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

Reportable
Case No: J 1832/02

In the matter between:

TECHNIKON PRETORIA
(Now. Tshwane University of Technology) Applicant

And

COMMISSIONER E.P NEL N.O 1ST Respondent

COMMISION FOR CONCILIATION MEDIATION
AND ARBITRATION 2nd Respondent

Z GORDON –FATAGODIEN 3rd Respondent

Date of proceedings and date of order : 24 March 2011

Date of reasons : 16 August 2011

JUDGMENT

MOLAHLEHI, J

Introduction

1] The dispute that gave rise to this matter arose 11 years ago and to date remains unresolved. The third respondent is the former employee of the applicant who was dismissed in November 2000. The history of this matter is accompanied by several complications and technicalities which contributed to this excessive delay in finalising the dispute.

[2] The matter on the main involves the review of the rescission ruling that had been issued by the first respondent ("the Commissioner"). The rescission ruling which the applicant seeks to review and set aside concerns the default arbitration award which had been granted in favour of the third respondent who will in this judgment for convenience and ease of reference be referred to as "the employee".

[3] The review application was launched during 2003. The employee had since the issuance of the arbitration award made several applications seeking to enforce the arbitration award in terms of section 158 (1) (c) of the Labour Relations Act (LRA).[1] The matter came before Gush J on 3 December 2010 and was postponed to 24 March 2011, in an order that detailed a number of aspects which the parties needed to attend to before the next hearing.

[4] The matter was postponed again on the 24 March 2011. The order made on that day reads as follows:

> "1. The matter is postponed to afford the respondent (an opportunity) in the point *in limine* (prescription point) to file further heads of argument.
> 2. The submission (third respondents') shall be made by the 12 April 2011.
> 3. The applicant shall have thereafter 10 days to file any reply thereto."

[5] The above order was consequent to a "NOTICE TO ARGUE POINT OF LAW" filed by the applicant on 23 March 2011, a day before the hearing. The notice of point in law reads as follows:

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1 66 of 1995.

> "The applicant will argue, with reference to the decision in Sifuba v Commissioner of the SAPS and other (2009) 30 ILJ 1309 (LC), and other authorities, that any debts created by the default arbitration award and/or the ruling refusing rescission, have prescribed in terms of the Prescription Act 68 of 1969, and accordingly are not enforceable. The current review application and and an order to this effect (and a declaratory that the award has prescribed) will be sought at the hearing hereof."

[6] As a result of the above, this Court is called upon to deal with the issue of prescription before it can entertain the main issue being the review application.

Background Facts

[7] The brief history of the process that has unfolded in this matter is as follows: The default award ordering the reinstatement of the employee was made on the 17 April 2002. The arbitration award was issued on the applicant on the 23 April 2002.

[8] It would appear that the applicant did not comply with the arbitration award as on 20 May 2002, the employee filed an application in terms of which he sought to have the arbitration award made an order of Court in terms of section 158 (1) (c) of the LRA.

[9] It would also appear that before the section 158 (1) (c) could be considered, the applicant filed an application to have the default arbitration award rescinded on 3 June 2002. As indicated earlier, the applicant was unsuccessful in its rescission application.

[10] The applicant being unhappy with the outcome of the rescission application filed its review application of the rescission ruling on 3 May 2003. Thereafter and for a number of years nothing materially happened regarding the review application. On 1 July 2009, the employee filed another application in terms of section 158 (1) (c) of the LRA. That application was subsequently withdrawn. Another section 158 (1) (c) application was filed by the employee on 21 June 2010. That application was set down as unopposed on the unopposed roll for hearing on 24 November 2010. The matter was then removed from the unopposed roll as there was opposition on the day of the hearing. The matter was placed on the opposed roll and set down for 3 December 2010. At the hearing, the Court made the order referred to above and in terms of which time frames were set out as to what the parties were expected to do.

