

Reportable and of interest to other judges

**IN THE LABOUR COURT OF SOUTH AFRICA
(HELD IN BRAAMFONTEIN)**

Case no: J1262-09

In the matter between:

SATAWU obo TIMOTHY PHAKATHI

APPLICANT

v

GHEKKO SERVICES SA (PTY) LTD

1st RESPONDENT

RICARDO MARIO GASPAR

2nd RESPONDENT

MARK JOUBERT

3rd RESPONDENT

JUDGMENT

AC BASSON, J

[1] The applicant in this matter is SATAWU obo Timothy Phakathi ("Phakathi"). The 1st Respondent is Ghekko Services SA (Pty) Ltd ("Ghekko"). The 2nd Respondent is Mr. Ricardo Caspar ("Caspar") a

director of Ghekko and the 3rd Respondent is Mr. Mark Joubert ("Joubert"). Where appropriate I will refer to the three respondents collectively as "*the respondents*".

- [2] This is an application for an order to hold Ghekko in contempt for its failure to comply with the award under case number D1343/ JHB/72/ 38/ 2004A dated 20 March 2006 which was certified in terms of section 143(3) of the Labour Relations Act 66 of 1995 ("the LRA") on 21 June 2006. The applicant also sought an order ordering that Ghekko take the necessary steps to re-employ Phakathi within 10 days upon granting of this order.

Relevant background facts

- [3] I do not intend to dwell on the background facts save for referring to the facts that are pertinent to deciding this matter. Phakathi was dismissed by Ghekko in October 2004. On 20 March 2006 the arbitrator of the National Bargaining Council for the Road Freight Industry issued an award in terms of which Ghekko was ordered to re-employ Phakathi on the same terms and conditions that applied to his employment prior to his dismissal. Ghekko was further ordered to effect the re-employment within 10 days of the date of the award. Ghekko was, in addition ordered to pay Phakathi an amount of R 11 727.00 within 10 working days from the date of the award. It is common cause that Ghekko has in fact paid Phakathi the aforementioned sum of money together with interest. Ghekko has, however, not re-employed Phakathi.

- [4] It is common cause that the award was certified in terms of section 143 of the LRA on 21 June 2006.
- [5] Ghekko filed an application to have the award reviewed and set aside on 15 November 2006. The review was argued before this court and on 3 September 2008 the Labour Court issued an order dismissing Ghekko's review application with costs. The Court did not, as part of its order, make the arbitration award an order of court.
- [6] On 1 July 2009 Phakathi (represented by SATAWU) launched this application for contempt. (I will refer to the present application as the "contempt application".)
- [7] From the aforementioned facts it appears that the contempt application was launched more than three years (3 years and 3 months) after the award was made and also more than three years after the award was certified (3 years and 9 days).
- [8] Whilst the respondents do not dispute the fact that the award was certified, the respondents contend that they cannot be held in contempt on the basis of an arbitration award that was certified in terms of section 143 of the LRA:
- (i) Firstly, the certification in terms of section 143 does not have the effect of transforming the arbitration award into an order of this court. In this regard the respondents raised a special plea in terms of which it prayed for the dismissal of this application on the basis that Phakathi's application is materially defective.

- (ii) Secondly, the respondents raised a special plea of prescription. It was argued that the award which forms the underlying *causa* of the present application has prescribed in terms of the provisions of section 10(1) and 11(d) of the Prescription Act no 68 of 1969 ("the Prescription Act") in that more than 3 years have lapsed since the award was made (20 March 2006) and three years since the award was certified (21 June 2006). In addition hereto, it was argued that the award had not been made an order of this court in terms of the provisions of section 158(1)(c) of the LRA.
- (iii) Thirdly, in the event of a finding that the respondents have been incorrect in their understanding of the legal position, the respondents then contend that they have been *bona fide* in their understanding and accordingly deny that they willfully and *mela fide* refused or failed to comply with an order of court.

Legal principles

Status of a certified award

- [9] An arbitration culminates in a final and binding decision. The award is, however, not enforceable until it has been certified (in terms of section 143 of the LRA) or made an order of court (in terms of section 158(1)(g) of the LRA). In terms of section 143(1) of the LRA, an arbitration award may be certified and enforced as if it was an order of the Labour Court. In terms of section 143(3) of the LRA an arbitration award will only be enforced in terms of section 143(1) of the LRA if the director has certified

that the award is an award as contemplated in subsection (1). Section 143 reads as follows:

"143. Effect of arbitration awards

- (1) An arbitration award issued by a commissioner is final and binding and it may be enforced as if it were an order of the Labour Court, unless it is an advisory arbitration award.*
- (2) If an arbitration award orders a party to pay a sum of Money, the amount earns interest from the date of the award at the same rate as the rate prescribed from time to time in respect of a judgment Debt. In terms of section 2 of the Prescribed Rate of Interest Act*

§ 975 (Act No. 55 of 1975), unless the award provides otherwise.

