



IN THE LABOUR APPEAL COURT OF SOUTH AFRICA, JOHANNESBURG

Case number: JA 55/2014

Reportable

In the matter between:

HENDOR MINING SUPPLIES (A DIVISION OF

MARSCHALK BELEGGINGS (PTY) LTD)

Appellant

and

NATIONAL UNION OF METALWORKERS OF

SOUTH AFRICA

First respondent

MOSES FOHLISA & 41 OTHERS

**Second to further
respondents**

Heard: 17 September 2015

Delivered: 26 November 2015

Summary: Dismissal of respondents found substantively unfair by Labour Court (Cele AJ) and reinstatement ordered. Following unsuccessful appeal by appellant, writ of execution issued to execute payment of wages from date on which reinstatement ordered until date of actual reinstatement. Writ set aside by Labour Court in that not founded on order sounding in money. Respondents sought declaration from Labour Court that appellant liable to pay arrear wages. Gaibie AJ ordered appellant to pay back pay to respondents from date of reinstatement order to date of actual reinstatement. On appeal judgment debt distinguished from

contractual claim for wages in terms of employment contract. Claim for arrear wages as claim in contract subject to 3-year prescription period in terms of s 11(d) of the Prescription Act. By date of application to Labour Court such claim had prescribed. Appeal upheld with costs.

Coram: Tlaletsi DJP, CJ Musi JA et Savage AJA

JUDGMENT

SAVAGE AJA

- [1] This is an appeal, with leave of this Court, against the judgment of the Labour Court (Gaibie AJ) in which the appellant, Hendor Mining Supplies, a division of Marschalk Beleggings (Pty) Limited, was ordered to pay to the second to further respondents (the respondents), excluding deceased employees, remuneration for the period from 1 January 2007, being the date on which the Labour Court (Cele AJ as he then was) had ordered their reinstatement, until the date of their reinstatement by the appellant on 28 September 2009 with interest at the prescribed rate and costs. The appellant was ordered to pay such remuneration to the estates of deceased respondents, upon production of letters from the administrator or Master of the High Court, provided that the respondents were party to the Labour Court proceedings.
- [2] The relevant background to the order of Gaibie AJ is as follows. The appellant dismissed the respondents on 18 August 2003 for participating in an unprotected strike. Cele AJ found the dismissals unfair and ordered that the respondents be reinstated from 1 January 2007 and report for duty on 23 April 2007. This Court dismissed the appellant's appeal against Cele AJ's judgment with costs on 19 June 2009 and the appellant's petition for leave to appeal to the Supreme Court of Appeal was similarly dismissed with costs on 15 September 2009.
- [3] On 29 September 2009 the appellant reinstated the respondents into their employment but failed to pay them arrear wages from 1 January 2007 until the date of reinstatement. This caused the respondents to have a writ of execution issued against the appellant. On 23 July 2011 the Labour Court

(Van Voore AJ) set aside the writ on the basis that it related to no underlying judgment sounding in money and directed the respondents “to deliver a declaration setting forth the grounds and amounts claimed” by the respondents.

- [4] On 19 September 2012 the respondents applied to the Labour Court for an order quantifying the arrear wages due to them. In addition, the respondents sought the substitution under Labour Court Rule 22(5) of the names of deceased respondents with the names of the executors of their respective estates.
- [5] The appellant opposed the application on the basis that the founding papers were incomplete with various documents and confirmatory affidavits outstanding and that the respondents’ claims had prescribed. The appellant contended that the respondents’ claims for the payment of arrear wages from 23 April 2007 until 28 September 2009 did not relate to a judgment debt but were claims in contract which accrued weekly under the contract of employment; and that such claims were therefore a “debt due” within the meaning of s11(d) of the Prescription Act 68 of 1969 and subject to a three-year prescription period. The appellant conceded that the arrear wages due for the period from 1 January 2007 until 23 April 2007 amounted to a judgment debt and that a claim for payment of such wages had not prescribed. Similarly, it was conceded that the claims for arrear wages from 19 September 2009 until reinstatement on 29 September 2009 had not prescribed given that the respondents’ application was launched on 19 September 2012.
- [6] The appellant contended that the respondents’ claims for arrear wages from 23 April 2007 to 28 September 2009 were new claims in contract and not a continuation of the unfair dismissal dispute that had existed between the parties. Issue was also taken with the substitution applications which had purportedly been made by the deceased respondents and not the executors of their respective estates.

