IN THE LABOUR APPEAL COURT OF SOUTH AFRICA, JOHANNESBURG

Reportable

Case no: JA 47/16

In the matter between:

DR PAKASHE AARON MOTSOALEDI	**First Appellant**
MR GIDOEN PUDUMO MASHEGO	**Second Appellant**
NATIONAL DEPARTMENT OF HEALTH	**Third Appellant**
MPUMALANGA DEPARTMENT OF HEALTH	**Fourth Appellant**

and

ZANDILE QUEEN MABUZA	**Respondent**

Heard: **02 March 2017**

Delivered: **06 September 2018**

Summary: An alleged unfair labour practice constitutes a debt and the provisions of the Prescription Act 68 of 1969 are applicable. An application to a bargaining council to certify an award is not a process contemplated by the Prescription Act and does not interrupt prescription. *Brompton Court Body Corporate v Khumalo* (398/2017) [2018] ZASCA 27 (23 March 2018) considered but Froneman J's judgment in *Myathaza v Johannesburg Metropolitan Bus Services (SOC) Limited t/a Metrobus and Others* (2017) 38 ILJ 527 (CC); [2017] 3 BLLR 213 (CC) and *Food*

and Allied Workers' Union obo Gaoshubelwe v Pieman's Pantry (Pty) Limited **2018 (5) BCLR 527 (CC) followed. Appeal upheld as regards two appellants that have no power to implement the order and dismissed as regards the remaining appellants.**

Coram: Waglay JP, Tlaletsi DJP, Landman JA

Neutral citation: **Motsoaledi v Mabuza** (LAC JA47/16)

JUDGMENT

LANDMAN JA

[1] Dr P A Motsoaledi, Mr Gidoen Pudumo Mashego (in their official capacities), the National Department of Health and the Mpumalanga Department of Health, the first to fourth appellants, appeal against the whole judgment of the Labour Court (Boda AJ) delivered on 7 August 2015 that made an arbitration award of an arbitrator, acting under the auspices of the Public Health and Social Development Sectoral Bargaining Council, concerning Ms Z Q Mabuza, the respondent, an order of court and granting consequential relief. The appeal is with leave of the court *a quo*.

Condonation and reinstatement of the appeal

[2] The appellants applied for condonation of the late filing of the notice of appeal and their failure to file the record timeously. The respondent did not object to the application. As the explanation was satisfactory condonation was granted.

The background

[3] On 7 August 2009, the Health & Other Services Personnel Trade Union of South Africa (HOSPERSA), other trade unions and the fourth appellant reached a

settlement agreement during an arbitration. It was agreed, *inter alia*, that nurses performing certain duties, as at 30 June 2007, would be translated to specific salary notches.

[4] Although the settlement agreement was reached on 7 August 2009, further deliberations took place between the parties stretching to June 2012. The outcome does not affect the respondent as her claim was instituted on 11 September 2010 when she referred a dispute to the Public Health and Social Development Sectoral Bargaining Council. Case number PSHS711-09/10 was assigned to her case. I infer that the case number signifies that it was received on 11 September 2010.

[5] The respondent's referred a dispute or claim in terms of the settlement agreement. The arbitrator notes that the issue to be decided was whether the failure by the fourth appellant and the Witbank Hospital to translate the respondent to salary notch PN-A8 because she had acted as Deputy Manager: Nursing since 2005 constituted an unfair labour practice.

[6] The dispute was arbitrated. The arbitrator's award dated 30 September 2010 was received ie published on 7 October 2010. The arbitrator held that the failure by the fourth appellant and the Witbank Hospital to translate the respondent to the post of Deputy Manager: Nursing with effect from 1 July 2007 amounted to an unfair labour practice. The fourth appellant and the Hospital were ordered to translate the respondent to that post with 'immediate effect' as from 1 July 2007. The process was to be completed by 1 November 2010.

[7] In spite of the demand, the fourth appellant did not comply with the award. Therefore:

(a) On 3 October 2013, the respondent caused the award to be certified in terms of section 143 of the Labour Relations Act 66 of 1995 ("LRA").