- (3) An arbitration award may only be enforced in terms of subsection (1) if the director has certified that the arbitration award is an award contemplated in subsection (1).
- (4) If a party fails to comply with an arbitration award that orders the performance of an act, other than the payment of an amount of money, and is in default of the award, it may be held in contempt of court and proceedings may be instituted in the Labour Court."

[10] Section 143(3) of the

RA was introduced by way of an amendment to the LRA¹. The reason for the insertion of this subsection appears from the explanatory memorandum which states the following in regard to this section:

"It is proposed that the enforcement of awards be expedited by according arbitration awards the same status as orders of a Civil Court (such as the Labour Court, the High Court or the Magistrate's Court)."

- [11] Prior to this amendment, awards by the CCMA had to be made orders of court in terms of section 158(1)(c) of the LRA. The above mentioned amendment did not, however, repeal section 158(1)(c) of the LRA and a party therefore still has a choice to either certify the award in terms of section 143 of the LRA or to approach the Labour Court in terms of section 158(1)(c) of the LRA. The question, however, is whether an award certified in terms of section 143 of the LRA has the same status as an order in terms of section 158(1)(c) of the LRA. The answer is no. The mere fact that an order has been certified and may be enforced "as if it were an order of the Labour Court" does not mean that the award is now transformed into an order of the Labour Court. The certified CCMA award remains an award. Because the CCMA award remains an award, it can still be the subject of a rescission under the jurisdiction of the CCMA (or the bargaining council). If the intention was that certification converted the CCMA award into an order of the Labour Court, the CCMA would not have been able to consider rescission applications. All those applications would

¹ In terms of the Labour Relations Amendment Act 12 of 2002.

then have had to be heard by the Labour Court. Also, an application for review does not automatically stay an award. For an award of the CCMA to be stayed, the applicant for review must first apply to stay the award pending the review thereof. (See *Olivier v University of Venda*² and *Blue Marine (Pty) Ltd v CCMA & Others*.³)

- [12] The Labour Court has also in two decisions made it clear that certification does not afford the award the status of a court order. A certified award consequently does not have the same status as an order in terms of section 158(1)(c) of the LRA. See in this regard: *Gois t/a Shakespeare's Pub v Van Zyl & Others*.⁴

*"[24] The Amendment Act - the new s 143 - did not alter the nature or the composition of the award. The award remains a CCMA arbitration award. It is not transformed into a court order as a result of the certification process and as such there is no need to involve this court in the process of rescinding CCMA awards."*⁵

The approach of the court in *Goise* was endorsed by the court in *Chillibush Communications (Pty) Ltd v Gericke & Others* (2010) 31 ILJ 1350 (LC), the Labour Court also expressly held as follows:

"[14] In order to reach the status 'as if it were an order of the Labour Court' such an award needs to be certified as such by the

² [2003] 5 BLLR 471 (LC).

³ [2003] 9 BLLR 853 (LC).

⁴ (2003) 24 ILJ 2302 (LC).

⁵ Court's emphasis.

Director of the CCMA or any commissioner delegated to perform such function. The powers of the director in performing this function do not in my view extend to correcting the substantive determination made by the commissioner in the award, but he or she may suggest to the commissioner a variation of the award if there are typographical errors and errors in the calculation of the compensation.

[15] In my view and by way of comparison what the legislature intended with this section was nothing different to the function performed by a notary public where, if a party wishes to execute a notarial deed, he or she simply appears before the notary public, presents the document with his or her identity document and then the document is notarially executed. The function of the director in this respect is simply to confirm that the arbitration award is one issued by a person who is properly appointed as a commissioner by the CCMA board and that the arbitration award whose status is sought to be changed to be 'as if it is an order of the Court' is the one issued by such a commissioner.

