REPUBLIC OF SOUTH AFRICA

Reportable

THE LABOUR COURT OF SOUTH AFRICA, PORT ELIZABETH

JUDGMENT

Case no: P 297/11

In the matter between:

SATAWU o.b.o HANI **APPLICANT**

and

FIDELITY CASH MANAGEMENT SERVICES (PTY) LTD **RESPONDENT**

Heard: **23 February 2012**

Delivered: **30 March 2012**

JUDGMENT

BHOOLA J

Introduction

1] This is an opposed application in terms of section 158(1) (c) of the Labour Relations Act, 66 of 1995 ("the LRA") to have an arbitration award, in which the dismissal of the individual applicant ("Mr Hani") was declared to be substantively unfair, made an order of court. The respondent opposes the application and pleads that the debt created by the award has become prescribed by the effluxion of time.

The common cause facts

2] The individual applicant was dismissed by the respondent and referred a dispute to the National Bargaining Council for the Road Freight Industry ("the Bargaining Council"), which culminated in an arbitration award being issued by arbitrator Van Der Walt on 24 April 2007 directing that he should be reinstated with effect from 2 May 2007.

3] The respondent initiated review proceedings by way of an application dated 23 May 2007. The review application was opposed by the applicant and was dismissed with costs by Steenkamp J in a judgment dated 18 March 2009. Steenkamp J also dismissed the application for condonation for the late filing of the review. Dissatisfied with the outcome, the respondent then sought leave to appeal, which was again opposed by the applicant, and was likewise dismissed in 2010. The application for leave to appeal was out of time by more than a year. The respondent proceeded to petition the Labour Appeal Court, which petition was dismissed by way of an order dated 30 May 2011.

4] On 9 June 2011 the applicant's attorneys wrote to the respondent seeking reinstatement of Mr Hani in compliance with the arbitration award. The respondent's attorneys replied on 15 June 2011 contending that the arbitration award had become prescribed.

5] In 1 July 2011 the applicant instituted these proceedings.

The Prescription Act

6] Section 11 (d) of the Prescription Act, 68 of 1969 ("the Act") provides that a "judgment debt" prescribes in 30 years and that the period for "other debts" is three years. Section 10(1) provides that "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." Section 12 provides that "prescription shall commence to run as soon as the debt is due".

7] Section 13 provides that in certain specified circumstances the running of prescription is delayed. In particular, section 13(1) (f) states: "If…(f) the debt is the object of a dispute subjected to arbitration the period of prescription shall not be completed before a year has elapsed after the day referred in paragraph (i)". Paragraph (i) provides : "the relevant period of prescription would, but for the provisions of this subsection, be completed before or on, or within one year after, the day on which the relevant impediment referred to in paragraph (a), (b), (c), (d), (e), (f), (g) or (h) has ceased to exist".

8] Section 14 provides for the interruption of prescription in the following circumstances :

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".

9] Section 15 provides as follows :

15. Judicial interruption of prescription.—(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.

(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.

(3) If the running of prescription is interrupted as contemplated in subsection (1) and the debtor acknowledges liability, and the creditor does not prosecute his claim to final judgment, prescription shall commence to run afresh from the day on which the debtor acknowledges liability or, if at the time when the debtor acknowledges liability or at any time thereafter the parties postpone the due date of the debt, from the day upon which the debt again becomes due.

(4) If the running of prescription is interrupted as contemplated in subsection (1) and the creditor successfully prosecutes his claim under the process in question to final judgment and the interruption does not lapse in terms of subsection (2), prescription shall commence to run afresh on the day on which the judgment of the court becomes executable.

(5) If any person is joined as a defendant on his own application, the process whereby the creditor claims payment of the debt shall be deemed to have been served on such person on the date of such joinder.

(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.

The parties' submissions

10] The applicant submits that in the labour law context the application raises two possibilities – that the debt becomes due when the employee is dismissed or when the arbitration award is issued. In this regard the applicant submits as follows :

10.1 If the true ‘debt’ is the fact of a dismissal then the applicant’s referral of his dispute to arbitration served to interrupt the running of prescription. This interruption continued for the statutorily sanctioned litigation which followed and included the review application and the unsuccessful petition.