- [7] The Labour Court (Gaibie AJ) rejected the appellant's reliance on prescription as "incongruous, if not illogical" and found that the appellant bore "the risk of additional financial obligations which become fully executable at the date of the order of the highest court that pronounces on it, as a judgment debt rather than a contractual claim". With reference to *Billiton Aluminium SA Ltd t/a Hillside Aluminium v Khanyile (Billiton)*¹ and *Equity Aviation Services (Pty) Ltd v CCMA and Others (Equity Aviation)*,² the Court *a quo* rejected as "not only odd but perverse" the appellant's contention that the claim for unpaid wages from 23 April 2007 was one in contract in that the employees were entitled to back pay until 28 September 2009. Consequently, the respondents' claims were found not to have prescribed and the appellant was ordered to pay back pay for the period 1 January 2007 to 28 September 2009 with interest at the prescribed rate with costs. Although the Labour Court did not expressly order a substitution under Rule 22(5), payment to those executors who had applied to be substituted on production of letters of executorship was ordered.

Evaluation

- [8] The remedies available to a court or arbitrator on finding a dismissal unfair are limited by s193 of the Labour Relations Act 66 of 1996 (LRA) to those of reinstatement, re-employment or compensation. Of these, reinstatement is considered the primary remedy, placing the employee in the position he or she would have been but for the unfair dismissal by restoring the employment contract.³ As was stated in *Equity Aviation*:⁴

'The ordinary meaning of the word "reinstate" is to put the employee back into the same job or position he or she occupied before the dismissal, on the same terms and conditions. Reinstatement is the primary statutory remedy in unfair dismissal disputes. It is aimed at placing an employee in the position he or she would have been but for the unfair dismissal. It safeguards workers' employment by restoring the employment contract.' (footnotes omitted)

¹ [2010] 5 BLLR 465 (CC).

² 2009 (1) SA 390 (CC); 2009 (2) BCLR 111 (CC).

³ *Equity Aviation Services (Pty) Ltd v CCMA and Others* 2009 (1) SA 390 (CC) at para 1.

⁴ 2009 (1) SA 390 (CC) at para 36.

- [9] The court or arbitrator in ordering the restoration of the employment contract may in terms of s193(1)(a) order reinstatement “from any date not earlier than the date of dismissal”.⁵ An order of retrospective reinstatement is not compensation as contemplated in s193(1)(c) or s194 and the period of retrospectivity of the reinstatement order is therefore not limited to the maximum 12 months compensation provided in the LRA.⁶
- [10] In *Coca Cola Sabco v Van Wyk (Coca Cola)*,⁷ this Court cautioned that the LRA does not cater for prospective relief beyond the date of reinstatement and that the retrospective operation of a reinstatement order should not be conflated with an employer’s contractual duty to pay wages. In its restoration of an employment contract, an order of reinstatement does not constitute an order for the payment of prospective remuneration from the date of the order until the date of its actual implementation. This is so because consequent to the restoration of the employment contract, an employee holds a contractual claim for the payment of any arrear wages which accrued weekly or monthly under the contract, to which claim the employer holds any contractual defences available to it in opposing such claim. I am satisfied that the decision in *Coca Cola* is correct and the order of reinstatement does not encompass an order quantifying the arrear wages payable for the entire period from the date of the order of reinstatement to date of compliance with that order.
- [11] The reinstatement order made by Cele AJ restored the employment contract between the appellant and the respondents from 1 January 2007. With the respondents only required to report for duty on 23 April 2007, Cele AJ had applied his mind to the period of retrospectivity to be applied to the reinstatement order in the manner contemplated in s193(1)(a). It followed that

⁵ Section 193 states that: (1) If the Labour Court or an arbitrator appointed in terms of this Act finds that a dismissal is unfair, the Court or the arbitrator may- (a) order the employer to reinstate the employee from any date not earlier than the date of dismissal; (b) order the employer to re-employ the employee, either in the work in which the employee was employed before the dismissal or in other reasonably suitable work on any terms and from any date not earlier than the date of dismissal; or (c) order the employer to pay compensation to the employee. See too *NUMSA and Others v Fibre Flair CC t/a Kango Canopies* [2000] 6 BLLR 631 (LAC); *Kroukam v RSA Airlink (Pty) Ltd* [2005] 12 BLLR 1172 (LAC) at paras 61-64.