*[16] The other unintended consequence that has become a challenge to the enforcement of the arbitration awards is, with due respect, the bureaucratic process designed by the CCMA in its interpretation of s 143. **As indicated earlier the incorrect interpretation given to s 143 by the CCMA prior to the***

Shakespeare's Pub case was that the status of an award changes to that of being the same as an order of court issued for instance in terms of s 158(1)(c) of the Labour Relations Act.

It would seem to me that that interpretation informed and became the basis of designing the process of dealing with enforcement of arbitration awards in terms of s 143.”⁶

- [13] Under the old regime the courts have also held that section 17(15) of the now repealed LRA did not render the judgment of the Industrial Court to be a judgment of the Supreme Court. This section read as follows:

“Any decision, award, order or determination of the Industrial Court may be executed as if it is a decision, an award, order or determination made by the Supreme Court.”

See also *NUMSA v Med Laboratories (Pty) Ltd*⁷ where the court was of the view that the decision of the Industrial Court “*is not metamorphosed into a Supreme Court judgment*”. The same view was held in *CWIU v Price Candles (SA) (Pty) Ltd*⁸) See also *Wright v St Mary's Hospital, Melmoth and Another*⁹ where the High Court also ruled that an award is not converted in an order of the Supreme Court. With reference to the word “execute” in section 17(15) of the now repealed LRA, the court ruled that these words only mean that the procedure for executing an order of

⁶ The court's emphasis.

⁷ (1989) 10 ILJ 499 (LC).

⁸ (1994) 15 ILJ 857 (LC).

⁹ (1993) 14 ILJ 617 (LC)

the Industrial Court was the same as the procedure for executing a similar order of the Supreme Court.

- [14] Lastly, despite the fact that an award was certified in terms of section 143 of the LRA party is not prevented from still applying to have the award made an order of the Labour Court in terms of section 158(1)(c) of the LRA (see in this regard *Viljoen v Nketoana Local Municipality*.¹⁰).
- [15] In the premises, an arbitration award is not transformed into an order of the Labour Court once it has been certified.

Can a contempt application be brought against an award that has been certified in terms of section 143 of the LRA?

- [16] In light of the foregoing, the question arises whether or not it is competent to bring contempt proceedings merely on the strength of an award which has been certified in terms of section 143 of the LRA. Put differently, must the award first be made an order of the Labour Court in terms of section 158(1)(c) of the LRA before contempt proceedings may be instituted in the Labour Court?
- [17] Section 143(4) of the LRA does not expressly indicate whether or not contempt proceedings may be brought merely on the strength of a certified award. This section also does not require that only an award that has been made an order of court in terms of section 158(1)(c) of the LRA may be the subject of a contempt application. This section does, however, specifically state that a party to an award may approach the Labour Court by way of contempt proceedings “if a party fails to comply with an

¹⁰ (1993) 14 ILJ 617 (D).

arbitration award that order the performance of an act, other¹¹ than the payment of an amount of money”.

- [18] On behalf of the respondent it was argued that because a certified award is not an order of this court, it is not competent to institute contempt proceedings against a party who fails to comply with a certified award. It further argued that a failure to comply with a certified award of the CCMA (or a Bargaining Council) can only constitute contempt of the CCMA or the Bargaining Council. Section 142(9) of the LRA provides for the procedures to be followed in the event of a finding by a commissioner of the CCMA that a party is in contempt of the CCMA.
- [19] I do not agree. I have already indicated that section 143 specifically states that a party may approach the Labour Court in contempt proceedings in the circumstances contemplated by that section.¹² Section 143 of the LRA was enacted to allow for an inexpensive and expeditious procedure to enforce an award. To require that a party who has obtained a certified order to again approach this court for an order in terms of section 158(1)(c) of the LRA seems to defeat the whole purpose of this section. Although certification does not convert the award into a court order, nothing prevents a party from approaching the Labour Court in terms of section 143(4) of the LRA for an order for contempt for non-compliance with an award ordering reinstatement. In this regard I am in agreement

¹¹ A claim for monetary compensation may be enforced through the mechanisms provided for in section 143(1) – (3) of the LRA.

¹² Where a party claims performance of an act, such as reinstatement or re-employment and not the payment of an amount of money.

with the view expressed by my learned brother Van Niekerk, J in *Molaetsa v Meyer & Another*¹³ that it is not necessary to first approach the Labour Court for an order in terms of section 158(1)(c) of the LRA before a party can approach this court for an order for contempt:

"9 As I noted above, the applicant approached this court primarily to seek an order in terms of which he was to be paid remuneration from the date on which he alleges that he tendered his services, ie 1 June 2006, to the present. I agree that it is not competent for this court, in these proceedings, and on the papers before it, to make such an order. The applicant ought properly to have instituted contempt proceedings given his claim that the second respondent had refused his tender of services, and given that the arbitration award reinstating him in the second respondent's employ had been certified in terms of s 143(3).

