



IN THE LABOUR APPEAL COURT OF SOUTH AFRICA, JOHANNESBURG

Reportable

Case no: JA 90/2016

In the matter between:

NUMSA OBO E MASANA

Appellant

and

GILI PIPE IRRIGATION (PTY) LTD

Respondent

Held: 22 November 2018

Delivered: 12 December 2018

Summary: Rescission application – Labour Court dismissing rescission application by employee– Labour Court holding the view that award prescribed and no prospects of success in rescission application – principles relating to prescription restated – *Metrobus* and *Pieman’s Pantry* decisions in Constitutional Court applied - On the facts, prescription had not run its full term; employee’s right of action had not prescribed – premise upon which application dismissed by Labour court incorrect - Appeal upheld and matter remitted to the Labour Court for consideration of the merits of the rescission application.

Coram: Sutherland and Jappie JJA and Murphy AJA

JUDGMENT

SUTHERLAND JA

Introduction

[1] This appeal is from a judgment of Cele J in the Labour Court, given on 22 November 2012. An application was brought by the appellant (Masana) in terms of Rule 16A(1)(b)¹ of the Labour Court Rules to rescind a judgment given by default by Bhoola J, given on 16 September 2011. The application before Bhoola J had been an application in terms of Section 158(c)² of the Labour Relations Act 66 of 1995 (LRA) to make an award, given on 4 January 2005 by a commissioner of the Commission for Conciliation Mediation and Arbitration (CCMA), an order of court. On the premise that the rescission would be granted, the Section 158(c) application was put before the court again. Cele J dismissed the rescission application and thus did not need to address the section 158(c) application. The appeal lies against the dismissal of the rescission application and its logical consequences.

[2] The judgment of Cele J addressed, first, a preliminary application by Masana for condonation of the late filing of the rescission application. It was one day late. However, although that degree of lateness would probably have been condoned, Cele J also, quite correctly, examined the prospects of success to determine the question. Cele J made a finding that the right to make the award an order of court had prescribed because a period well in excess of three years had elapsed between 4 January 2005, when the award was issued, and 17 September 2009 when the section 158(c) application had been initiated (ie a period of four years and eight months). Therefore, he held that this fact was fatal to the rescission application and he dismissed the condonation application. Axiomatically, having

¹ Rule 16A(1) (b) provides:

The court may, in addition to any other powers it may have-

(a)....

(b) on application of any party affected, rescind any order or judgment granted in the absence of that party.

² Section 158(c) provides:

(1) The Labour Court may-....

(c) make any arbitration award or any settlement agreement an order of the Court;

made that finding, Cele J did not find it necessary to address the merits or demerits of the rescission application *per se* which were concerned with the circumstances under which Bhoola J had dismissed the section 158(c) application, in the absence of Masana or his representative, when the matter had been called in her court.

- [3] The critical issue in the appeal is whether Cele J was correct in his appreciation of the law regarding prescription.
- [4] In the judgment, Cele J alluded to the impending amendment of Section 145 of the LRA to add Section 145(9) which eventually came into force pursuant to section 22 of Act 6 of 2014, two years after he gave judgment, in terms whereof a review application in terms of section 145 would interrupt prescription.³ This matter is, therefore, one, among many, which at the time it came before this Court, the legal controversy *per se*, is a matter of history.

Awards of the CCMA and the law of prescription

- [5] The period during which this litigation has been conducted has been an era of great uncertainty about the application in Labour Relations litigation of the principles of prescription as encapsulated in the Prescription Act 68 of 1969 (PA)
- [6] Cele J drew on the earlier decision by Molahleli J in *Public Servants Association obo Khaya v CCMA and Others* (2008) 29 ILJ 1546 (LC) to decide the case before him. The stance taken by Molahleli J was that the PA applied to Labour Relations litigation and that section 13(1)(f) of the PA envisaged a three-year period of prescription to apply to an award. On that premise, Cele J dismissed the rescission application.

³ Section 145(9) provides:

An application to set aside an arbitration award in terms of this section interrupts the running of prescription in terms of the Prescription Act, 1969 (Act 68 of 1969) in respect of that award.

[Sub-s. (9) added by s. 22 of Act 6 of 2014 (wef 1 January 2015).]

- [7] Late in 2016, the Constitutional Court decided the matter of *Myathaza v Johannesburg Metropolitan Bus Services Ltd t/a Metrobus*⁴ (*Metrobus*). The critical controversy in that matter was whether the PA applied to awards issued under the aegis of the LRA. Eight judges sat in that case and, in the result, the Constitutional Court was evenly split between those who held the PA did not apply and those who held it did apply to matter decided under the aegis of the LRA. Axiomatically, the discernment of a *ratio* was impossible.⁵
- [8] The controversy about the applicability of the PA to matter decided under the aegis of the LRA was, however, resolved by the Constitutional Court in the matter of *FAWU obo Gaoshbelwe v Pieman's Pantry (Pty) Ltd*⁶ (*Pieman's Pantry*.) That matter was not concerned with an award *per se*, but rather about what juridically recognised event interrupted prescription, if prescription applied. Again, the Constitutional Court was divided on the question of whether the PA applied at all. However, a clear majority held that the PA indeed was applicable to Labour Relations litigation.
- [9] In the Judgment of Kolapen AJ, for the majority, it was held that PA is compatible with the LRA and further, held that an alleged unfair dismissal is a debt as contemplated by the PA.⁷ The controversy about what juristic act might interrupt prescription running was resolved by the finding that a referral of such a dispute for conciliation was the first step in the litigious process and had the effect of interrupting prescription.⁸ Kolapen J went on to hold thus:

'[202] In addition, given the mandatory nature of conciliation as a requirement for arbitration or a referral to the Labour Court, it follows, in my view, that the proceedings for the recovery of the debt, that arise from an unfair dismissal, commence when a dispute is referred to conciliation. To hold otherwise would simply mean airbrushing the important and legally mandated process of

⁴ (2017) 38 ILJ 527 (CC).