⁶ *Coca Cola Sabco v Van Wyk* [2015] 8 BLLR 774 (LAC) at para 17; *Equity* at para 42; *Billiton A; Republican Press (Pty) Ltd v CEPPWAWU and Others* [2007] SCA 121 (RSA); 2008 (1) SA 404 (SCA) at para 19.

⁷ At para 17

the appellant was required under the retrospective terms of the reinstatement order to pay wages to the respondents from 1 January 2007 until 22 April 2007. This order constituted a judgment debt being “...a judgment from which there can be gathered what money or thing the judgment debtor must deliver.”⁸ As such, it amounted to an independent cause of action that prescribes after 30 years, in respect of which execution may be levied and against which an appeal may be sought.⁹

[12] The appellant pursued its appeal remedies pending which the execution of the judgment and order was suspended under both the common law and Uniform Rule 49(11).¹⁰ The appellant bore the risk of any prejudice which arose from the delayed implementation of the order resulting from its unsuccessful attempts to appeal the judgment.¹¹ When the appellant’s petition for leave to appeal was refused on 15 September 2009, the suspension was uplifted and the judgment and order became operative and enforceable. As a consequence, the respondents’ employment contracts were restored retrospectively to 1 January 2007 which entitled the respondents to claim arrear wages until the date of their reinstatement on 29 September 2009.

[13] It is material that Cele AJ made no order concerning the payment of wages prospective from the date of his judgment, nor would such an order have been competent under the LRA.¹² This is illustrated by the fact that the appellant would, by way of example, have been entitled to raise a defence to a claim for arrear wages where a respondent had passed away subsequent to Cele AJ’s order or in circumstances in which performance under the contract had become impossible. The respondents’ claims for wages from 23 April 2007 until date of reinstatement on 29 September 2009 were therefore founded on a cause of action distinct from that of unfair dismissal. These wage claims

⁸ *McNutt v Mostert* 1949 (3) SA 253 at 255; *De Crespigny v De Crespigny* 1959 (1) SA 149 (N) at 150F-G.

⁹ *EA Gani (Pty) Ltd v Francis* 1984 (1) SA 462 (T) at 466E-H; *Bulsara v Jordan & Co Ltd (Conshu Ltd)* 1996 (1) SA 805 (SCA) at 464F-G. *Kilroe-Daley v Barclays National Bank Ltd* [1984] 2 All SA 551 (A); 1984 (4) SA 609 (A) at 21. Section 11(a)(ii) of the Prescription Act 68 of 1969.

¹⁰ Uniform Rule 49(11) repealed with effect from 22 May 2015 (s18 of the Superior Courts Act 10 of 2013 now applies).

¹¹ *Billiton (supra)*; *Republican Press (supra)*; *Performing Arts Council of the Transvaal v Paper Printing Wood and Allied Workers Union and Others* 1994 (2) SA 204 (A) at 219H-I in relation to the previous Labour Relations Act 28 of 1956.

¹² *Coca Cola* at para 21.

were claims for payment under the terms of the employment contract which had been reinstated by Cele AJ with effect from 1 January 2007 and were claims the Labour Court is empowered by s77(3) of the Basic Conditions of Employment Act 75 of 1997 (BCEA) to determine.¹³

[14] It follows that on 15 September 2009 when the suspension of the execution of the judgment and order of Cele AJ was uplifted, the respondents' arrear wage claims from 23 April 2007 became a "debt due" within the meaning of s11(d) of the Prescription Act, which debt prescribed three years from 15 September 2009.¹⁴ Prescription began to run afresh in terms of s15(4) of the Prescription Act on the day on which the judgment became executable, being 15 September 2009,¹⁵ by which date the respondents knew both the identity of the appellant as debtor and the facts from which the debt arose in the manner contemplated in s12(3).¹⁶ The respondents therefore acquired a complete cause of action for the recovery of the debt on 15 September 2009, which debt prescribed three years thereafter.¹⁷ The debt did not become owing or payable, as was contended by the respondents, only when the appellant failed or refused to pay the debt; nor from the date of actual reinstatement; nor on the date on which the debt was quantified by the Court.

