REPUBLIC OF SOUTH AFRICA

THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

JUDGMENT

Not Reportable

Case no: J 989/14

JOB CREATIONS **Applicant**

and

ALPHEUS MEKO **First Respondent**

SHERIFF OF THE HIGH COURT: GERMISTON SOUTH **Second Respondent**

Heard: **3 June 2014**

Delivered: **6 June 2014**

JUDGMENT

TLHOTLHALEMAJE, AJ

Introduction:

[1] The Applicant approached the Court on an urgent basis to seek an order in the following terms:

1.1 The writ of execution issued by the Registrar of the Court on 16 September 2010 under case number MEGA 27164 be set aside.

1.2 The Second Respondent be interdicted from removing the Applicant's goods already attached pending the outcome of this application.

Background:

[2] Following a referral of an alleged unfair dismissal dispute by the First Respondent to the Metal Engineering Industries Bargaining Council (The MEIBC), an award was issued in his favour on 23 March 2010. In terms of the award, the Applicant was ordered to pay the First Respondent compensation in the amount of six months compensation, totalling R62 975.52 on or before 12 April 2010. The award was certified in terms of Section 143 (3) of the Labour Relations Act (The LRA) on 16 July 2010 by the Commission For Conciliation, Mediation and Arbitration (The CCMA).

[3] On 11 May 2010, the Applicant had filed an application to review and set aside the arbitration award under case number JR1066-2010. On 12 October 2010, the First Respondent had approached the Applicant with instructions to execute the writ. He had attached numerous items belonging to the Applicant. It is not clear from the papers as to what had happened to that writ or the goods that were attached, as the First Respondent had sought to execute the same writ some years later.

[4] The matter remained dormant until 7 July 2011, when the First Respondent filed an application to dismiss the review application in terms of Rule 11 of the Rules of this Court. This application came before the Honourable Justice Rabkin-Naicker on 20 June 2012. It was removed from the roll after being opposed, with a further order that the Applicant should file the record of proceedings in the review application and to comply with Rule 7A (8) of the Rules of the Court within a certain time frame. The Court had further ordered that where there was non-compliance with the order, the First Respondent could re-enrol the application to dismiss on the same papers.

[5] The Applicant had duly complied with the Court order of 20 June 2012. Thereafter, nothing happened until 14 April 2014 when the First Respondent visited the Applicant's premises with the same writ of execution issued on 16 September 2010, and with instructions to execute. It was on the basis of this recent visit that the Applicant approached the Court. Its main contention was that the First Respondent had waited four years and one month after the date of the arbitration award and three years and seven months after the date of

the writ of execution to take steps to execute the writ of execution. In the light of these delays, it was argued that as the claim arose from the arbitration award, it had the status of a debt, and that the debt had prescribed after three years. The First Applicant had opposed the application on the grounds that the Prescription Act did not apply, more so in view of the Applicant's failure to timeously prosecute the review application, and further on the grounds that a Rule 11 application interrupted prescription.

Preliminary issue raised:

[6] The First Respondent had contended that the deponent of the Applicant's founding affidavit was not authorised to act on its behalf, and that there was no resolution attached to the founding affidavit to corroborate his allegations that he was duly authorised to depose to that affidavit. In his replying affidavit, Peter Maphanga had submitted that he was a member of the Applicant, was duly authorised to act on its behalf and further that he had personal knowledge of the facts of the matter. He had also attached to the replying affidavit, confirmation from the Applicant that he was indeed authorised to act on its behalf. In these circumstances, nothing further turns on the preliminary point raised by the First Respondent.

The legal framework pertaining to urgent applications:

[7] The well-known legal requirements to be satisfied in order to succeed in an urgent application are as follows: (a) the applicant has to either show a clear right or a *prima facie* right in the case of interim relief; (b) a well-grounded apprehension of irreparable harm if the relief is not granted on an urgent basis, (c) that the balance of convenience favours the granting of the relief on an urgent basis; and (d) that the applicant has no other satisfactory relief[1].

[8] An applicant instituting an urgent application must justify the necessity to circumvent the ordinary time periods set out in the rules of this Court. This is apparent from Rule 8 of the Rules of this Court which provides that:-

> "(2) The affidavit in support of the application must also contain-

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[1] See *inter alia*, *Jonker v Wireless Payment Systems CC* (2010) 31 ILJ 381 and also *LF Boshoff Investment (Pty) Ltd v Cape Town Municipality* 1969 (2) SA 256 (C) at 267 A-F.

(a) the reasons for urgency and why urgent relief is necessary;

(b) the reasons why the requirements of the rules were not complied with, if that is the case ..."

[9] The First Respondent had submitted that the urgency was self-created in that the Applicant had failed to prosecute its review application, and that its notice of motion was only signed on 2 May 2014, whilst the founding affidavit was signed on 25 April 2014.

