



REPUBLIC OF SOUTH AFRICA

Reportable

Of interest to other judges

THE LABOUR COURT OF SOUTH AFRICA, JOHHANESBURG

JUDGMENT

Case no: JR2438/07

In the matter between:

SAMPLA BELTING SA (PTY) LTD

Applicant

and

CCMA

First Respondent

COMMISSIONER DORMUND

Second Respondent

HILBIG LINDA

Third Respondent

Heard: 13 April 2012

Delivered: 24 April 2012

Summary: Prescription: Three applications:- Application to review award of the CCMA; Application to dismiss review application (rule 11) and Application

to dismiss application to dismiss review application on grounds that award had prescribed. As application based on prescription of award would dispose of the entire matter only this application proceeded. This application granted; award found to have prescribed, which disposed of the entire matter as the remaining two applications rendered academic.

JUDGMENT

GUSH J

- 1] This matter concerns an application to review and set aside the award of the second respondent and two interlocutory applications. The effect of the second respondent's award was that the applicant's dismissal of the third respondent was unfair and the second respondent awarded the third respondent compensation and ordered that the applicant pay the costs of the arbitration.
- 2] The award was made on 27 August 2007 and the applicant filed an application to review and set aside the award on 29 October 2007.
- 3] The matter subsequently followed a somewhat tortured path culminating in its enrolment today for the purpose of considering and deciding:
 - a. the main application by the third respondent to review and set aside the arbitration award;
 - b. an application by the third respondent to dismiss the applicant's review application for reasons that the applicant has not diligently pursued the matter; and
 - c. an application by the applicant to dismiss the third respondent's application as set out in paragraph 3 (b) on the grounds that the award which is the subject of the main review application has prescribed.

- 4] In circumstances when an award has prescribed any application to review that award or any other interlocutory application concerning the review application becomes academic.
- 5] In this matter, although the applicant in its "prescription" application in the main seeks to have the third respondent's application to dismiss its review dismissed on the grounds that the award has prescribed. If the award has indeed prescribed this disposes of the matter in its entirety.
- 6] It was accordingly agreed that the matter would firstly proceed only in respect of the issue of prescription.
- 7] The second respondent's award is dated 27 August 2007 and ordered that the applicant pay to the third respondent the compensation awarded within 10 days of the date of the award. All things being equal the award prescribed on 8 September 2010 being three years and 10 days after the date of the award.
- 8] In response to the applicant's averment that the award has prescribed, the third respondent's attorney filed an answering affidavit in which he relies on a letter which is annexed thereto, which he avers interrupted prescription. The letter was addressed to the third respondent's attorneys by the applicant's erstwhile attorneys "J D Verster Labour Law Office" and reads:

'We refer to above matter and can advise that we have received instructions from our client to lodge review proceedings against the award handed down in this matter.

In view of the fact that the review application does not stay the effect of a certified award of the CCMA, our instructions are to recommend that your client holds further steps in the enforcement of the award in abeyance pending the adjudication of our client's review application.

Please revert to us on your client's attitude to our client's suggestion'

9] The third respondent's does not give any clue as to his attitude at the time to the suggestion made in the letter. For the rest the third respondent's attorney refers to delays caused by the applicant's attorneys in prosecuting the review application, and promises that further legal argument in respect of prescription will be addressed at the hearing of the matter.

10] The question of prescription is governed by the Prescription Act 68 of 1969. The act deals with the interruption of prescription in sections 14 and 15.

11] Section 14 of the Act, under the heading "Interruption of prescription by acknowledgement of liability" provides:

- 1) 'The running of prescription shall be interrupted by an express or tacit acknowledgement of liability by the debtor.
- 2) If the running of prescription is interrupted as contemplated in subsection (1), prescription shall commence to run afresh from the day on which the interruption takes place or, if at the time of the interruption or at any time thereafter the parties postpone the due date of the debt from the date upon which the debt again becomes due.'

12] Section 15 of the Act, under the heading "judicial interruption of prescription" provides:

'(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.

(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.'

13] The letter addressed to the third respondent's attorneys cannot by any stretch of the imagination be interpreted to be 'an express or tacit acknowledgement of liability by the debtor' and in any event even if it was, it was merely a suggestion and there is no indication in the papers that the third respondent ever agreed to the "suggestion".

14] It is established law that the Prescription Act applies to awards of the CCMA and that the filing of a review application does not interrupt prescription. See *Technikon Pretoria (now Tshwane University of Technology) v Nel NO and Others* (2012) 33 ILJ 293 (LC); *SA Transport and Allied Workers Union on behalf of Phakathi v Ghekko Services SA (Pty) Ltd and Others* (2011) 32 ILJ 1728 (LC) and *Magengenene v PPC Cement and Others* (2011) 32 ILJ 2518.

15] The third respondent opposed the applicant's application concerning prescription on three grounds viz.