[11] I now turn to deal with the issue at hand, namely prescription. The employee has raised a point *in limine* in relation to the applicant's point concerning prescription. The employee's attorneys of record contend that the prescription point raised by the applicant should be dismissed because the point was not formally raised in the pleadings. It is argued in the heads of argument that the issue of prescription needed to be pleaded so as to indicate the date when the prescription took place.

[12] The need to plead prescription is necessary, according to the employee, even where it is common cause or self evident as to when prescription took place. The further point made on behalf of the employee is that the applicant was aware of the point when the matter came to Court on 3 December 2010 and although it was mentioned, at that stage it was never pleaded.

[13] The applicant in its supplementary heads states that the matter had prescribed because:

> "10. (The employee) abandoned the first section 158(1)(c) application.
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> 10.1 (The employee) launched 2 further applications for identical relief (enforcement of arbitration award) on identical grounds as 158(1) (c).
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> 10.2 (The employee) failed to take any steps to prosecute the first application. No replying papers were filed, and the matter was never set down for hearing. The employee only persists with the third section 158(1)(c) application. The effect is that the employee failed to successfully prosecute his claim (the first 158(1)(c) application) to finality, and therefore this claim is deemed to have never interrupted the prescription at all.
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> 12. "It follows that the debt in the form of the arbitration award has become prescribed, with effect from 17 April 2005.
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> 13. Both the review application and the 158(1)(c) application are academic and should be dismissed."

[14] In his oral submission, Mr Fourie for the applicant submitted that the prescription was initially interrupted by the section 158(1) (c) of the LRA filed by the employee during May 2002. According to him, that interruption has elapsed because it was not pursued to finality in terms of section 15(2) of the Prescription Act.[2] The employee failed to take any step to prosecute his section 158(1)(c) for a period of nine years. The two other section 158(1) (c) are no longer before this Court because they have been withdrawn.

2 68 of 1969.

[15] The employee on the other hand has raised a point *in limine* to the applicant's prescription point. In this regard, it has been submitted in the heads of argument on behalf of the employee that the prescription point is not sustainable because it was not raised in the applicant's pleadings.

[16] The approach to be adopted in raising the issue of prescription is dealt with in the case on *Minister of Justice-Constitutional Development V Mathobela and Others*[3], in which the Court per Hendricks J, held that:

> "I am of the view that prescription was not properly raised as a defence seeing that no facts were placed before this Court by way of an opposing affidavit. The Court cannot on its own motion take notice of prescription. First Respondent who wishes to invoke prescription as a defence should have done so in an opposing affidavit as a relevant document, and not in heads of argument."

[17] In *Rand Staple –Machine Leasing v I.C.I. (S.A.) LTD,*[4] the Court in dealing with the provisions of section 17(2) of the Act had the following to say:

> "I do not agree that the interlocutory motion proceedings initiated by a party who wishes to amend his pleadings are such proceedings as are envisaged in section 17(2) of the Act 68 of 1969. The litigant invokes prescription is variably the defendant or the defendant in reconvention in trial proceedings or the respondent in motion proceedings and the document to be filed by him off

3 (1185/05) [2007] ZANWHC 5 (25 January 2007) unreported at para 22.
4 1977 (3) SA 199 (W) at page 201H-2002.

> record in the trial proceedings is his plea or plea in reconvention or his opposing affidavit in motion proceedings. The proceedings envisaged are, in my view, the main proceedings and are not intermediate or interlocutory proceedings".

[18] The Court in *Rand Staple Machine Leasing* went further to say that; "the proper way to raise this issue of prescription is to do so by way of a special plea. Although this type of special plea is often referred to as peremptory exception…"[5]

[19] In response to the above point raised by the employee that the prescription was not properly raised, the applicant responded as follows:

> "4.The Court may allow prescription to be raised at any stage of the proceedings. While the case law indicates that prescription should preferably be raised in the pleadings, this rule is not inviolate:
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> 4.1 Prescription Act expressly grants the court discretion in this regard. The general principle is that pleadings are made for the court and not visa versa. …
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> 4.3 The issue was raised prior to the hearing of the matter, by way of a notice to argue a point in law. While this point could be raised in an affidavit, it was properly raised by way of a notice to argue a point of law, which is recognized in motion court practice.
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> 4.4 The dominant consideration is potential prejudice to the other party-for this reason the court allowed the third respondent's attorneys to hand up further documents during the course of the argument and further time to file written submission. This clearly cured the possible prejudice which could have arisen by the late raising of the point of law.