10.2 If the ‘debt’ is considered to be the arbitration award itself then there are two arguments. Firstly, the review application served as an acknowledgement of debt within the contemplation of the Prescription Act[1], thereby interrupting the running of prescription. Secondly, this ‘debt’ does not ‘become due’ within the contemplation of the Prescription Act until the respondent’s right of review is exhausted. Only then does the debt become executable.

11] Mr Buchanan, appearing for the applicant, submitted that it was inherently unfair and inequitable that an employee with an award in his favour, like Mr Hani, should find himself in a position where he is unable to enforce the award as a result of the respondent’s reliance on prescription. Although the applicant does not abandon the arguments made in its primary heads by Mr Wade, it submits that s 13 (1) (f) provides a substantive answer to this dilemma despite the fact that it appears not to have been raised in this context before. In this regard Mr Buchanan submitted that where a debt is the subject of a dispute which is “subjected to arbitration” within the meaning of s 13(1)(f), there is a period of one year <u>after</u> the arbitration is concluded before prescription starts to run. The applicant’s claim would then only prescribe on 2 May 2012, one year after the petition to the Labour Appeal Court was refused.

12] Mr Buchanan’s primary submissions in this regard were that it is common

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1 The applicant relied on *Aon South Africa (Pty) Ltd v CCMA* (as yet unreported judgment of

Cook AJ, case number JR2766/04 dated 21 September 2011) as authority for this submission.

cause in the present case that there was a dispute and that it was "subjected to arbitration" and that this ended only when the Labour Appeal Court finally disposed of the matter. The term "subjected to arbitration" he argued envisages an actual reference to arbitration (not simply a potential to refer to arbitration based on an arbitration clause) and that the arbitration must have commenced. [2] In this context he submitted that it is common cause that the original dispute between the parties, i.e. the dismissal of Mr Hani, was in fact the dispute "subjected to arbitration" and that the arbitration proceedings indeed commenced. By initiating the review (in addition to the review interrupting prescription in that it was a tacit acknowledgment of debt – a point to which I shall return) the respondent acknowledged that the dispute was still "subjected to arbitration". Indeed, the very purpose of the review, in Mr Buchanan's submission, was to set aside the arbitration award and to seek remittal of the dispute to another arbitrator for another arbitration. The arbitration proceedings can therefore be said to only have ended for the purposes of the Prescription Act when the Labour Appeal Court refused the petition. Until such time the dispute was still "subjected to arbitration" within the terms of section 13(1)(f). The applicant would then have had a year after such decision on 30 May 2011 before prescription began to run.

13] Notwithstanding the above submissions, Mr Buchanan conceded that there was significantly sparse authority on the meaning of the rather cryptic phrase "subjected to arbitration". It goes beyond requiring that there must be potential for arbitration or that an arbitration clause exists in a contract. It envisages that the dispute must have actually been referred to arbitration. In the present instance there is no difficulty with that requirement and the only issue is when the arbitration was held and when it ended. The respondent, he argued, concedes that when the dispute was referred to the Bargaining Council it was "subjected to arbitration" and prescription was interrupted. This was an impediment as defined in s 13(1)(f), he argued, and the sole issue is when that impediment ceased to exist. The respondent concedes that it ceased when the award was issued.

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2 See *Members of the Sugar Industry Central Board v Maritz & Another* 1984 (4) SA 101 (T) and Prescription in South African Law, Saner, at 3 – 34 to 3-86.

However, that cannot be correct, Mr Buchanan submitted, since the common practice in the Labour Court is that an award is not made an order of court if there is a review pending. Instead, the application is stayed pending the outcome of the review. Thus in his view while the review is pending the debt is still the object of a dispute "subjected to arbitration". Both in the Labour Court and High Court in proceedings in terms of the Arbitration Act, it is invariable that the relief in a review is that the award is set aside in a successful review and remitted to be heard *de novo* by another arbitrator. Patently, Mr Buchanan submitted, under such circumstances the award is still "subjected to arbitration".

