



**THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG**

**JUDGMENT**

Case no: JS801/10

In the matter between

**TITO BS MTHENJWA**

Applicant

and

**STATE INFORMATION TECHNOLOGY AGENCY**

First Respondent

**LEFATSHE TECHNOLOGIES (PTY) LTD**

Second Respondent

**NOEDINE ISAACS-MPULO**

Third Respondent

**Heard: 13 November 2015**

**Delivered: 13 November 2015**

**Edited: 3 February 2016**

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## EX TEMPORE JUDGMENT

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### CELE J

- [1] The applicant, in these proceedings, has raised two issues; one relates to the jurisdiction of this court in dealing with severance pay; the second one talks to the prescription of the sum of the claims relating to severance pay. I thank both parties for their submissions that they have made in the heads of argument.
- [2] I refer to the applicant who is in fact the respondent in the main trial and the respondent as being the applicant in that main trial. The challenge here was that the issue of severance pay if it is linked to an unfair labour practice is an issue that belongs either to the CCMA or a bargaining council and, therefore, this court lacks jurisdiction to proceed with this matter.
- [3] It has remained common cause between the parties that there is a main issue, which was referred by the respondent to the court for trial, relating to an automatically unfair dismissal as is envisaged in terms of section 187 of the Labour Relations Act 66 of 1995.
- [4] Because there is that main issue, it must follow that the other ancillary issues may be dealt with by this court in the same vein. I made a comparison of a situation where an employee alleges that he has been unfairly dismissed through the operational requirements by a company, then when this court is seized with such a matter in terms of section 189, this court simultaneously is able to examine the question of severance pay because the issue of severance pay becomes an ancillary claim against the main claim of retrenchment.

- [5] Similarly, in this case, the main claim is premised on the provision of section 187 and, therefore, the issue of the incentive bonus comes an ancillary issue which can be determined by this court, particularly, now that there has been a recent amendment of the Act. I believe both parties saw that approach as being appropriate and they have agreed that such position should prevail in this matter.
- [6] I then move on to the last issue raised by the applicant, it talks to the prescription of a claim. The suggestion in the papers is that because the main issue or the main claim was referred in 2008 that the claims of the respondent had become due and payable from 2008 onwards and that, therefore, have since prescribed. According to the heads prepared by Ms Botha which I believe have the correct date, at paragraph 19.4, the applicant alleges that he referred an unfair labour dispute on 20 June 2008.
- [7] The applicant went on then to suggest that the claim of the bonus would be due and payable on 7 June of each years, calculated from 2005, 2006, 2007, 2008 onwards. Using that date of 20 June 2008 as being the date when the dispute was referred, it must follow that when you add three years to that date, the first claim from 1 March 2004 to 28 February 2005 and looking at it becoming due from 7 June, three years after that would be June 2008.
- [8] The three year period would have run through and therefore in a matter of days that claim would possibly have prescribed because of the three year period as envisaged in the Prescription Act but the rest of the other claims would remain. I need to go back on the basis on which the date should be construed.
- [9] The parties, in their presentation of the matter, differed in terms of when prescription would, stop running. According to the applicant, it would stop running from the date of the referral of this matter to

this court. My view of the matter is that, before a dispute is referred to the labour court for adjudication, I am talking about the trial matters, the first step that is prescribed by section 191(1) up to (3) is that the dispute must first be conciliated.

[10] This is an important and essential step; without it, this court would not be properly seized with this matter; without it, this court would lack jurisdiction in this matter. My view, therefore, of the matter is that the referral, a complete referral as envisaged as in section 191(1) up to (3), amounts to a process is envisaged in the Prescription Act. Therefore, the date of the referral of this dispute in 2008 is the date that should be used in this matter and it should therefore not be the date when the matter is referred to the Labour Court. It should be the date when the matter is referred for conciliation.

[11] It is on those basis that the referral to the CCMA then interrupted the running of prescription except the first claim dated 1 March 2004 to 28 February 2008 which should, where prescription began to run from 7 June 2005. It is that claim which I will uphold as having prescribed, the rest of the other claims remain intact.

[12] I will therefore make the following order:

12.1. Court has jurisdiction to be seized with a claim on bonus as an ancillary claim where the main claim based on section 187(1) of the LRA.

12.2. Prescription is upheld only in respect of the bonus claim for the period from 1 March 2004 to 28 February 2005 which claim was due and payable from 7 June 2005.

12.3. In respect of other claims for incentive bonus, the running of prescription was stopped when the matter was referred for condonation in terms of section 191(1)(3) of the LRA.

12.4. The Registrar is now to set the matter down in the expedited trial roll for a 3 day trial period on notice to both parties.

12.5. There is no order as to costs.

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Cele, J

Judge of the Labour Court