[10] The Applicant's contentions on the other hand were that in the light of the background facts, the normal rules and time limits would not suffice in prohibiting the Second Respondent from executing the writ of execution. It was contended that an application in due course in accordance with the provisions of Rule 7 of the Rules of this Court would not in the circumstances assist the Applicant at all, as the First Respondent would proceed with the execution of the writ if not interdicted by the Court.

[11] It is my view that the fact that the Second Respondent is in possession of a writ, which it appears that he is prepared to execute at any given time when least expected, makes this matter urgent. It would not in my view assist the Applicant to wait for the Second Respondent to first execute the writ and then approach the Court once its property has been attached as before.

[12] The Second Respondent had lamented the fact that the manner with which the documents in this application were filed indicates that the urgency is self-created. The Applicant's contention however was that following the First Respondent's approach to the Applicant on 15 April 2014 with a view to execute the writ, attempts were made to contact him with a view of making arrangements in respect of the execution of the writ. The First Respondent's view however when contacted was that only a court order could prevent the execution of the writ. This being so, and since the First Respondent had clear intentions to execute the writ, and more so at any time he needed to do so, the Applicant was indeed entitled to approach the Court on an urgent basis. Furthermore, it was common cause that the Applicant's alleged failure to timeously prosecute the review application was the subject matter before the court under the Rule 11 application launched by the First Respondent. Thus

the allegation that the matter was not urgent on the grounds of lack of timeous prosecution of that application becomes unsustainable.

Has the award prescribed?

[13] There is divided opinion in this Court as to whether the Prescription Act 68 of 1969 is applicable to awards issued under the auspices of the Labour Relations Act. Section 10 of the Prescription Act provides that;

> Extinction of debts by prescription
>
> '(1) 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.'

[14] In considering the issue of prescription within the context of our labour law, Pillay J in *Mpanzama v Fidelity Guards Holding (Pty) Ltd*[2] stated the following;

> 'Given that the Labour Relations Act does not expressly exclude the operation of the Prescription Act, it will therefore not be inconsistent to apply the provisions of the Prescription Act to section 143 read with section 158(1)(c) of the Labour Relations Act.
>
> Whatever the rationale may be for the doctrine of prescription or the limitation of actions, the Labour Relations Act compels the effective resolution of disputes (section 1(d)(iv) of the Labour Relations Act).
>
> This implies that labour disputes must be resolved or finalised expeditiously. For this reason too, it would not be inconsistent to apply the Prescription Act to sections 143 and 158 (1)(c) of the Labour Relations Act.
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> The Prescription Act has been applied to the Basic Conditions of Employment Act of 1983. (Uitenhage Municipality v Malloy 1998 (19) ILJ 757 (SCA)).
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> In Uitenhage Municipality v Molloy, the Supreme Court of Appeal stated the following:
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> > 'The remedy lies in the employee's own hands. Such an employee cannot profit by his or her own inaction. As was stated by Van den

[2] [2000] 12 BLLR 1459 (LC) at paras 8-11.

Heever J in Benson and another v Walters and Others 1981 (4) SA 42 (C) at 49G:

> 'Our Courts have consistently held that a creditor is not able by his own conduct to postpone the commencement of prescription.[3]'

[15] Subsequent to that decision, there have been a number of judgments which followed Pillay J's approach, which shall be dealt with in due course. On the other hand, Cook AJ in *Aon SA (Pty) Ltd v Commission for Conciliation, Mediation Arbitration and Others*[4] in considering the applicability of prescription within the context of arbitration awards where an application for a review had been launched had stated the following;

> 'The Applicant, by launching the review application, acknowledged the debt created by the award, but seeks to have the debt reviewed, corrected or set aside by the Court. I am of the view that the filing of the review application by the applicant, the debtor, amounts to express acknowledgement of liability by the applicant to the employee, the creditor. Accordingly, the running of prescription was interrupted by an express acknowledgement of liability by the debtor on 11th of November 2004.'

[16] In *Cellucity (Pty) v CWU OBO Peters*[5] and also in *Coetzee & 48 others v The Member of the Executive Council of the Provincial Government & Others*[6], Rabkin-Naicker J had held in both matters that the Prescription Act was incompatible with the architecture of the LRA. The rationale behind this view was *inter alia* that there was a strong case on public policy grounds to find that prescription does not apply to unfair dismissal claims under the LRA, and that the application of the Prescription Act to LRA claims would create inequalities between litigants using different routes for their disputes and furthermore will be unworkable where disputes move between tribunal and court and vice versa.