(b) On 4 October 2013, the respondent served a statement of case (the first statement of case) in order to enforce the award and a copy of form 1 (an

application to the Registrar of the Labour Court for a case number on the fourth appellant on 4 October 2013.

(c) The Registrar had not issued a case number when the first statement of case was served. At the insistence of the Registrar the respondent subsequently applied for a case number. Case number JS1097/13 was issued. The second statement of case to enforce the award, bearing the case number, was served on the fourth appellant on 22 November 2013.

(d) On the same date the respondent served an application in terms of section 158(1)(c) of the LRA to make the award an order of court.

(e) It seems that the application to make the award an order of court was not pursued.

(f) On 17 April 2015, the respondent launched an urgent *ex parte* application to hold the appellants in contempt of court.

[8] The contempt application gave rise to a rule *nisi* that was opposed by the four appellants. They submitted that no one could be held in contempt of an arbitration award. The first and third appellants submitted that they were not responsible for ensuring compliance with the award. It was also contended that the award was only binding on the fourth appellant, but it was not enforceable because it was not implementable and the award or debt had prescribed in terms of the Prescription Act 68 of 1969 ('the Prescription Act'). The second and fourth appellants raised the plea of prescription in their opposing affidavit in the following way:

> 'The certification of the award does not make an award an order of court and it does not [not] interrupt the running of prescription. The award prescribed on the 6 October 2013.'

The judgment of the court *a quo*

[9] The court *a quo* found that:

(a) prescription had been interrupted by the application for the certification of the award; and

(b) the award was binding on all the appellants.

[10] The court *a quo* made the following order, which is the subject of this appeal, against all the appellants:

> '1. The award of the Bargaining Council dated 30 September 2010 as served on the parties on 7 October 2010 is binding on the Respondents and is hereby made an order of the Labour Court.
>
> 2. The Respondents are compelled to comply with the award, they must do so within two weeks of the date of this order by complying with paragraph 38 and 39 of the award as it appears on page 18 of the paginated papers.
>
> 3. Should the Respondents fail to comply with the award, the Applicant is granted leave to re-enrol the application for contempt in urgent court.
>
> 4. The Respondents are ordered to pay the costs of this application jointly and severally.'

The issues on appeal

[11] This judgment examines:

(a) whether the award was implementable;

(b) whether it was competent for an order to be made against the first and third appellants;

(c) whether an unfair labour practice relating to promotion gives rise to a debt;

(d) whether this debt, that was the subject of arbitration proceedings, prescribed in accordance with the Prescription Act as interpreted by the Constitutional Court;

(e) whether this debt, that was the subject of arbitration proceedings, prescribed in accordance with the Prescription Act as interpreted by the Supreme Court of Appeal;

(f) whether it was competent for the court a quo to make the award an order of court?

(a) Is the award implementable?

[12] The second and fourth appellants aver that the award is not implementable but they do not elaborate on this. The action which these appellants are obliged to perform is clear and straightforward. The complaint that the award is not implementable is probably not directed at the clarity of the award and subsequent order. It may be that these appellants are reiterating an objection, voiced during the arbitration, that it is too expensive to comply with the award because several nurses acted in the position in question. But this does not assist them as they have not challenged the validity of the award by means of an application to review it.

(b) Was it competent for an order to be made against the first and third appellants?

[13] An award is only binding on the parties to the arbitration. In this case, it binds only the second appellant in his official capacity and the fourth appellant on the one hand and the respondent on the other hand. But where a corporate body or an organ of state is required to perform an act, it is competent for the Labour Court, on application, to:

(a) make the award an order of court;

(b) to order the natural person responsible to effect to or put in operation the order into operation the order, to comply with the order; and

(c) should such a person fail to comply with the order, contempt proceedings may be instituted and those responsible for the failure may be joined in the application.

[14] The second step may not always be required. Nkabinde J writing for the Constitutional Court in *Pheko and Others v Ekurhuleni Metropolitan Municipality (No 2)*[1] said:

> 'When a court order is disobeyed, not only the person named or party to it but all those who, with the knowledge of the order, aid and abet the disobedience or wilfully are party to the disobedience are liable. The reason for extending the ambit of contempt proceedings in this manner is to prevent any attempt to defeat and obstruct the due process of justice and safeguard its administration. Differently put, the purpose is to ensure that no one may, with impunity, wilfully get in the way of, or otherwise interfere with, the due course of justice or bring the administration of justice into disrepute.'[2]

But it may be salutary to order such persons to comply with the order so that they are apprised or reminded of their responsibilities and duties.