14] Mr Buchanan submitted that insofar as the respondent contends that once the award was issued a new debt arose, this ignores the relief sought in the review application. In this regard the respondent cites *Murray & Roberts Construction (Cape) (Pty) Ltd v Upington Municipality* 1984 (1) SA 571 (A) at 579-580 as follows :

"For present purposes s 13(1) of the Act is the provision which gives effect to this principle. It lays down that prescription is delayed in certain circumstances, eg where the creditor is a minor or is insane, or is a person under curatorship etc. Where an "impediment" of the type mentioned in s 13 exists a year or less before prescription would otherwise have been completed, the completion of prescription is delayed until a year after the impediment has ceased to exist.

The same duality of purpose can be seen, in my view, in s13(1)(f) of the Act, which is of direct relevance to the present case. The subsection applies "if…the debt is the object of a dispute subjected to arbitration". An arbitration agreement does not necessarily oust the jurisdiction of the court. Despite the existence of such an agreement, although he might be met by an application for a stay of proceedings or a special plea to the same effect (see s 6 of the Arbitration Act 42 of 1965; Universiteit van Stellenbosch v J A Louw (Edms) Bpk 1983 (4) SA 321 (A) at 333G-H and authorities there cited). The court would in practice normally order a stay if requested to do so (ibid at 333H- 334C). An arbitration agreement is *therefore in a sense an impediment to the recovery of a debt by means of legal proceedings, but it is one because it provides an alternative means of resolving disputes which carries the approval of the law. This applies a fortiori where a dispute has actually been subjected to arbitration. The creditor is protected against the running of prescription because there exists an impediment to his approaching the ordinary courts, and the impediment exists because he is taking appropriate alternative steps to recover his debt. It is against this background that s 13 (1) (f) of the Act should in my view be interpreted and applied."*

15] Mr Buchanan submitted that this quote reflects an approach that deals neatly and appropriately with the difficulties that inevitably arise from a strict interpretation of the Prescription Act to the effect that the award has become prescribed. On this approach it was only on 30 May 2011 when the petition for leave to appeal was refused that Mr Hani could enforce his award. Until that date his dispute was still "subjected to arbitration" in the broad sense. Such an interpretation he submitted would be fair and equitable to both parties. It would allow Mr Hani to seek to enforce an award in his favour and the respondent to refuse to reinstate him pending the outcome of a review which may or may not succeed.

16] Mr Snyman submitted on behalf of the respondent that equity and fairness were trumped by the provisions of the Prescription Act. He argued that the constitutional validity of rules relating to prescription (in this case section 23(1) of the Road Accident Fund Act, 56 of 1996 ("RAF Act") has recently been confirmed by the Constitutional Court. In *Road Accident Fund v Mdeyide* [3] the Court reaffirmed that the limitation on the right of access to courts by section 23(1) of the RAF Act was reasonable and justifiable under section 36 of the Constitution. The Court held (at para [8]): "PLEASE INSERT.

"*This court has repeatedly emphasized the vital role time limits play in bringing certainty and stability to social and legal affairs, and maintaining the quality of adjudication. Without prescription periods, legal disputes*

3 2011 (2) SA 26 (CC).

would have the potential to be drawn out for indefinite periods of time, bringing about prolonged uncertainty to the parties to the dispute. The quality of adjudication by the courts is likely to suffer as time passes, because evidence may have become lost, witnesses may no longer be available to testify, or their recollection of the events may have faded. The quality of adjudication is central to the rule of law. For the law to be respected, decisions of court must be given as soon as possible after the events giving rise to disputes, and must follow from sound reasoning, based on the best available evidence."

The Court addressed any prejudice to an individual applicant by stating that all he or she needed to do in three years to avoid prescription was to file a notice of motion. In this regard Mr Snyman referred to *Cadac v Webber* [4]as a case in point. The plaintiff did nothing to prosecute his claim after issuing summons and after a considerable period of time the defendant claimed that the debt had prescribed. The Court held that it had not.

