

IN THE LABOUR APPEAL COURT OF SOUTH AFRICA  
HELD AT JOHANNESBURG

CASE NO: DA19/08

In the matter between:

THE NATIONAL UNION OF PUBLIC SERVICE                      Applicant  
AND ALLIED WORKERS

and

THE PUBLIC SERVANTS UNION Respondent

## JUDGMENT

**Waglay DJP**

## Background

- [1] On 30 March 1998 a number of Trade Unions amalgamated to form a single union. This was done in terms of s102 of the Labour relations Act no 66 of 1995 (the “LRA”). The new amalgamated union was called: “*The National Union of Public Service and Allied Workers*”. It is the appellant in this matter. The appellant was registered as a trade union in terms of the LRA on 13 August 1998.

- [2] One of the Unions that was a party to the amalgamation was the Public Servants Union.
- [3] In terms of the LRA when a number of trade unions amalgamate to form one union and the new union is registered, all the assets, rights, obligations and liabilities of the trade unions which constitute the new union devolve upon and vests in the new union.<sup>1</sup>
- [4] The above notwithstanding, the trade unions that formed the appellant concluded a written agreement (hereafter referred to "the Agreement") on 30 March 1998, in relation to their amalgamation. There are two clauses in the Agreement which are relevant to this matter. These two clauses provide as follows:

*Clause 5: That all assets acquired by the parties prior to the signing of this agreement shall be the property of that party to deal with in terms of its constitution.*

*Clause 6: That each party shall be afforded a period not exceeding two years within which to centralise their administration and financial affairs into the trade union [the new/amalgamated union]*

### **The present dispute**

- [5] In and during September 2005 the appellant instituted an action against “*The Public Servants Union*” (the “Respondent”) at the Labour Court wherein it sought the following order:

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<sup>1</sup> See s 102(5) of the LRA

" 1. *THAT it is declared that the applicant is entitled to delivery of the respondent's assets as at 13 August 1998; alternatively all such assets and the value of any monetary assets comprising the same as at 13 August 1998 together with interest thereon at the rate of 15,5% per annum according to law.*

2. *THAT the respondent is ordered:*

*(a) to render to the applicant within 10 days of the date of this Order a statement of account of its assets at 13 August 1998; and*

*(b) to debate the said account with the applicant within 30 days from the date when it was rendered in terms of paragraph 2 (a) of this Order.*

3. *THAT the respondent is ordered to pay the applicant's costs. "*

[6] In support of its prayers, in its Statement of Claim, it made inter alia, the following allegations:

at paragraph 4 (the first paragraph 4 on page2) it said:

*"The respondent is the PUBLIC SERVANTS UNION, a former trade union and an association duly registered and incorporated under section 21 of Act No. 61 of 1973 according to law, which has its registered address at 9 Stanley Crescent, Umhlanga Rocks, Kwazulu-Natal. "*

at paragraph 5 (the second paragraph 5 at page 6)it said:

*"On 13 August 1998, upon the registration of the applicant and in terms of section 102 (5) (a) of the Labour Relations Act, No. 66 of 1995, all the assets,*

*rights, obligations and liabilities of the respondent, as an amalgamating trade union at the material time, devolved upon and vested in the applicant”*

at paragraph 6 it said:

*“On a proper interpretation of the said agreement, material express, alternatively implied, terms of the said agreement were, in order to give effect to the provisions of s 102 (5):*

*(a) During the period not exceeding two years from the date of the said agreement contemplated in clause 6, the assets of the respondent acquired prior to the signature of the said agreement would continue to remain the property of the respondent to be dealt with by it in terms of its constitution. (See clause 5)*

*(b) But, within a period of two years from the date of the said agreement, the respondent was obliged to do all things necessary to transfer its administration and financial affairs, including the delivery of all its assets, to the applicant (See clause 6)”*

[7] The appellant further added that the respondent had failed to comply with the Agreement in that it failed and/or refused to deliver its assets and make disclosure thereof to the appellant and that it was “unaware of the precise extent of the assets” that vested and devolved upon it in terms of s102(5) (a) of the LRA.

[8] In response to the appellant’s claim the respondent denied that it was a “*former trade union*” and admitted that it was, as alleged by the appellant, a company duly registered in accordance with the Company laws of South Africa. The respondent also admitted, in paragraph 16.4 of its response to the appellant’s Statement of

Claim, that prior to becoming a company it was a duly registered trade union and that as a trade union<sup>2</sup> it was party to the Agreement; that after the registration of the appellant it no longer retained its status as a trade union and that all assets and liabilities of the amalgamated unions devolved upon and vested in the appellant. It added that the devolution and vesting was however, subject to clause 5 of the Agreement which provided that the amalgamated unions had two years to deal with their assets in accordance with their constitution.

[9] Respondent further went on to deny that it was liable to the appellant and denied the appellant's allegation relating to the import of the Agreement in relation to s102 of the LRA.

[10] Most importantly however the respondent raised a point *in limine* on the following grounds:

i. that the Appellant's claim had prescribed because it was based on the Agreement which was concluded in March 1998 and required performance in terms thereof within 2 years of its conclusion.;

ii. that the Labour Court had no jurisdiction to entertain this claim; and

iii. the referral was defective because it was brought by way of action rather than on application.

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<sup>2</sup> Even though respondent makes this allegation, the court must accept it because a trade union which in amalgamation with others goes on to form a new union loses its status as a trade union by operation of law in terms of s102(4) of the LRA.