[15] The first and third appellants operate on the third tier of government and do not have the responsibility or power to give effect to an award relating to an employee employed by the second tier of government. It is common cause that the respondent is an employee of the Mpumalanga Provincial Government, the second tier of government. The respondent has not pointed to any legal authority that imposes liability on the first and third appellants. The finding that the award was binding on the first and third appellants is erroneous and therefore the order of court making that award an order of court *vis-à-vis* the first and third appellants cannot stand. The appeal must be upheld as regards these appellants.

[16] It was competent for the court *a quo* to make an order that the award binding upon him as the MEC responsible for the fourth respondent and to order him and the fourth appellant to comply with the order.

(c) Is an unfair labour practice relating to promotion a debt?

[1] [2015] 6 BLLR 711 (CC).
[2] At para 47.

[17] In order to answer this question it is necessary to have regard to the latest judgments of the Constitutional Court regarding prescription of claims addressed by the Labour Relations Act.

[18] At the time the appeal was heard, the applicability of the Prescription Act 68 of 1969 to claims governed by the LRA had been the subject of a decision of the Constitutional Court in *Myathaza v Johannesburg Metropolitan Bus Services (SOC) Limited t/a Metrobus and Others (Myathaza)*.[3] The court was equally divided on the issue. The judgment written by Jafta J (Nkabinde ADCJ, Khampepe J and Zondo J concurring) held that the Prescription Act did not apply to awards made in terms of the LRA. Zondo J also provided his own reasons. The other judgment written by Froneman J (Madlanga J, Mbha AJ and Mhlantla J concurring) held that the Prescription Act does apply but that the Act must be read in harmony with the right of access to courts and that prescription can readily be interrupted.

[19] The four appellants relied on the judgment of Froneman J while the respondent was content to rely on the judgment of Jafta J.

[20] Since then the Constitutional Court has revisited the applicability of the Prescription Act to claims in terms of the LRA in *Food and Allied Workers' Union obo Gaoshubelwe v Pieman's Pantry (Pty) Limited* (*Gaoshubelwe).*[4] The majority decision written by Kollapen AJ may be summarised as follows:

(a) There is compatibility and consistency between the provisions of the Prescription Act and those of the LRA. Although they both deal with the issue of time, they focus on different aspects of its application in the litigation process. The LRA deals with time periods that do not necessarily result in the extinction of a claim in the event of non-compliance with them,

[3] (2017) 38 ILJ 527 (CC); [2017] 3 BLLR 213 (CC).
[4] 2018 (5) BCLR 527 (CC).

while the Prescription Act deals with time periods that will result in the extinction of the claim in the event of non-compliance.[5]

(c) The two relevant statutory provisions that require consideration are section 16(1) of the Prescription Act and section 210 of the LRA. Section 16(1) of the Prescription Act reads:

> '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.'

Section 210 of the LRA reads:

> 'If any conflict, relating to the matters dealt with in this Act, arises between this Act and the provisions of any other law save the Constitution or any Act expressly amending this Act, the provisions of this Act will prevail.'[6]

(d) The rationale for the existence of time periods is generally to expedite litigation, to limit delays, and to bring a measure of certainty to the litigation process.[7]

(e) There are essentially two distinguishable kinds of time periods - a time bar (as in the LRA) and a true prescription time period (as in the Prescription Act). Non-compliance with a time bar is capable of being condoned while a true prescription period is not.[8]

(f) A limitation within which an action was to be instituted was not in itself constitutionally offensive. A limitation's ultimate coherence with the scheme of the Constitution of the Republic of South Africa of 1996 would

[5] At para 140 of the majority judgment in *Gaoshubelwe.*
[6] At para 142 of the majority judgment in *Gaoshubelwe.*
[7] At para 143 of the majority judgment in *Gaoshubelwe.*
[8] At para 143 of the majority judgment in *Gaoshubelwe.*

be determined by whether the time prescribed could be regarded as constituting a reasonable and fair opportunity to seek redress.[9]