17] Mr Snyman submitted further that whilst it was correct that the general practice in this Court was to stay the enforcement of an arbitration award pending the outcome of a review, this was not an inflexible rule. Instead the Court weighed the different considerations and had in fact in some instances refused a stay. He cited in this regard *Khoza v Sasol (2002) 23 ILJ 1567 (LC)* in which Ntsebeza AJ made the award and order of court, as well as *Ntshangase v Speciality Metals cc (1998) 19 ILJ 584* at para 14.

18] The respondent's principal submission is that section 13(1) (f) finds no application in the present instance. Mr Snyman submitted that section 13 deals with an impediment to the issue of a summons or notice of motion or a statement of claim in labour law. It refers to the impediments that prevent legal process from being issued – for instance the claimant is a minor, married, outside the Republic, in partnership or the dispute is subjected to arbitration. For this reason the Prescription Act disregards process until the impediment ceases. For example, if parties opt for

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4 2011 (3) SA 570 SCA at 21.

arbitration they do not have to issue process until a year after the arbitration is concluded.[5] He submitted further that the *ratio* in Murray & Roberts (supra) is clear. The impediment exists because an alternative dispute resolution mechanism has been agreed to settle the debt itself. In the labour law context the alternative dispute resolution mechanism is the only manner in which the dispute is to be resolved, and the parties cannot proceed to court directly as an alternative to arbitration. Section 191 (5) (a) and (b) of the LRA makes it clear that, depending on the reason for dismissal, an unfair dismissal dispute must be arbitrated. This is a primary dispute resolution mechanism and not an alternative to litigation. Mr Snyman submitted in the alternative that the "debt" (i.e. the dismissal) has already been determined by the arbitration award. The proceedings have therefore concluded and any impediment would have ceased. For the applicant's interpretation to prevail it must be the award that is the dispute that is "subjected to arbitration", and this interpretation cannot be correct. The dismissal constituted a separate debt or cause of action and was novated by the arbitration award, which created a new debt in relation to the reinstatement of the individual applicant. To fall within the ambit of

s 13(1)(f) as proposed by the applicant it must have been the dismissal which was the dispute subjected to arbitration. Needless to say, this cannot be correct.

19] In the alternative Mr Snyman submitted, even if section 13(1)(f) were to find application in the present instance, it envisages that prescription is only interrupted for a year after the impediment is removed. See *Jans v Nedcor Bank Ltd 2003 (6) SA 646 (SCA); Bank of Lisbon International ltd v Neves 1992 (3) SA 349 (W); Kilroe-Daley v Barclays National Bank Ltd 1984 (4) SA 609 (A).* Therefore, even if it is accepted that the arbitration and the consequent review application formed part of the "impediment", this impediment would have ceased on 18 March 2009 when the Labour Court decided the review. Prescription would then have continued to run

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5 For purposes of this judgment I do not consider it necessary to determine when arbitration concludes i.e whether it is when the award is issued or when the LAC refused the petition for leave to appeal.

from one year thereafter. The applicant only filed its application on 1 July 2011 and even on this interpretation the claim would still have prescribed.

Evaluation of submissions

20] I have had the opportunity to comment on these issues in *Mangenegene v Pretoria Portland Cement and others* (unreported judgment case number JR698/02 dated 29 April 2011 – NOW REPORTED PLEASE CITE). It is trite that an arbitration award is a debt as contemplated in the Prescription Act : *National Union of Metalworkers of SA & another v Espach Engineering* (2010) 31 *ILJ* 987 (LC); *Chemical Energy Paper Printing Wood and Allied Workers Union & another v Le-Sel Research (Pty) Ltd* (2009) 30 *ILJ* 1818 (LC); *Public Servants Association obo Khaya v CCMA & others* (2008) 29 *ILJ* 1546 (LC); *SA Transport and Allied Workers Union obo Phakati v Ghekko Services SA (Pty) Ltd and others* (2011) *32 ILJ 1728 (LC).*

21] The launching of review proceedings does not automatically stay enforcement of an award nor does it bar the award being made an order of court: See *Ghekko (supra)*, *Espach (supra),* and *Police and Prisons Civil Rights Union on behalf of Sifuba v Commissioner of the SA Police Service and others* (2009) 30 *ILJ* 1309 (LC).