5 Ibid at 202 F.

> 4.5 While the third respondent's attorneys filed further notices that the matter was postponed, no further affidavits were filed, despite ample opportunity to do so. This is not surprising- the facts upon which the prescription argument is raised all appear in the papers already before the court.
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> 4.6 In summary, this court has already ruled that it will consider the point of law, and has reserved judgment on this point. Given the arrangement made to negate any possible prejudice, the question of the late raising of the point of law has been dealt with and does not require further consideration."

[20] The applicant further contended that the employee had abandoned his section 158(1) (c) application of 2002. Whilst conceding that the section 158(1)(c) of the LRA served as a process interrupting prescription, that interruption lapsed because of failure by the employee to prosecute the claim to finality.

Evaluation

[21] It is now well established that in terms of section 10(1), (11)(d) and 12(1) of the Prescription Act, an arbitration award which is regarded as a debt is extinguished by prescription after a lapse of three years from the date it was issued.

[22] In terms of section 15 (1) of the Prescription Act, the running of prescription is interrupted by the service of any process whereby the creditor claims the debt. In the present instance, it is common cause that the section 158(1)(c) of the LRA which was filed by the employee in 2002 serves as a process that interrupted prescription in this matter as envisaged in section 15 (1) of the Act.[6]

6 The provisions of section 15(1) of the Prescription Act 68 of 1969 reads as follows: " 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."

[23] As stated above in the present instance, it is common cause that the running of prescription was interrupted by the filling of section 158(1)(c) during 2002. The two questions that have arisen in the present instance is whether the employee has abandoned the section 158(1)(c) of the LRA and whether the interruption that arose from that process has lapsed because of the undue delay in the prosecution of that very process.

[24] The key question to answer before answering the above questions is whether the prescription point is properly before this Court. If the answer to this question is in the negative then the need to answer the above questions would not arise. As indicated earlier, the contention of the employee is that the prescription point is not properly before the Court because it was not properly pleaded.

[25] Section 17 of the Prescription Act entitled "Prescription to be raised in pleadings" provides:

> "A party to litigation who invokes prescription, shall do so in the relevant document filed of record in the proceedings: Provided that a court may allow prescription to be raised at any stage of the proceedings."

[26] In considering the implication of section 17(2) of the Prescription Act in the *Mathobela* case, , Hendricks J, had the following to say:

> "Section 17 (1) forbids that a court take ***mero motu***

> cognizance of the fact that a claim had prescribed. Understandably so, because there may well be certain facts which are not placed before the court that may have interrupted the running of prescription. Prescription must be invoked by the party who raises it as a defence and it must be done in the relevant document.[7]

[27] The learned judge went further to say:

> "Though Section 17 (2) refers to "relevant document" and not specifically to "pleadings" as contained in its predecessor (Section 14 of Act 18 of 1943), I am of the view that the "relevant document" is either a plea (special plea) in trial proceedings or an opposing affidavit in motion proceedings.
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> In my view heads of argument is an aid prepared by counsel or an attorney or a litigant for the convenience of the Court. Heads of argument cannot be regarded as evidence by a party. In my view the way to invoke prescription as envisaged in Section 17 (2) is either by way of a plea (special plea) in trial proceedings or an opposing affidavit in motion proceedings. First Respondent should have filed an opposing affidavit even if the only issue contained therein would have been prescription. By raising the issue in the manner it did, the First Respondent has, in my view, done so in an incorrect manner."[8]
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> [17] The onus is on the party that alleges that an obligation has been extinguished by prescription to plead and prove the necessary averment in this regard."