⁵ See Davis JA in *Van Tonder v Compass Group (Pty) Ltd* (2017) 38 ILJ 2329 (LAC) at paras 11 – 12 and 27 – 30.

⁶ (2018) 39 ILJ 1213 (CC).

⁷ At paras 156 - 157 and 196.

⁸ At Paras 197 -, 199.

conciliation, from what can only be seen as a continuum in the legal process from conciliation to adjudication that the LRA evidences. In *Cape Town Municipality*, the court held that a process that initiates proceedings for enforcement of payment of a debt interrupts prescription:

'It is sufficient for the purposes of interrupting prescription if the process to be served is one whereby the proceedings [began] there under are instituted as a step in the enforcement of a claim for payment of the debt. A creditor prosecutes his claim under that process to final, executable judgment, not only when the process and the judgment constitute the beginning and end of the same action, but also where the process initiates an action, judgment in which finally disposes of some elements of the claim, and where the remaining elements are disposed of in a supplementary action instituted pursuant to and dependent upon that judgment.'

[203] What is instructive from this decision is that it recognises that the judicial process may consist of various steps that are intertwined and that it is not necessary that the process that commences proceedings must result in a judgment in the same action. Thus, it matters not that the process that constitutes a referral to conciliation does not result in a judgment. It may still, and does indeed, constitute the commencement of proceedings for the enforcement of a debt.

[204] 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 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.'

[10] This Judgment in *Pieman's Pantry* must be read with the judgment of Froneman J in *Metrobus*. The judgment of Froneman J, for one half of that Court, held as follows regarding the effect of the institution of review proceedings in respect of an award:

'[85] It is important to note that this division of adjudicative labour is not premised on a substantive distinction between the nature of the different disputes: all are

disputes 'that can be resolved by the application of law'. A pragmatic choice was made that certain disputes should preferably be resolved through the possibly speedier process of arbitration and that choice was fortified by not allowing appeals against arbitration awards, only review. In contrast, Labour Court judgments are subject to appeals to the Labour Appeal Court and further up the judicial hierarchy. Arbitration under the LRA is merely adjudication without a right of appeal. Instead of a right of appeal only a right to review exists.

[86] The restriction to review only provides a cogent and compelling reason for re-interpreting the Prescription Act to include statutory reviews under s 145 of the LRA as included in the judicial process that interrupts prescription until finality is reached under s 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.

[87] 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 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 s 15 of the Prescription Act while it is still subject to a final pronouncement by a court.

[88] The institution of a review of the arbitration award by the employer in this case was thus part of the process that interrupted prescription in terms of s 15(1) of the Prescription Act. Until the review was finally determined prescription did not run. The new s145(9) of the LRA, which came into force in January 2015, merely confirms what I consider to have been the legal position before its enactment. It provides that an application to set aside an arbitration award interrupts the running of prescription.'

(Underling supplied)

[11] In my view, once it accepted that the PA applies to all litigation under the aegis of the LRA, there can be no rational basis to conclude that any aspect or stage of such litigation, including an award, is not subject to prescription. In *Metrobus*, Froneman J held that prescription applies specifically to awards. In the light of *Pieman's Pantry*, the view of one half of the Constitutional Court in *Metrobus* to that effect, must now be accepted as a definitive statement of the law. This Court endorses that view.

The Relevant Facts

[12] The critical chronology reveals the following:

12.1. The date of the dismissal which was the subject of the alleged unfair dismissal does not appear from the record.

12.2. **4 January 2005 – the award is issued.**

12.3. (13 months elapse and prescription runs.)

12.4. 6 February 2007 – A review is launched.

12.5. (13 months elapse and prescription is interrupted)

12.6. **30 June 2009 – the review application is dismissed.**

12.7. (Two months elapse and prescription runs)

12.8. 25 August 2009 – a tender is made to work.

12.9. 27 August 2009 – the tender is refused.

12.10. (One month elapses and prescription runs.)

12.11. 17 September 2009 – the section 158(c) application is launched.

12.12. (Two years elapse and prescription is interrupted)

12.13. 16 September 2011 – Bhoola J dismisses section 158(c) application

12.14. (Three weeks elapse and prescription runs)

12.15. 8 October 2011 – Rescission application is launched

12.16. (13 months elapse and prescription is interrupted)

12.17. 22 November 2012 – Cele J dismisses rescission application

12.18. (5 weeks elapse and prescription runs)

12.19. 11 December 2017 - Appeal is noted

12.20. (Further elapse of time during prescription is interrupted pending the outcome of the appeal)

[13] On this computation, as at the date that Cele J heard the matter, at best for the respondent's contention that prescription was running, a total of 19 months can be counted as periods during which prescription was running in relation to any given right of Masana.

The remedy

[14] For these reasons, it is appropriate to uphold the appeal.

[15] However, owing to the basis for the judgment *a quo*, ie a dismissal of the condonation application, the merits of the rescission application were not considered. Thus, no decision on that issue is before this Court.

[16] Accordingly, the matter should be remitted to the Labour Court to adjudicate that case.

The costs

[17] The circumstances, as described, in my view suggest that no costs order should be made.

The order

- (1) The appeal is upheld.
- (2) The case is remitted to the Labour Court for adjudication.

Sutherland JA

Sutherland JA (with whom Jappie and Murphy JJA concur)

APPEARANCES:

FOR THE APPELLANT:

Adv Kabelo Lengane,

Instructed by Phungo Inc

FOR THE RESPONDENT:

Attorney Ben McDonald.