(g) The word 'debt' should be given the meaning ascribed to it in the Shorter Oxford Dictionary, namely:

> '1. Something owed or due: something (as money, goods or service) which one person is under an obligation to pay or render to another.
>
> 2. A liability or obligation to pay or render something; the condition of being so obligated.'[10]

(h) A claim based on an alleged unfair dismissal is a claim that seeks to enforce three possible kinds of obligations against an employer: reinstatement, re-employment, and compensation. All three obligations fit neatly within the definition of debt as they constitute either an obligation to pay or render something.[11]

(i) An unfair dismissal claim activates proceedings for the recovery of a debt as contemplated in section 16(1) of the Prescription Act.[12]

(j) It is necessary, in the case of a claim for dismissal, to evaluate the inconsistency which the first judgment in *Myathaza* concludes does indeed exist.[13]

(k) Difference in the various provisions may provide evidence of inconsistency, but it does not alter the fundamental test that the section requires, namely a finding of inconsistency.[14]

(l) Section 210 of the LRA, which provides that the provisions of the LRA will apply in the event of conflict between it and the provisions of any other law

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[9] At para 147 of the majority judgment in *Gaoshubelwe*
[10] At para 155 of the majority judgment in *Gaoshubelwe.*
[11] At para 156 of the majority judgment in *Gaoshubelwe.*
[12] At para 157 of the majority judgment in *Gaoshubelwe.*
[13] At para 157 of the majority judgment in *Gaoshubelwe.*
[14] At para 159 of the majority judgment in *Gaoshubelwe.*

but a difference in itself will not constitute conflict unless such difference necessarily leads to conflict.[15]

(m) Regard being had to section 210 of the LRA, the provisions of the LRA are not in conflict with the provisions of the Prescription Act. It must follow that if there is no inconsistency then, *a fortiori* (with stronger reason), there can be no conflict. The existence of conflict between the two statutes has not been established.[16]

(n) Section 15 of the Prescription Act reads:

> '(1) 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.
>
> (2) Unless the debtor acknowledges liability, the interruption of prescription in terms of subsection (1) shall lapse, and the running of prescription shall not be deemed to have been interrupted, if the creditor does not successfully prosecute his claim under the process in question to final judgment or if he does so prosecute his claim but abandons the judgment or the judgment is set aside.'

(o) The referral of disputes to the Commission for Conciliation, Mediation and Arbitration (CCMA) for conciliation constitutes the service of a process commencing legal proceedings.[17]

(p) Applying the Prescription Act to the facts before it, the majority of the Court said:[18]

'For these reasons, I would conclude that, although prescription began to run when the debt became due on 1 August 2001, it was interrupted by the referral of the dispute to the CCMA on 7 August 2001 and continued to be interrupted until

[15] At para 167 of the majority judgment in *Gaoshubelwe.*
[16] At para 181 of the majority judgment in *Gaoshubelwe.*
[17] At para 199 of the majority judgment in *Gaoshubelwe.*
[18] At para 204 of the majority judgment in *Gaoshubelwe.*

> the dismissal of the review proceedings by the Labour Court on 9 December 2003. Accordingly, when the dispute was referred to the Labour Court for adjudication on 16 March 2005, it clearly had not prescribed. It is for these reasons that the appeal must succeed.'

[21] The majority judgment in G*aoshubelwe* does not explain when the interruption of prescription, ceases should an award not be reviewed. The explanation must be sought in the judgment of Froneman J in *Myathaza.* After considering *Van der Merwe v Protea Insurance Co Ltd* 1982 (1) SA 770 (E) at 773A-C Froneman J concludes:[19]

> 'The restriction to review only provides a cogent and compelling reason for re-interpreting the Prescription Act to include statutory reviews under section 145 of the LRA as included in the judicial process that interrupts prescription until finality is reached under section 15 of that Act. The restriction infringes the right of access to courts more severely than where a right of appeal is allowed. An interpretation that best protects the right of access should be preferred. That can be achieved by allowing the right of review to play the same role of finality as the right of appeal does in ordinary matters.'