[28] The facts in the *Mathobela's* case are very similar to the present. In that case, the respondent through his/her attorney raised the issue of prescription in the heads of

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7 Above n3 at para 11.

8 Above n3 at para 15-17.

argument.

[29] The Court in the *Mathobela's* case in making the findings as it did with regard to the provisions of section 17 of the Prescription Act relied on the cases of *Rand Staple*.[9]

[30] In Heeriah *and Others v Ramkissoo[10], in* dealing with the same issue, under the 1943 Act which specifically required that prescription should be pleaded had the following to say:

> "The question of prescription was not raised by the defendants in their plea, nor was any application made to the Magistrate or to this court to amend the plea so as to refer to it. I mention this because it is provided for in sec 14 of Act 18 of 1943, as follows:' A party to a suit who raises prescription shall do so in the pleadings: Provided that the court may allow prescription to be raised at any stage in the proceedings.' I think that the requirement that a party to a suit who raises prescription shall do so in the pleadings, is peremptory in this sense that the court will not hold a claim made before it to be prescribed by extinctive prescription unless the prescription is raised in the pleadings, whether in convention or reconvention, though I take it that the word 'pleadings' would be extended to cover affidavits if the relevant proceedings were by way of application or cross application. I think that what was intended by sec 14 was that prescription must be specifically raised in the pleadings (or affidavits, as the case may be) where it is relied upon as rendering unenforceable the claim made by the opposite party."

9 Above n3 at paras 13-14.
10 [1955] (3) SA (N)

[31] It seems clear from the above authorities that a proper way of raising prescription is by way of a plea or an answering affidavit. It would seem to me that because the law allows for prescription to be raised at any stage of the proceedings, a supplementary affidavit may be filed where the answering affidavit has already been filed when the point is raised. Harms says the reason for requiring the prescription point to be raised by way of a plea or special plea and not by way of exception is that the other party (the employee in the present instance) may have a valid answer to the prescription point and more importantly to the issue of the delay in prosecuting the process interrupting the prescription to finality.[11]

[32] In raising the prescription point in the manner it did, the applicant denied the employee the opportunity to give a full account of the delay in relation to prosecuting his section 158(1)(c) of the 2002 application to finality. In this regard, it is trite that the Court has a discretion which it has to exercise judicially, to dismiss a matter if a litigant delays in prosecuting that matter within a reasonable time. There are a number of factors which the Court in exercising such a discretion would have to take into account regarding whether such a delay should be condoned or not. Those factors in my view can only be considered on the basis of the facts presented by the parties before the Court.

[33] The other factor which the Court has to take into account in dealing with the delay in the prosecution of the matter has to do with the extent or the contribution to the delay by the party seeking to have the matter dismissed because of the alleged unreasonable delay. In other words, the question which the Court needs to determine

11 Harms *Amler's precedents of pleadings* 7 ed (LexixNexis, Durban 2009) at 331.

is, what did the party complaining about the delay do in order to progress the matter to the next stage. Because of the approach adopted by the applicant in placing this matter before the Court, those facts are not before the Court. The Court is therefore unable to exercise its discretion properly.

[34] In light of the above discussion it is my view that the applicant's point regarding prescription stands to fail. The point raised by the Respondent that the offer was not properly placed before court stands to succeed. I see no reason why costs should in the circumstances of this case not follow the results.

[35] In the premises the following order is made:

1) Prescription in this matter had been interfered by section 158 (1) (c) of the LRA

2) The Applicant's point regarding prescription is dismissed.

3) The Applicant is to pay the costs.

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Molahlehi J

Judge of the Labour Court of South Africa

Appearances:

For the Applicant: Adv. G.A. Fourie

Instructed by: Glynn Marais Inc.

For the Respondent: Mr A.L. Goldberg from Jansens Labour Court Attorneys