22] It is trite that prescription starts to run when the “debt” becomes due. On the facts in *casu* prescription would have commenced to run when the award was issued to the parties on 24 April 2007 or, more correctly, on 2 May 2007 when the applicant’s right to be reinstated came into effect. The parties are in agreement that the award created a new debt (although the applicant relies primarily on the unfair dismissal as having been the dispute subjected to arbitration in the context of section 13(1)(f)). This approach is consistent with that taken by Friedman JP in *Primavera Construction SA v Government, North-West Province and Another 2003 (3) SA 579 (B).* At 604 the court held: “The effect of a valid award by an arbitrator will usually be to create new rights and obligations between the parties, and it will either dissolve existing rights or bring an end to a dispute as to whether certain rights existed or not. It is clear that in the absence of voluntary compliance, the award can be enforced only with the approval of the Court. The party therefore wishing to enforce the award will sue on the award and not on the original contract from which the dispute arose. It is clear that a judgment debt lapses through prescription after 30 years, an arbitrator's award will acquire the status of a judgment debt only once it has been made an order of Court…I reiterate that once the award has been made an order of Court, it becomes a judgment debt which prescribes after 30 years. See s 11(a)(ii) of the Act. Until it is made an order of Court, it appears that a party's right to enforce the award would ordinarily prescribe within three years from the date of publication of the award". This approach has been endorsed by the Labour Court in *Sifuba* (supra at para 33) in the following terms: "The debt in issue in this matter is the debt that flows from the arbitration award. A valid arbitration award, like a court of judgment in certain circumstances, is regarded as a novation of the former debt on which the award was granted and the arbitration award itself constitutes the new debt. The former debt is converted into a new debt that is due by virtue of the valid arbitration award. New rights, duties and obligations are created by a valid arbitration award."

23] In regard to the s 13(1) (f) point I do not agree that arbitration in this context is an impediment to the determination of the dispute by the courts. Section 13 (1) (f) therefore cannot therefore find application in this context. This is apparent from the literal meaning of impediment in the section. In *Silhouette Investments Ltd v Virgin Hotels Group Ltd 2009 (SA) 617 (SCA)* the Court held as follows with regard to the meaning of impediment: "The various impediments listed in s 13(1) are circumstances which, as Professor M.M Loubser puts it in his work Extinctive Prescription at 117, 'have in common some legal or practical problem which makes it difficult or undesirable for a creditor to institute proceedings for the enforcement of his claim against the debtor'. See also *ABP 4X4 Motor Dealers (Pty) Ltd v IGI Insurance Co Ltd 1999 (3) SA 924 (SCA)* at 930I-931A, where it was said that –the word impediment…covers a wide spectrum of situations ranging from those in which it would not be possible in law for the creditor to sue to those in which it might be difficult or awkward, but not impossible, to sue." There was therefore, as Mr Snyman submitted, no impediment in place that prevented or made it impossible in law or undesirable for Mr Hani to approach the Labour Court to enforce his award. S 13(1)(f) has no application in the present instance.

24] I agree with Mr Snyman that it is trite that the award could not have been the dispute "subjected to arbitration". This would only apply to the unfair dismissal. Section 13 (1) (f) is not the definitive answer the applicant suggests. There must be a distinction between compulsory arbitration as envisaged in the LRA and voluntary arbitration agreed by the parties as an alternative to litigation in the ordinary course. The section makes no provision for compulsory arbitration as envisaged in the LRA as a primary dispute resolution mechanism for "debts" arising from unfair dismissals in certain circumstances. Such arbitration would not constitute an impediment as it arises out of a carefully crafted institutional framework in the LRA to expedite the resolution of individual labour relations disputes.