- [11] The Labour Court (D.Pillay J) did not deal with the third ground of the point *in limine* nor has the appellant persisted therewith in this appeal. In any event it is a meritless ground. The Labour Court did uphold the respondent's point *in limine* in respect of the first two grounds: It found that the appellant's claim had prescribed and that because the respondent was not a trade union the Labour Court had no jurisdiction to entertain the claim.
- [12] The matter now comes on appeal with the leave of the Labour Court in respect of the above issues.
- [13] The first point that needs to be made is that neither the Statement of Claim nor the Response thereto are models of clarity. However, there are sufficient details in them to determine the point *in limine*.
- [14] Turning firstly to the issue of prescription. This is a statutory provision governed by the Prescription Act<sup>3</sup> and is intended to bring finality to disputes. The Prescription Act provides *inter alia* that a person or legal entity must institute legal proceedings within 3 years from the date on which a debt was due to it by a person or entity known to it, or whose identity it could have ascertained by the exercise of reasonable care.<sup>4</sup> For the purposes of prescription the word "debt" has a wide meaning and includes things other than money. Once a date for payment or delivery is fixed the debt becomes due from that fixed date and that is the date from which prescription commences to run. The Act also provides for instances

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<sup>3</sup> No 68 of 1969

<sup>4</sup> See sections 11(d); and 12(1) – (3) of the Prescription Act

when prescription ceases to run or is interrupted or suspended, but that is not relevant for present purposes. Hence, for prescription to run against a creditor, and at the expense of stating the obvious, the creditor must be aware of the existence of the debt; the debt must be due; and, the creditor must know the identity of the debtor.<sup>5</sup>

- [15] In this matter the appellant alleges that the assets held by the respondent vested and devolved upon it on the date it became registered as a trade union, which is 13 August 1998. In that case prescription would have commenced to run from that date and the claim would have prescribed three years later on or about 13 August 2001, because: the appellant knew the debtor (it was one of the trade unions that was party to its formation); it knew that it was owed a debt (which was the assets held by the respondent in terms of s102 (5) of the LRA); and, that the assets had devolved upon it and vested in it from 13 August 1998 (being the date of its registration as a trade union). If one has to disregard the date of the appellant's registration as a trade union and rely simply on the Agreement and the allegations made by the appellant in its Statement of Claim then prescription would have commenced to run from about 30 March 2000, because, the appellant alleged that the Agreement was concluded on 31 March 1998 and that the assets due to it by the respondent only became deliverable to it two years after the signing of the Agreement. On the allegations made by the appellant, it (the appellant) was obliged to institute a claim against the respondent on or before 30 March 2003. The appellant failed to do so, it only instituted its claim five and a half years after

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<sup>5</sup> This may not be necessary in all instances and if it is established that the creditor could have established the identity of the debtor then it may not be able to raise lack of knowledge as to the identity of the debtor as a defence against prescription.

it was due, in September 2005. Based on what I have stated earlier no matter which of the two dates is taken as the date on which the claim became due, having regard to the allegations contained in the appellant's statement of claim, its claim has prescribed.

[16] One of the arguments raised by the appellant, but not persisted in with any great vigour, and properly so, was that prescription could not commence to run against the appellant because it was unaware of the respondent's exact indebtedness to it. This is not one of the exceptions or grounds upon which prescription either does not commence to run, is interrupted or suspended. The appellant, as I have stated earlier, was aware that respondent was indebted to it for whatever assets it possessed as at 31 March 1998 or 13 August 1998 and that those assets were deliverable by, at the latest, 30 March 2000. With that knowledge the appellant could have instituted legal proceedings against the respondent within 3 years for the accounting of the debt as it has now done. Its failure to do so cannot serve to interrupt prescription. In any event it is not the certainty in relation to the quantum of the debt that determines the running of prescription but the fact of the debt that so determines it.

[17] In the circumstances the first ground of the respondent's point *in limine* was well founded and the claim, having prescribed, the Court *a quo* was correct in its decision and, on that ground alone, could have dismissed the appellant's claim. I may add that in deciding the issue of prescription I have assumed, in favour of the appellant, that respondent is a trade union that was a party to the Agreement on 31 March 1998 and continues to exist in that form.

[18] In regard to the issue of jurisdiction, the respondent has taken the name of the trade union and styled itself on that name. The “Public Servants Union” is now a company registered in terms of the company laws of South Africa. This is the allegation made by the appellant and admitted by the respondent. Furthermore, the appellant also alleges that the respondent was formerly a trade union, that being so, I fail to understand the basis upon which the appellant decided to institute an action against the respondent in the Labour Court. The Agreement that was signed and on which the appellant relies was signed by a different legal entity; the assets which the appellant seeks delivery of were possessed by a different legal entity; and, the appellant has made no allegations, assuming prescription was not a factor, to show why the respondent in the present form is liable for and on behalf of an entity that no longer exist, or, why the Labour Court could entertain an action against the respondent.

[19] As the appellant has failed to allege that the respondent in its present form is the entity that: is a trade union; or, is a trade union that amalgamated to form the appellant in terms of s102 of the LRA; or, is the entity that signed the Agreement which forms the basis for its claim, I fail to see any basis upon which the Labour Court could have jurisdiction over the respondent with respect to the alleged claim made by the appellant.

[20] In the circumstances the point *in limine* is well founded and the Court *a quo* was indeed correct to make the order it did.

[21] With regard to costs, I see no reason why in law and equity costs should not follow the result.

[22] In the result:

**The appeal is dismissed with costs.**

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**Waglay DJP**

**I agree**

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**Musi AJA**

**I agree**

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**McCall AJA**

APPEARANCES:

For the appellant: Adv.A G Jeffrey SC instructed by R F Sobey attorneys.

For the respondent: Adv.M B Pitman instructed by Masipa Inc.

Date of hearing: 13 May 2010

Date of judgement: 02 June 2010.