

IN THE LABOUR COURT OF SOUTH AFRICA

HELD IN JOHANNESBURG

REPORTABLE

CASE NO: J2432/08

In the matter between:

NATIONAL UNION OF METALWORKERS

OF SOUTH AFRICAN (“NUMSA”)

1ST APPLICANT

J. RAMAHOYO

2ND APPLICANT

AND

ESPACH ENGINEERING

RESPONDENT

JUDGMENT

Molahlehi J

Introduction

[1] This is an application to have the arbitration award issued under the auspices of the bargaining council for the motor industry made under case number NT212/03 dated 19th March 2004, made an order of court. In terms of the arbitration award the commissioner ordered the respondent to pay the employee compensation and reinstatement. The applicant was to be reinstated and paid the compensation amount by no later than 15th April 2004.

[2] The respondent opposed the application and raised a point *in limine* concerning prescription and in the alternative that the conduct of the applicant was dilatory

in enforcing its claim and sought to have the applicants' claim dismissed for those reasons.

[3] The brief background to this matter is that subsequent to the issuance of the award, the respondent being unhappy with the outcome thereof filed an application to review and have it set aside under case JR919/2004. The respondent was unsuccessful in its endeavoured to have the award reviewed and set aside as its application was dismissed by the Court on 24th April 2006. The respondent then sought leave to appeal to the Labour Appeal Court which leave to appeal was granted on 23rd May 2006.

[4] Despite being granted leave to appeal the respondent failed to prosecute the appeal in that it failed to deliver the record of appeal within sixty days (60) of the date of the order granting leave to appeal. The applicants brought this failure to the attention of the respondent's attorneys in a letter dated 15th February 2008. In that letter it was specifically recorded that in terms of Rule 5 (17) of the Labour Appeal Court if the applicant fails to lodge the record within the prescribed period, the appellant will be deemed to have withdrawn the appeal. The applicants also in this letter called on the respondent to comply with the arbitration award and to confirm that they will do so by close of business on Wednesday, 20th February 2008. The respondent failed to comply with the award and this is the reason for this application.

[5] I am called upon in this matter to determine whether or not prescription in terms of the Prescription Act No.68 of 1969 can be interrupted by the filing of the review application.

[6] The relevant provisions of the Prescription Act read as follows:

“Section 10(1) provides that:

Subject to the provisions of this Chapter and of Chapter IV, a debt shall be extinguished by prescription after the lapse of the period which in terms of the relevant law applies in respect of the prescription of such debt”

[7] In terms of section 12(1) prescription shall commence to run as soon as the debt is due. Section 12(3) provides that:

“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.”

[8] Section 15(1) provides that:

“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.”

[9] It is trite that in terms of section 11(d) of the Prescription Act a debt arising from an arbitration award prescribes after a period of three years. See *Solidarity &*

Others v Eskom Holdings Limited (2005) 26 ILJ 338 (LC). However, the three year period of prescription may be interrupted in terms of section 15(1) of the same Act by service of any process on the debtor by the creditor. The word “*process*” is defined in section 15(6) of the Prescription Act to mean:

“ . . . a petition, a notice of motion, a rule nisi, a pleading in reconvention a third party notice referred to any rule of the court, and any document whereby legal proceedings are commenced.”

[10] In terms of the Labour Relations Act, once an award has been issued the successful employee party may enforce it either in terms section 143 of the Labour Relations Act 66 of 1995, by having it made as if it is an order of the Court or made an order of the Court in terms section 158(1)(c) of the Labour Relations Act. These processes which in my view are part of those envisaged in section 15(6) of the Prescription Act, are available to the successful employee party despite the fact that the employer party may have filed an application to have the arbitration award reviewed.

[11] It is trite that a review application does not automatically stay the enforcement of an arbitration award. In this respect Grogan AJ in *Professional Security Enforcement v Namusi (1999) 20 ILJ 1279 (LC)*; [1999] 6 BLLR 610 (LC) at para 10 had this to say:

“Neither the Act not (sic)] the common law lays down a hard-and-fast rule that an application to have an award (or any judicial order) made an order of court must be dismissed or conditionally postponed if the person

against whom it is to be made has applied for its rescission or review. This court has, however, adopted the practice of postponing applications brought under s 158(1)(c) if the respondent has filed an application for review.”