[22] The appeal before us involves an unfair labour practice relating to promotion as opposed to an unfair dismissal considered in *Gaoshubelwe*. But as the LRA treats unfair dismissals and unfair labour practices in much the same way, this appeal is undistinguishable from the exposition of the law laid down in *Gaoshubelwe*.

[23] A dispute concerning an unfair labour practice must, in terms of section 191(b)(ii) of the LRA, be referred to the CCMA or a bargaining council having jurisdiction within 90 days of the date of the act or omission which allegedly constitutes the unfair labour practice or, if it is a later date, within 90 days of the date on which the employee became aware of the act or occurrence. In terms of section 193(4) an arbitrator may determine any unfair labour practice dispute referred to the arbitrator, on terms that the arbitrator deems reasonable, which may include

[19] At para 86 of the Froneman J's judgment in *Myathaza.*

ordering reinstatement, re-employment or compensation. A claim to remedy an unfair labour practice clearly gives rise to a debt as contemplated by the Prescription Act. I am of the opinion that the investigation and conclusion undertaken in the majority judgment in *Gaoshubelwe* apply equally to the case of an unfair labour practice concerning promotion.

What is the period of prescription?

[24] What is the period of prescription that applies as regards an unfair labour practice concerning promotion? A debt is extinguished by prescription after the lapse of the period which in terms of the relevant law applies in respect of prescription of such debt.[20] In the absence of any other specific period set out in section 11 (a), (b) and (c), the period of prescription of debts is three years.[21] The period of prescription commences to run as soon as the debt is due.[22] It follows that the prescription period applicable to an unfair labour practice concerning promotion is 3 years.

[25] There is no indication on the record when the respondent's unfair labour practice debt commences to run. I intend to return to this aspect. However, it may be accepted that prescription was interrupted when the dispute was referred to the bargaining council on 11 September 2010.

(d) Did this debt, that was the subject of arbitration proceedings, prescribe in accordance with the Prescription Act as interpreted by the Constitutional Court?

[26] In accordance with the Froneman J's judgment in *Myathaza*, impliedly adopted in *Gaoshubelwe*, the interruption of prescription ceases when any review proceedings are terminated by a judgment.[23] The award in this appeal was not taken on review. So when did the interruption of prescription cease?

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[20] Section 10(1) of the Prescription Act.
[21] Section 11(d) of the Prescription Act.
[22] Section 12(1) of the Prescription Act.
[23] Froneman J observed in Myathaza that:
'Just as there are statutory provisions and court rules regulating the lodging and prosecution of appeals, the LRA provides that the review of an arbitration award must take place within six weeks of the date of

[27] The reasoning in *Myathaza* suggests that the interruption of prescription ceases when the award is published because the publication of the award gives rise to a new prescription period of 30 years. This follows from the observation made in the judgment at para 71:

> 'Where a debt is the object of a dispute subjected to arbitration the period of prescription is delayed. The award of an arbitrator in terms of an arbitration agreement has the status of a court order between the parties and the applicable prescription period is that which is applicable to a judgment debt. There seems little reason why parties subjected to statutory arbitration should not enjoy similar protection in respect of arbitration awards in their favour.'

[28] It follows that on the application of Froneman's judgment in *Myathaza* to the facts of this appeal the award gave rise to a new period of prescription of 30 years. This period had not expired when the respondent's application to hold the appellant in contempt of court was served. Whether it was competent for the court a quo to make the award an order in regard to that application will be investigated later.

[29] In view of the 30-year prescription period it would not be necessary to decide whether the court *quo* correctly held that the certification of the award by the bargaining council interrupted the running of prescription. But nevertheless some remarks are called for. In Froneman J's Myathaza judgment he held at para 75 that:

> 'Unfair dismissal disputes must be referred to the CCMA] or bargaining councils and if conciliation fails can then be referred to arbitration or the Labour Court. The CCMA Rules provide for service of referrals and the further steps when arbitration follows. Section 15(6) of the Prescription Act defines "process" as including a petition, a notice of motion, a rule nisi, a pleading in reconvention, a third party notice referred to in any rule of court and "any document whereby

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service of the award, or within six weeks of the date that the applicant discovers corruption where the defect involves corruption. This avoids the difficulty that the absence of certain time limits may have in the case of common law review. And, to reiterate, logically a judgment cannot be final and executable under section 15 of the Prescription Act while it is still subject to a final pronouncement by a court.'

legal proceedings are commenced". In Mountain Lodge Hotel Georges CJ held in relation to a similar provision in Zimbabwean legislation that:

> 'The definition of "process" in subsection (6) is not exclusive in its scope. The section merely enumerates some documents which fall within the ambit of the word. It clearly contemplates that other documents may fall within that ambit.'