*10 Section 143(4) provides that if a party fails to comply with an arbitration award that orders the performance of an act, other than the payment of an amount of money, any other party to the award may enforce it by way of contempt proceedings instituted in the Labour Court. **It seems to me on a proper construction of this subsection that it is not necessary for a party to approach this court for an order in terms of s 158(1)(c), prior to initiating any contempt proceedings***¹⁴ (see *MIBCO v Osborne & others* [2003]

¹³ (2007) 28 ILJ 2600 (LC).

¹⁴ Court's emphasis.

6 BLLR 573 (LC)). Section 143 was enacted to provide an expeditious and inexpensive mechanism to enforce arbitration awards. The construction that the applicant seeks to place on s 143 is not only at variance with its wording, but also its purpose.”

[20] In the event I am of the view that in principle, a party may bring an application for contempt of a certified order in this court without first having to approach this court in terms of section 158(1)(c) of the LRA. The respondents’ first special plea is therefore dismissed.

Prescription

[21] It is common cause that the award was issued on 20 March 2006. The respondents argue that the award had prescribed in terms of the provisions of section 10(1) and 11(d) of the Prescription Act. It is trite that an award is considered to be a “debt” as envisaged by the Prescription Act. The notion as to what constitutes a “debt” in the context of the Prescription Act has been described by the court in *HMBMP Properties (Pty) Ltd v King*¹⁵ as referring to the obligation to do something either by way of payment or by delivering goods and services or not to do something.¹⁶ In terms of section 12(1) of the Prescription Act prescription commences to run as soon as the debt is due.¹⁷ A debt is not deemed to be due until the creditor has knowledge of the identify of the debtor and

¹⁵ 1981 (1) SA 906 (N).

¹⁶ At 909A-B.

¹⁷ See: *Deloitte Haskins & Sells Consultants (Pty) Ltd v Bowthorpe Hellerman Deutsch (Pty) Ltd* 1991 (1) SA 525 (A): “Section 12(1) of the Prescription Act 68 of 1969 provides that prescription shall commence to run as soon as the debt is due. This means that there has to be a debt immediately claimable by the debtor or, stated in another way, that there has to be a debt in respect of which the debtor is under an obligation to perform immediately.”

the facts from which the debt arises, provided that a creditor is deemed to have such knowledge if he could have acquired it by exercising reasonable care (see section 12(3) of the Prescription Act).¹⁸ Section 11 of the Prescription Act provides for the period within which a debt becomes prescribed: Any other debt apart from a debt owed to the state (where the prescriptive period of 15 years applies) and a debt arising from a bill of exchange or negotiable instrument (where the prescriptive period of 6 years applies), is governed by a three year period prescriptive period. It has been accepted in numerous cases that extinctive prescription as envisaged in the Prescription Act applies to labour law matters (see, *inter alia*, *Mpanzama v Fidelity Guards Holdings (Pty) Ltd*).¹⁹ In terms of section 10(1), 11(d) and 12(1) the debt shall be extinguished by prescription after the lapse of a period of three years from the date the debt is due. Prescription will be interrupted once the creditor serves a process whereby the creditor claims payment of the debt. Section 15 of the Prescription Act set out the circumstance under which prescription will be interrupted:

¹⁸ In *Solidarity v Eskom Holdings (Pty) Ltd* 2008 ILJ 4150 (LAC) the Labour Appeal Court held as follows: "A debt is due in this sense, when the creditor acquires a complete cause of action for the recovery of the debt, that is when the entire set of facts which the creditor must prove in order to succeed with his or her claim against the debtor is in place or in other words when everything has happened which would entitle the creditor to institute action and to pursue his or her claim." See also *Truter v Deyssel* 2006 (4) SA 168 (SCA) where the Supreme Court of Appeals defined "debt" as follows: "The term 'debt due' means a debt, including a delictual debt, which is owing and payable. A debt is due in this sense when the creditor acquires a complete cause of action for the recovery of the debt, that is, when the entire set of facts which the creditor must prove in order to succeed with his or her claim against the debtor is in place or, in other words, when everything has happened which would entitle the creditor to institute action and to pursue his or her claim."