[15] Reliance was placed by Mr *Malindi* SC on *Billiton* as support for the contention that the effect of the reinstatement order was to order the payment of wages prospective from the date on which reinstatement was ordered until date of actual reinstatement. In *Billiton*, the employee's entitlement to arrear wages

¹³ Section 77(3) states: "... (3) The Labour Court has concurrent jurisdiction with the civil courts to hear and determine any matter concerning a contract of employment, irrespective of whether any basic condition of employment constitutes a term of that contract..."

¹⁴ Section 11(d) of the Prescription Act provides for a three-year period of prescription in respect of "any other debt save where an Act of Parliament provides otherwise".

¹⁵ Section 15(4) states:

"(4) If the running of prescription is interrupted as contemplated in subsection (1) and the creditor successfully prosecutes his claim under the process in question to final judgment and the interruption does not lapse in terms of subsection (2), prescription shall commence to run afresh on the day on which the judgment of the court becomes executable."

¹⁶ Section 12(3) provides that:

"(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." See too *Truter and Another v Deyssel* at para 17 quoting *Loubser* para 4.6.1 at p 80 and the authorities there cited; *Evins v Shield Insurance Co Ltd* 2006 (4) SA 168 (SCA) at para 15-16 [insert] at 838D-839A. *Deloitte Haskins & Sells Consultants (Pty) Ltd v Bowthorpe Hellerman Deutsh (Pty) Ltd* 1991 (1) SA 525 (A) at 532H-I.

¹⁷ *Truter and Another v Deyssel* 2006 (4) SA 168 (SCA) at para 16.

under the employment contract once restored was not disputed by the employer, who took issue rather with the constitutionality of the extent of the employee's entitlement to the payment of arrear wages over a number of years where extensive delays had arisen while appeal remedies were extinguished. While ordinarily employers will not refuse to comply with an order of retrospective reinstatement and will pay arrear wages to employees until the date of actual reinstatement, such payment is made in spite of the fact that the *lis* between the parties has not been judicially resolved. This is so in that while the reinstatement award creates a debt that is due it does not, as is the case in the current matter, constitute an order for the payment of arrear wages prospective from the date of the court order.¹⁸

[16] For these reasons, it follows that the respondents' claim for arrear wages from 23 April 2007 until 19 September 2009 (when the respondents' instituted their claims for payment of arrear wages) have prescribed and the Court *a quo* erred in finding differently. The appeal must therefore succeed.

[17] Given the finding on prescription, it is not necessary to determine whether the Court *a quo* erred in the manner of its approach to the respondents' applications in terms of Labour Court Rule 22(5)¹⁹ to substitute the executors of the deceased estates of certain respondents for certain deceased respondents. Nevertheless, quite clearly, deceased respondents could not have sought the substitution relief that they did and the Labour Court erred in failing to dismiss such applications on this basis.

[18] The appellant sought costs in this appeal, including the costs of two counsel. The view I take of the matter is that an order of costs is not warranted.

Order

[19] In the result, an order is made as follows:

¹⁸ *Coca Cola* at para 18.

¹⁹ Rule 22(5) states: 'If in any proceedings it becomes necessary to substitute a person for an existing party, any party to such proceedings may, on application and on notice to every other party, apply to the court for an order substituting that party for an existing party and the court may make such order, including an order as to costs, or give such directions as to the further procedure in the proceedings as it deems it fit.'

1. The appeal is upheld with no order as to costs.
2. The judgment of the Labour Court is set aside and substituted with the following:

"1. The applicants' claims for the payment of arrear wages from 23 April 2007 to 18 September 2009 have prescribed.

2. The application is dismissed with no order as to costs".

Savage AJA

Tlaletsi DJP and CJ Musi JA agreed with Savage AJA.

APPEARANCES:

FOR THE APPELLANT: C E Watt-Pringle SC and K S McLean

Instructed by Fairbridges Attorneys

FOR THE RESPONDENTS: G Malindi SC and B Lekokotla

Instructed by Ruth Edmonds Attorneys