Given the CCMA's constitutionally compliant status as an independent and impartial tribunal resolving judicial disputes I can see no reason why the service of a referral under the provisions of the LRA and the CCMA Rules should not fall within the ambit of section 15(1) of the Prescription Act.'

[30] The certification of an award is the first step in the process of enforcing an award. Although it has been held that an application for the certification of an award interrupts prescription,[24] this proposition is erroneous. The running of prescription is "interrupted by the service on the debtor of any process whereby the creditor claims payment of the debt." There is no requirement that an application to certify an award, like a referral of a dispute to the CCMA or bargaining council, must be served on the debtor. Therefore, although an application for certification is the first step in enforcing an award, the absence of service does not satisfy section 15(1) of the Prescription Act and it does not interrupt the running of prescription.[25]

(e) Did this debt, that was the subject of arbitration proceedings, prescribe in accordance with the Prescription Act as interpreted by the Supreme Court of Appeal?

[24] *See Sampla Belting SA (Pty) Ltd v CCMA* (Labour Court, Case no: JR2438/07, 24 April 2012).

[25] An application for the certification of an award is not served on the other side; it is not a document of a court; it does not claim payment of the debt and it is not a document whereby legal proceedings are commenced. An application for certification is no better than a notice in terms of section 3 of the Institution of Legal Proceedings against Certain Organs of the State of Act 40 of 2002 which has been held not to be a process as contemplated by section 15(1) of the Prescription Act 68 of 1969. See *Seleka and Others v Minister of Police and Others* (unreported judgment under case no 288/2013 of the Limpopo Division.

[31] In *Brompton Court Body Corporate v Khumalo (Brompton Court)*[26] the Supreme Court of Appeal (SCA) pointed out that even a judgment of a court of law generally does not create a new debt. The SCA said at para 6 that a judgment of a court of law:

> '… serves to affirm and/or liquidate an existing debt which was disputed. What the judgment does in relation to prescription of a debt, is to give rise to a new period of prescription of 30 years in terms of s 11(a)(ii) of the Act. The same must generally apply to an arbitration award, save that it does not attract a new prescriptive period in terms of s 11 of the Act.'

[32] The SCA examined section 13(1)(f) of the Prescription Act. This section provides that:

> '(1) If —
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> …
>
> (f) the debt is the object of a dispute subjected to arbitration;
>
> …

and

> '(i) the relevant period of prescription would, but for the provisions of this subsection, be completed before or on, or within one year after, the day on which the relevant impediment referred to in paragraph (a), (b), (c), (d), (e), (f), (g) or (h) has ceased to exist,
>
> the period of prescription shall not be completed before a year has elapsed after the day referred to in paragraph (i).'

[33] The SCA said that the impediment to the enforcement of the debt, caused by its submission to arbitration, save in exceptional circumstances, such as abandonment of the arbitration proceedings before completion, will cease to exist

[26] (398/2017) [2018] ZASCA 27 (23 March 2018).

on affirmation of an existing debt by an arbitration award. The Court went on to say at para 8 that the sensible and logical approach is that the delay of completion of prescription in terms of section 13(1)(f) is intended to enable a creditor to apply that the arbitration award be made an order of court in terms of section 31 of the Arbitration Act 42 of 1965, before the debt, on which it is based, prescribes.

[34] In applying the approach in *Brompton Court* to the facts of the appeal before us, the immediate problem is that one does not know when the period of prescription of the debt (the unfair labour practice) of three years commenced to run. This means that one cannot calculate what period of prescription remained when the award was published on 7 October 2010. If any part of the relevant period of prescription would, but for the provisions of this subsection (13(1)(f) be completed before or on 7 October 2010, or within one year of this date, the period of prescription is not completed before a year has elapsed after 7 October 2010. On the other hand, although the SCA did not decide this, it would follow that if the prescription period were to expire more than a year after the award as published this period would continue to apply.