[12] The issue of whether or not the filing of a review interrupts prescription received attention in the case of *Police & Prison Civil Rights Union on behalf of Sifuba v Commissioner of the SA Police Service* (2009) 30 ILJ 1309 (LC). The decision of the court in that judgment which I align myself to, is that the filing of a review does not interrupt prescription as envisaged by section 15(6) of the Prescription Act.

[13] Before dealing with the provisions of the Prescription Act, Musi AJ in the *Sifuba matter (supra)*, deals with the philosophy and policy considerations underlying extensive prescription. In this regard the Learned Judge had the following to say:

“[29] The aim is therefore to compel a plaintiff to prosecute a claim expeditiously within a specific time failing which to run the risk of having the claim declared unenforceable. Prescription therefore operates in favour of a defendant and protects a defendant from stale claims. Prescription also creates legal certainty and finality in the relationship between creditor and debtor after the lapse of a period of time. See A Loubser M M Extinctive Prescription (Juta 1996) at 22.”

[14] Turning to the purpose of the Labour Relations Act the Court in *Sifuba* found that one of its objectives was to promote the effective resolution of labour disputes, which entails the expeditious resolution of labour disputes. This point was emphasized by the Constitutional Court in *National Education Health & Allied Workers Union v UCT B & others* 2003 (3) SA 1 (CC); (2003) 24 ILJ 95 (CC) at para 31 where it is observed that:

“By their nature labour disputes must be resolved expeditiously and be brought to finality so that the parties can organize their affairs accordingly. They affect our economy and labour peace. It is in the public interest that labour disputes be resolved speedily.”

[15] There seems to be no doubt that the debt in the present instance arose from the arbitration award issued in favour of the second applicant. The common practise by the Court to postpone the application to make the arbitration award an order of Court in terms of section 158(1)(c) of the Labour Relations Act, if there is a pending review has no impact on the prescription of the claim. It is trite that the review application is no bar to an application to have the arbitration award made an order of Court. See *National Education Health & Allied Workers Union on behalf of Vermeulen v Director-General: Department of Labour* (2005) 26 ILJ 911 (LC) at para 23 and *Ntshangase v Speciality Metals CC* (1998) 19 ILJ 584 (LC) para 14.

[16] In preparation of this judgment and having regard to the contention by the applicant that the filing of the review application had interrupted prescription, I

noticed that the review papers were not before me. I then issued a directive to both parties to enquire about their attitude in the Court having regard to the review application papers filed under case number JR919/2004. Both parties indicated that they did not believe that the Court should have regard to the review papers. I regard myself as being bound by the preferences of the parties, and have had no regard in arriving at my decision below to those papers. I must however mention that my decision would probably have been different had the parties agreed that regard should be had to the review papers.

[17] As indicated above there are certain processes which in terms of section 15(1) of the Prescription Act may interrupt prescription. One of the processes is pleadings in reconvention, which may include a counter claim. Had the parties agreed to place the review papers before me, I would have had to evaluate the nature of the processes that arose from the applicant's papers in that review application. I may also mention that in the review application, the papers of which I had sight of, the union in its notice of opposition pleaded for the dismissal of the review application and confirmation of the award. It is highly probable that, if I had the review papers being before me, I may have treated that as a process as envisaged in section 15 of the Prescription Act.

[18] In the light of the above I am of the view, that running of prescription in this matter was never interrupted and accordingly the arbitration award which was issued in favour of the applicant has prescribed.

[19] In the premises, I make the following order:

1. The debt in the form of the arbitration award has become prescribed.
2. The application to make an award an order of the Court is dismissed.
3. There is no order as to costs.

Molahlehi J

Date of Hearing : 23rd April 2009

Date of Judgment : 23rd September 2009

Appearances

For the Applicant : Mr Xolisa Ngako of Ruth Edmonds Attorneys

For the Respondent: Mr C Geldenhuys of Geldenhuys CJ @ LAW INC

Instructed by : The State Attorney