraphs 46-48.

> *[48] The reasonableness or unreasonableness of a delay is entirely dependent on the facts and circumstances of any particular case (see eg Setsokosane at 86G). The investigation into the reasonableness of the delay has nothing to do with the Court's discretion. It is an investigation into the facts of the matter in order to determine whether, in all the circumstances of that case, the delay was reasonable. Though this question does imply a value judgment it is not to be equated with the judicial discretion involved in the next question, if it arises, namely, whether a delay which has been found to be unreasonable, should be condoned (see Setsokosane at 86E - F).*"

[40] The finding of the court *a quo* was that the appellants had delayed unreasonably in the launching of its declaratory application.

[41] It has however been argued on behalf of the appellant that the court *a quo* did not properly exercise its discretion in that having found that there was unreasonable delay, the court *a quo* "*considered that to be the end of the matter and looked no further*".

[42] In its reasoning the court noted that in the present matter the respondent withdrew the early retirement scheme on 15 January 1999 – just over two months after it was reduced to writing: That the appellants raised a grievance in respect thereof and the grievance was unsuccessfully dealt with on 22 January 1999: That notwithstanding, no formal steps at all to pursue the matter further were taken for an inordinately long period, from 22 January until 5 August 2002. On 5 August they again filed a grievance and then declared a dispute on 27 August 2002 this dispute remained unresolved following a conciliation meeting held on 25 November 2002. Appellants then waited a further six months before they launched the present proceedings.

[43] It was contended on behalf of the appellants that the delay in the institution of proceedings was adequately explained by the events which occurred at the meeting held between Prozesky and the appellants in which it was explained that notwithstanding the withdrawal of the directive, the respondent remained committed to the spirit and intent of the directive. To this extent Prozesky stated that persons, who would have otherwise qualified under MD 102 for early retirement, could approach him and their circumstances would be considered on a case by case basis. In my view the undertaking by Prozesky to consider each case on its merits could not have been misconstrued by the appellants as the respondent's revival of MD 102.

[44] The court *a quo* found that not only was the delay in prosecuting the action by the appellants substantial but that they had failed to provide any explanation for their delay. It noted that the first appellant was a trade union and by its nature an expert on the actions it ought to take in order to protect its member's interest. In this regard it found that:

> "*In any event it does not claim that it was uncertain of the actions it was required to take. The second to further applicants like the first applicant were aware of the respondent's withdrawal of the early retirement scheme from 15 January 1999 they also took no steps to prosecute this action nor do they explain the reason for their failure to do so. The fact that the applicants may have repeatedly raised the issue with senior officials of the respondent does not assist them as they were well aware of the processes with which they were obliged to comply*."

[45] I can find no cogent reason to interfere with the court *a quo's* finding in this regard.

[46] Mr Van der Riet who appeared on behalf of the respondent submitted that the

appellants cannot succeed when the prejudice to the respondent is considered. I agree. Of pivotal consideration is the severe prejudice that the declaratory order would have caused not only to the respondent but to a large number of its workforce.

[47] Prozesky's evidence in this regard is instructive. He testified that if MD 102 had to be implemented, it would run counter to the principle of collective bargaining, in that all of the parties that would be implicated would not have had an opportunity to negotiate on the issue of early retirement.

[48] There would be severe financial prejudice. If MD 102 had to be implemented, about 80 senior reactor operators and 155 reactor operators would be eligible for the benefits under MD 102, which would cost the respondent approximately R162 million.

[49] The implementation of MD 102 would also have national implications since other employees in high-risk jobs such as national control operators and pilots would have to be considered for early retirement. There are about 73 employees affected which would cost the respondent an additional amount of some R160 million. In total the respondent would stand to lose about R322 million.

[50] For four years, the respondent and trade unions had been in negotiations to move from a defined benefit type of pension scheme to a defined contribution scheme. The scheme in terms of MD 102 is in conflict with the principles of those negotiations and the new pension system is incompatible with MD 102.

[51] The implementation of MD 102 would also have an adverse effect on labour relations at the respondent's coal-fired power stations. MD 102 was not negotiated at central level in a national forum and if it had to be implemented at Koeberg, there was the potential that the lack of negotiation at central level would have been used as a precedent by employees at other coal-fired power stations.

[52] It was also submitted that the court erred when it considered the question of unreasonable delay as a point *in limine*. I have grave difficulty in comprehending the appellants' complaint in this regard when in terms of the pre-trial minute dated 9 February 2004 the parties agreed to shorten the proceedings by seeking the court's indulgence to consider the issue of prescription and unreasonable delay raised by the respondent in its special pleas. The appellants' submission is therefore devoid of any substance.

**ORDER**

[53] For these reasons, the following order is granted:

[53.1] The appellants' appeal is dismissed with costs, including the costs of two counsel.
[53.2] The Respondent's cross-appeal is dismissed with costs, including the costs of two counsel.

**KHAMPEPE, AJA**

I concur.

**ZONDO, JP**

I concur.

**JAPPIE, AJA**

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|---|---|---|
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| DATE OF JUDGMENT | : | 2007-12-21 |