[35] If one assumes, for example, at best for the respondent that her debt arose a day before the referral of the unfair labour practice dispute to the bargaining council on 11 September 2010, the 3-year period of prescription would have expired on 10 September 2013.

[36] As no process had been served before this date, if the *Brompton Court* judgment is applied to the facts of this appeal, the debt would have prescribed.

(f) Was it competent for the court a quo to make the award an order of court?

[37] The appellants submitted that the court a quo was bound by the four corners of the papers. There was no application to make the award an order of court (meaning that the application that had been served was not moved). It was

submitted that it was not competent for the court a quo to mero motu make the award an order of court.

[38] The respondent was remiss in failing to move her application to make the award an order of court. It was certainly competent for the court that granted the rule and the court a quo to have dismissed the application. But it was also competent for the court a quo, on the extended return day, to make the award an order of court and effectively postpone the application a regards contempt of court. In her contempt application the respondent prayed for further or alternative relief. The relief which the court a quo afforded the respondent qualifies as alternative relief. There is no suggestion that the appellants were prejudiced save as regards the additional costs. This ground of appeal falls to be dismissed.

Conclusion

[39] The majority judgment in *Gaoshubelwe* resting on the Froneman J's judgment in *Myathaza* is binding on this court. In the result the respondent's debt has not prescribed. The respondent was entitled to enforce the order in the manner that she did. But no order should have been made as to costs in view of the way in which the respondent sought relief. The court a quo erroneously declared that the award was binding on the first and third appellants but the court a quo was entitled to order the second appellant to comply with the award. The award is implementable. The court a quo was entitled to make the order that it did save that it must be amended by restricting its application to the second and fourth appellants.

Costs

[40] I turn to the costs of the appeal. In terms of section 179 of the LRA, this Court may make an order for the payment of costs, according to the requirements of the law and fairness, taking into account the factors set out in subsection (2).

[41] The first and third appellants have been successful. Although the first and third appellants were wrongly enmeshed in this litigation, their costs should be minimal

as they used the same attorney and the same advocate to represent them. I would not make an order for their costs.

[42] The second and fourth appellants failed to comply with an award of the bargaining council, failed to review the award, made no attempt to resolve the issue and simply took the prescription point. It seems to me that they acted unfairly towards the respondent. It will be fair to order them to pay the costs of the appeal.

Order

[43] The following order is made:

1. Condonation for the late filing of the record is granted and the appeal is reinstated.

2. The application for condonation for the late filing of the notice of appeal is condoned.

3. The appeal is upheld as regards the first and third appellants.

4. The appeal is dismissed as regards the second and fourth appellants.

5. The order of the court *a quo* is amended to read:

‘(1) The application as regards the first and third respondents is dismissed.

(2) The award of the Bargaining Council dated 30 September 2010 issued under PSHS711-09/10 as served on the second and fourth respondents on 7 October 2010 and attached hereto as annexure ‘A’, is binding on these respondents and is hereby made an order of the Labour Court.

(3) The second and fourth respondents are compelled to comply with this order and must do so within two weeks of the date of this order

by translating the applicant Ms MZ Mabuza to Deputy Manager Nursing (PN-A8) with effect from 01 July 2007 in terms of the OSD agreement.

(4) Should the second and fourth respondents fail to comply with this order the applicant is granted leave to re-enroll the application for contempt in urgent court.

(5) There is no order as to costs.

6. The two-week period referred to in paragraph 3 of the amended Labour Court order shall commence on the date of service of this order on the second and fourth appellants.

7. The second and fourth appellants are ordered to pay the costs of the appeal.

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A A Landman

Judge of the Labour Appeal Court

APPEARANCES:

FOR THE APPELLANTS**:** Adv F P Phamba

Instructed by the State Attorney Pretoria

FOR THE RESPONDENT: Adv A Snider

Instructed by Webber and Wentzel Attorneys