- a. Firstly, that the applicant had interrupted the running of prescription as provided for in section 14 of the Prescription Act by expressly or tacitly acknowledging liability;
- b. The third respondent's second ground was that the answering affidavit and the application to dismiss the applicant's application constituted "a process" as defined in section 15 of the Prescription Act and therefore amounted to "service on the debtor of a process whereby the creditor claims payment of the debt"; and
- c. Thirdly and apparently in amplification of the second ground, the respondent somewhat obliquely argued that the answering affidavit to the review application and the application to dismiss the review application constituted processes designed to have the effect of removing an impediment (the review application) to the third respondent enforcing the award and therefore interrupting prescription, , and that therefore somehow the filing of these processes interrupted prescription.

16] I will deal with the third respondent's grounds in the order in which they were raised.

17] Dealing with the third respondent's first ground: Having disposed of the averment that the letter addressed to the third respondent's attorneys interrupted prescription, I will deal with the second basis upon which the third respondent avers that the applicant acknowledged liability. Despite the fact that the applicant's review application expressly challenged the award and was intended to set aside the second respondent's award which imposed the liability on the applicant, the third respondent argued that the fact that the applicant had launched the review application constituted 'an express or tacit acknowledgement of liability'. During argument, the third respondent's Counsel persisted in referring to 'acknowledgement of **the** liability' which may to some extent assist in understanding the third respondent's argument. It is, however, inconceivable that the application by the applicant to challenge the award of the second respondent's award and have it set aside could ever amount to an 'acknowledgement of liability' by the applicant as envisaged by section 14 of the Prescription Act. The application to review and set aside the award arises purely from the fact that the applicant in fact disputes being liable for the debt. I am satisfied that the applicant's application to review the second respondent's award did not interrupt prescription.¹

18] The third respondent's second ground is that the third respondent's answering affidavit and application to have the review application dismissed, despite the provisions of section 15 of the prescription Act, constituted a 'process whereby the creditor claims payment of the debt'. It is abundantly clear from both the answering affidavit and the dismissal application that that neither of them constitute 'process whereby the **creditor claims payment of the debt**'. (*my emphasis*).

19] In this regard, the third respondent relied on an unreported decision of this Court where the Honourable Judge Cook AJ held not only that an application to review an arbitration award interrupted prescription but that even if that

¹ See also the judgments referred to above.

view was incorrect an application to dismiss a review application did.² Having dealt with the averment that a review application interrupts prescription it remains to consider, in the light of this judgment, whether either the third respondent's answering affidavit or the application to dismiss interrupted prescription.

20] The provisions of section 15 of the Prescription Act set out quite clearly what would constitute judicial interruption of prescription viz: "service on the debtor of any process whereby the creditor claims payment of the debt". In order therefore for either the answering affidavit or application to dismiss the review application the "process" must claim payment of the debt. It is patently clear from both the third respondent's answering affidavit and application to dismiss that neither "process" claimed payment of the debt. The position in the AON case³ was markedly different. In that matter it appears from the judgment that the application to dismiss the review did comply with section 15 of the Prescription Act in that not only did the applicant seek the dismissal of the review application but in addition sought an order "reinforcing the existing CCMA award"(sic).⁴

21] Insofar as the third ground is concerned, the applicant's review application does not constitute an impediment to the running of prescription nor is it an impediment to the third respondent [the creditor] interrupting prescription.

22] At all times the third respondent could have interrupted prescription either by applying for the award to be certified by the CCMA in accordance with section 143 of the Labour Relations Act or applying to have the award made an order of court in accordance with section 158(1)(c) of the Labour Relations Act. The third respondent did not do so.

23] Despite the seemingly unfair consequence of a review application not interrupting prescription, the court has no option but to give effect to the Prescription Act.

² AON SA (Pty) LTD and CCMA and Others Case Number JR 2766/04 (unreported).

³ supra

⁴ AON supra at pages 8 and 9 paragraphs 14 and 15

24] It is worth noting though, that the provisions of section 24 of the Labour Relations Act Amendment Bill, 2012, proposes that the Labour Relations Act be amended to provide that the filing of a review application will suspend the running of prescription. The proposed amendment to section 145 of the Labour Relations Act reads as follows:

‘(9) an application to set aside an arbitration award in terms of this section interrupts the running of prescription in terms of the Prescription Act (Act No. 68 of 1969) in respect of the award’

25] Whilst this amendment will remedy the unfairness, it also serves to confirm that the filing of a review application does not at present interrupt prescription.. In the circumstances and particularly as the applicant has properly raised the question of prescription in its pleadings, I am obliged to uphold the applicant’s plea of prescription.

26] As far as the question of costs is concerned, this matter has proceeded far beyond the date upon which the award prescribed. It was not necessary for the applicant to proceed with its review application after September 2010 and the matter of prescription could have been dealt with then. I am therefore satisfied that it is just and equitable that no order as to costs be made.

27] In the circumstances, I make the following order: on the basis that the second respondent’s award in favour of the third respondent has prescribed, the plea of prescription is upheld and the remaining applications that are before the court are dismissed. There is no order as to costs.

Judge of the Labour Court

APPEARANCES

APPLICANT: Donald Graham; GSR Attorneys

THIRD RESPONDENT: Adv. A Cook

Instructed by Anthony Hinds Attorneys