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[3] *Ibid* at 762F-G.
[4] (2012) 33 ILJ 1124 (LC).
[5] 2014] 2 BLLR 172 (LC)
[6] (2013) 34 ILJ 2865 (LC)

[17] It is accepted that the LRA does not expressly exclude the operation of the Prescription Act as pointed out in *Mpazama*, and this lacuna is to be addressed in the amendments to the LRA. In the meanwhile, and since the advent of the LRA in 1995, this lacuna has indeed created an untenable position for vulnerable employees who are in possession of a favourable award that is taken on review. These employees ultimately become at the mercy of reviewing parties and the slow machinery of the judicial system.

[18] The pending amendment to section 145[7] of the LRA, which invokes the interruption of the running of prescription in terms of the Prescription Act is small comfort for these employees. Inasmuch as I agree with my sister Rabkin-Naicker J in the decisions referred to above, more pertinently regarding the incompatible nature of the Prescription Act with public policy, and the unintended iniquitous consequences it creates, the difficulty always arises on the basis that once it is established that the Act applies to our labour law as a matter of interpretation and operation of that Act, then this Court has no discretion in the matter. As Musi AJ (As he then was) had stated in *Police and Prisons Civil Rights Union on behalf of Sifuba v Commissioner of the SA Police Service and Others*[8], although this court is a court of equity, considerations of equity do not come into play when all the requirements for a successful plea of prescription are established. Furthermore, inasmuch as this lacuna in the LRA created untenable consequences, it is also accepted as pointed out in *Uitenhage Municipality v Molloy* that a remedy lies in the employees' own hands, and that employees could not profit by their own inaction.

[19] Rule 11 of the Rules of this Court, together with clause 11.2.7 of the Practice Manual of this Court were meant as stop-gap measures to ameliorate the effects of lack of timeous prosecution of review application. However, unrepresented employees, and in most times, those that are even represented, hardly ever approached the court in terms of these provisions for intervention. In the end, employees tended to hold on to favourable awards

[7] The proposed amendment to s 145 of the Labour Relations Act reads as follows:
'(9) [A]n 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.'
[8] 2009 30 IJ 1309 (LC) at para 44.

which ultimately became meaningless on account of their own inaction and that of their chosen representatives. In the end, the court's intervention in such circumstances becomes limited.

[20] Adv. Prinsloo on behalf of the Applicant raised five pertinent questions the court had to deal with in determining this application. These are watered down to the following;

(i) Does the Prescription Act apply and what is the status of an arbitration award?

The Labour Court is a court of equity, and it follows that the application of the Prescription Act creates iniquitous results as it *inter alia*, deprives an employee of the benefits of a favourable award. However, flowing from the decision in *Mpanzama*, upon which the Applicant had relied upon, and with which I align myself with, an arbitration award has the status of a debt. Further reliance was placed on *Police & Prisons Civil Rights Union obo Sifuba v Commissioner of the SA Police Service & others*[9] where it was held that until the arbitrator's award is made an order of Court, the applicant's right to enforce the award therefore prescribes within three years of the publication of the award. Upon this interpretation and operation of this particular Act, as indicated above, the Court finds itself constrained.

(ii) What is the effect of the review application filed by the Applicant in 2010?

[21] A number of decisions[10] of this Court have held the view that the filing of a review application does not interrupt prescription[11]. Gush J in *Sampla Belting SA (Pty) Ltd v CCMA*[12] and acknowledged the lacuna already pointed above by stating that;

[9] *Supra*.
[10]See *Technikon Pretoria (now Tshwane University of Technology) v Nel NO and Others* (2012) 33 ILJ 293 (LC);
[11] *Police and Prisons Civil Rights Union on behalf of Sifuba v Commissioner of the SA Police Service and Others* (2009) 30 ILJ 1309 (LC).
[12] (2012) 33 ILJ 2465 (LC) at para 23-25.

> '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.'

Since a review application does not interrupt prescription, it is incumbent upon a party against whose award a review application is brought, to ensure that that application is timeously prosecuted. In this regard, the usefulness of the provisions of Rule 11 of the Rules of this court, and clause 11.2.7 of the Practice Manual of this Court have been pointed out. It is accepted that the prosecution of that application should ordinarily be driven by an applicant party. Be that as it may, the onus is still on the respondent party whose execution of that award is stayed, not to fold its arms and wait for four years before acting on that award as the First Respondent had done in this case.