25] The general submissions in my view likewise do not assist the applicant. As Molahlehi J makes it clear in *Espach* (supra) that review proceedings do not interrupt prescription. Nor was there any impediment to the applicant issuing process in its steps to enforce the award. Molahlehi J stated the position clearly in Espach (supra at [15]) in the following terms : "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 practice by the court to postpone an application to make an arbitration award an order of court in terms of s 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".

26] Mr Hani's right to reinstatement in terms of the arbitration award (in other words the debt) came into existence on 2 May 2007. This was when the debt became due and when prescription began to run. The predominant approach in the Labour Court is that prescription is not interrupted by a review and given the applicant's failure to issue any "process" as envisaged in the Prescription Act the debt would accordingly have prescribed three years later i.e. on 2 May 2010. This application was brought a year and two months after the claim had prescribed. Although the applicant opposed the review the first steps it took to enforce the award were taken four years and 2 months later, on 1 July 2011. Nothing in the respondent's attempts to set aside the award prevented the applicant from simply filing this application at any stage after the award was issued. This and nothing more would have interrupted prescription and avoided this unfortunate consequence for Mr Hani. In *Solidarity obo Prins and 10 others v Gijima AST (Pty) Ltd* (judgment of Van Niekerk J in JS 333/08 dated 31 March 2010) Van Niekerk J indicated that this was very simply all the applicant needed to do. In dispensing with the argument that a letter from the respondent "suspended" prescription, Van Niekerk J held : [11] There is no merit in this argument. The fact remains that nothing stood in the way of the applicants simply instituting process to stay prescription, as some of them in fact did. As a matter of law, the applicants cannot rely on any explanation, or any allegation about the conduct of the respondent for their inaction and in particular, their failure to file proper and prescribed process to stay prescription. In this instance, the claim having prescribed as a matter of legal consequence (see Phasha v Southern Metropolitan Local Council of the Greater Johannesburg Metropolitan Council 2000 (2) SA 455 (W) 469-473). All that was required was a unilateral act by the applicants, in the form of the issuing and service and filing of process, to interrupt prescription. In Uitenhage Municipality v Malloy (1998) 19 ILJ 757 (SCA) Mahomed CJ said the following in the context of an employment law dispute, a statement that can equally be applied in this instance having regard to the defence raised by the applicants:

"A creditor against whose claim prescription commences to run, may protect himself or herself from its consequences, by causing the interruption of prescription in terms of s 15 of the Prescription Act through the service of 'any process, whereby the creditor claims payment of the debt.'"(at 760E- 761G)

27] In regard to the submission that the applicants were awaiting the outcome of the review Van Niekerk held that this issue had specifically been determined by the court in Van Der Grijp v City of Johannesburg (2007) 28 ILJ 2079 (LC) in a context where the applicant cited as a reason for the delay that she was awaiting a judgment in a a similar matter. The court held : " The…applicant's explanation appears to be entirely spurious for many reasons. There is no sound excuse as to why the applicant could not have complied with the legal enactment prior to the release of the said judgment however important it was expected to be to her. She should have delivered the required notice by no later than 25 may 2005. Had the judgment not been in her favour afterwards she would have been entitled simply to withdraw the notice at any time after the release of such judgment. Had the judgment subsequently been in her favour she would have been entitled to initiate the proceedings at any time after the expiry of the requisite notice."

28] There is no merit to the s 13(1)(f) argument nor to any of the general submissions made by the applicant in support of its application to make the arbitration award an order of court. As a legal consequence of the Prescription Act therefore, the claim stands to be dismissed. Given that this is personally an unfortunate consequence for Mr Hani I do not consider it to be in the interests of fairness that costs should follow the cause and for that reason I do not make any order as to costs.

<u>Order</u>

29] Therefore, I make the following order:

The application is dismissed. Each party is to pay its own costs.

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Bhoola J

Judge of the Labour Court of South Africa

APPEARANCES

APPLICANT:	R G Buchanan SC
	Instructed by Gray Moodliar Attorneys, Port Elizabeth
RESPONDENT:	S Snyman, Snyman Attorneys, Johannesburg