¹⁹ [2000] 12 BLLR 1459 (LC).

“Section 15(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.

Section 15(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.

Section 15 (6:) For the purposes of this section, 'process' includes 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 legal proceedings are commenced.”

- [22] The launching of the review does not, however, interrupt prescription (see *Police & Prison Civil Rights Union on behalf of Sifuba v Commissioner of the SA Police Service* (2009) 30 ILJ 1309 (LC) where the court held that the filing of a review does not interrupt prescription as envisaged by section 15(6) of the Prescription Act).
- [23] In order to execute an award a successful party has to make application on form 7.18 to the CCMA in terms of section 143 of the LRA for the certification of an award. This certified award is then presented to the

Registrar of the Labour Court who issues a writ of execution (for the payment of money).

- [24] The question which arises is whether an application for section 143 certification constitutes a process whereby the 'creditor claims payment of the debt' as prescribed by section 15(1) and of the Act. I am of the view that it is. This conclusion is supported by the definition of "process" as set out in section 15(6) of the Prescription Act. Moreover, it is the only process (apart from approaching the Labour Court in terms of section 158(1)(c) of the LRA) which is prescribed by the LRA for a successful party to enforce an award when the award is for the payment of money. This was also the view of the Labour Court in *National Union of Metalworkers of SA & another v Espach Engineering*²⁰ supports the above contention:

*"Section 15(1) of Prescription Act 68 of 1969 - Application to enforce arbitration award in terms of s 143 or s 158(1)(c) of LRA 1995 is process envisaged by s 15(6) of Prescription Act which interrupts prescription - Filing of review application not automatically staying enforcement of arbitration award - Running of prescription not interrupted by filing of review application."*²¹

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"[10] In terms of the Labour Relations Act, once an award has been issued the successful employee party may enforce it either in terms s

²⁰ (2010) 31 ILJ 987 (LC).

²¹ Quoted from the flynote.

143 of the Labour Relations Act 66 of 1995, by having it made as if it were an order of the court or made an order of the court in terms s 158(1)(c) of the Labour Relations Act. These processes which in my view are part of those envisaged in s 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.”²²

- [25] The respondents argued that the applicant’s claim has prescribed in terms of section 10(1) read with section 10(d) of the Prescription Act insofar as more than three years have lapsed since the award *in casu* was made. Although the award was certified on 21 June 2006 – which meant that prescription was interrupted on that day – more than three years had already lapsed at the time of launching this application in terms of section 143(3) which was on 1 July 2009.
- [26] On this point I am in agreement with the respondents’ submission namely that the “*debt*” as envisaged by the Prescription Act and which was interrupted on 21 June 2006, has prescribed at the time of launching this application. Consequently, although it is competent to approach the Labour Court with an application for contempt by virtue of non-compliance with an arbitration award duly certified in terms of section 143(3) of the LRA, the award in this particular matter has become prescribed. Accordingly the respondents’ special plea of prescription is upheld.

²² Court’s emphasis.

[27] There is one last issue to consider. In the present case Ghekko filed a review application against the award. On 3 September 2008 the Labour Court dismissed the review application with costs. What is the effect of a dismissal of a review application? Does it have the effect of making the arbitration award now an order of the Labour Court in the absence of an order of the court making the award an order of court? If the Labour Court merely dismisses a review without making the award an order of court it remains, in my view, an arbitration award which must be enforced either through the mechanisms provided for in section 143 of the LRA (certification) or by approaching this court for an order in terms of section 158(1)(c) of the LRA. The award remains an award. I have already pointed out that the award has prescribed.

[28] In the event the application is dismissed. Despite the fact that the respondents have been successful, I have decided to make no order as to costs.

.....
AC BASSON, J

Date of hearing: 20 October 2010

Date of judgment: 9 February 2011²³

²³ Judgment in this application has been delayed for the following reason: At the time of hearing this application, the 1st Respondent – Ghekko Services SA (Pty) Ltd has been placed in liquidation. Although this fact was brought to the court's attention on the day of argument, the court and all parties have agreed to argue the matter but delay judgment until the liquidator has

For the applicant: Mr. MM Baloyi of MM Baloi Attorneys.

For the respondents: Adv. LM Malan. Instructed by AC Shcmidt Attorneys.

LABOUR COURT

had an opportunity to decide whether or not to oppose this application. The court has now been informed that the liquidator does not intend opposing the application and that it will abide by the court's decision in this matter.