(iii) The effect of the section 143 certification and the Rule 11 application filed by the First Respondent

[22] Section 143 (1) of the LRA provides that;

> '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 award'

[23] It is common knowledge that the mere certification of an award is not sufficient on its own for the purposes of execution, especially in the face of a recalcitrant employer. After the applicant has approached the CCMA for certification in terms of s 143(3), the next step would be to approach the Labour Court with an application for the registrar of the court to issue a writ of execution for enforcement of the award. The Applicant's view in this case was that the certification of the award did not equate that award with an order of court. Support for this contention is also found in *SA Transport & Allied Workers Union on behalf of Phakathi v Ghekko Services (Pty) Ltd & others*[13] where this court confirmed that certification did not give the award the same status as an order of the Labour Court. The Court had however found that the

[13] (2011) 32 ILJ 1728 (LC)

employee could enforce the award by way of contempt proceedings without the need first to approach the court for an order in terms of s 158(1)(c). Further pertinent to that matter is that the Court had found that as more than three years had elapsed since the award was certified, the employee's claim had prescribed, and an unsuccessful attempt by the employer in the meantime to have the award reviewed had not interrupted the running of prescription. Similarly in this case, the award was merely certified without a further application in terms of section 158 (1) (c) of the LRA, and in seeking relief to dismiss the application in casu in terms of Rule 11, the First Respondent hardly ever made any mention of any relief in terms of these provisions.

[24] The Applicant had further relied on the provisions of Section 15 of the Prescription Act, under the heading "judicial interruption of prescription" which provides that;

> ‘(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.
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> (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.’

[25] In the light of these provisions, the Applicant had submitted that the filing of a Rule 11 application to dismiss the review application did not constitute service on the debtor of ‘process’ in terms of the Prescription Act and that the running of prescription was therefore not interrupted. Even if it is accepted that the First Respondent had invoked the provisions of Rule 11, at the same time, he does not appear to have simultaneously filed an application in terms of section 158 (1) (c) of the LRA for a conclusion to be made that there was ‘service on the debtor of any process whereby the creditor claims payment of the debt’. Curiously, after that application was removed from the roll on 20 June 2012, and the Applicant had complied with the court order to comply

with the provisions of Rule 7A (8) of the Rules of this court, the First Applicant had again folded his arms and sat on his writ, which he again belatedly sought to execute.

(iv) *Was prescription in casu interrupted*?

[26] The Applicant had conceded that the certification of the award on 16 July 2010 interrupted the running of prescription. It however maintained that the certified award had to be prosecuted and executed within 3 years from date of certification, failing which it became prescribed on 15 July 2013.

[27] The First Respondent had only approached the Applicant on 15 April 2014 with a view of executing the writ. In his pleadings, he had contended that the proper approach would have been for the Applicant to prosecute its review application and also to bring an application to stay the writ of execution. In my view, in the light of the stated principles and conclusions reached above in respect of the effect of a review application on the running of prescription, it would still not make much difference even if the writ was stayed or the application for a review was to be heard at some stage in the future as the claim or debt has prescribed. This fact rendered the review application ultimately redundant as there no longer exists the *justa causa* of that application on account of prescription.

Other considerations pertaining to the relief sought:

[28] The First Respondent in his pleadings had contended that the Applicant had not met the requirements of the relief that it seeks. The difficulty with the First Respondent's averments is that they concentrated much on the reason that prescription should not apply and accusations levelled against the Applicant for failure to timeously prosecute the review application and attempts to frustrate the execution of the writ. I am however satisfied that the applicant has shown a clear right for the relief it seeks in that the First Respondent is in possession of a writ which he has shown to seek to execute at any time when least expected. The right that the Applicant has derives from the conclusions stated above in regards to the application of prescription in such matters.

Furthermore, on account of the writ that the First Respondent has in his possession, the Applicant has established a well-grounded apprehension of irreparable harm if the relief is not granted on an urgent basis as the First Respondent can approach the sheriff and attach the Applicant's assets as he deems fit. The balance of convenience clearly favours the granting of the relief on an urgent basis for reasons already mentioned, and even though the Applicant has an alternative remedy of placing the matter on the ordinary roll to set aside the writ, it would be foolhardy on its part to wait for the moment that the First Respondent decides to act on his writ, and then to approach the court on the ordinary roll.

Costs:

[29] The Applicant had sought a cost order against the First Respondent. It is my view that considerations of law and fairness dictate that such a cost order would be inappropriate. As matters stand, the First Respondent lost out on the benefits of a favourable award on account of his inaction or operation of the law. To burden him further with a cost order would be like the proverbial nail in the coffin for him. In conclusion, it is reiterated that the award in favour of the First Respondent has prescribed, and the plea of prescription should be upheld. Accordingly, the following order is made;

Order:

i. The writ of execution issued by this Court on 16 September 2010 under case number MEGA 27164 is set aside.
ii. There is no order as to costs.

Tlhotlhalemaje

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Tlhotlhalemaje, AJ

Acting Judge of the Labour Court of South Africa

APPEARANCES:

On behalf of the Applicant:	Adv. Connie Prinsloo
Instructed by:	De Villiers & Du Plessis Attorneys
On behalf of the Respondent:	Adv . Mashitoa
Instructed by:	BM Kolisi Inc