



Of interest to other judges

THE LABOUR COURT OF SOUTH AFRICA,

HELD AT JOHANNESBURG

Case no: J2179/14

In the matter between:

NUMSA OBO ANDILE VANQA

Applicant

and

**ENGEN BASSONS SERVICES
STATION**

Respondent

Heard: 09 March 2017

Delivered: 20 March 2017

Comments: (arrear wage claim – non-compliance with settlement agreement – tender of services not accepted in breach of agreement – estoppel- waiver – prescription – prescription of award not in issue)

JUDGMENT

LAGRANGE J

Introduction

- [1] The applicant, a petrol attendant, is claiming arrear wages for the period 31 May 2010 until 2 September 2013. The claim arises out of a settlement agreement which was later made an order of court in terms of which the respondent ('Engen Bassons') had agreed to reemploy him with effect from 31 May on the same terms and conditions that applied to him previously except that he would render his services but at a different petrol station from the one he had been employed at.
- [2] Although the matter had been launched in the form of an application on 13 May 2016 the Labour Court ordered that the founding and answering affidavits would stand as a statement of case and responding statement for the purposes of trial.
- [3] The respondent raised a special plea of prescription in respect of his claim for the period 31 May 2010 to 17 October 2011 prescription, on the basis that he only filed his claim on 18 October 2014.
- [4] The respondent also disputed that the applicant had tendered his services on 31 May 2010. Further, on account of an affidavit in which he said that he did not want to work for the respondent anymore it claimed that "... the applicant is barred/stopped from claiming any remuneration as from 11 December 2010 as the applicant, in writing represented he does not want to render services for the respondent."
- [5] A claim of non-joinder in respect of Willow Crest Motors CC was withdrawn by the respondent, because Engen Bassons accepted that in so far as the court determined that the applicant was entitled to any of the wages he claimed for the period in question, it accepted liability for such remuneration.
- [6] Condonation for the late filing of the respondent's answering affidavit was granted.

Chronology

- [7] The applicant was dismissed in March 2010. He referred his dispute to the relevant bargaining council the same month and on 4 May 2010 a

settlement agreement was concluded between himself and Engen Bassons in terms of which he would be employed from 31 May 2010 at Willow Crest Motors CC and would be paid a cash amount of R 800.00.

- [8] The Applicant was paid the cash amount but, despite him tendering his services on 31 May and reporting on two subsequent days for that purpose at Willow Crest Motors, he was not re-employed in terms of the agreement. The applicant went back to the bargaining council's dispute resolution centre to obtain assistance following the respondent's non-compliance with the agreement and on 4 June 2010, he deposed to an affidavit that the respondent had failed to call him back for work.
- [9] Thereafter, he launched proceedings on 26 July 2010 to make the award an order of court. The settlement agreement was finally made an order of court on 10 November 2010. Having obtained the order he then sent it to the manager of Engen Bassons, Mr C De Waal. He phoned Mr De Waal to check whether he received the court order and the manager told him that there was nothing he could say to him and that everything would be done by the respondent's lawyer. He was never contacted by the respondent's attorneys.
- [10] On 11 November 2010 the applicant stated in an affidavit that he was not going back to work for the respondent, that he wanted them to pay him backpay from the date of his dismissal and that it failed to put him back at work. He claimed that he made the affidavit after he was advised by staff at the Labour Court that he should claim the monies owing to him because it was obvious that the employer did not want him back anymore. He stated in the affidavit:
- "I am not going back to work for Bassons Service Station I want them to pay me money from the date they terminate my job with them from 16 March 2010 the company failed to put me back at work in D. R.C. so I want those payments to be made after 10 day I used to get R 1000-00 and R 800.00 per week + R 4000- leave pay per year."
- [11] The applicant agreed that he had faxed this affidavit to Engen Bassons, but never got any response nor did he receive any of the payments he was claiming. He denied that he had given the original affidavit together

with the court order to De Waal on or about 11 or 12 November 2010, but claimed that he had given all his documents to his union, NUMSA. The respondent never called any witnesses to rebut the applicant's version of how it came to have the affidavit, but nothing really turns on this. There was also no evidence given by the respondent about what it did on receiving the applicant's affidavit in relation to the representation it claims he had made that he did not want to tender his services to it any longer.

- [12] Under cross-examination, it was repeatedly put to the applicant that, when he stated he was not going back to work that was a decision on his part. The applicant said that the reason he had done so was because he had been 'to many places to get his job back', which appeared to be a reference to his previous tendering of his services and approaches to the Labour Court and the bargaining Council Dispute Resolution Centre. He was also asked when he decided that he 'wanted more money' and is somewhat cryptic response was that "The more I stayed at home I realised the money would be more".
- [13] In any event, within a couple of months, on 16 March 2012, the applicant through his union had launched a contempt application to enforce the settlement agreement which had been made an order of court. There was no evidence of any other communications between the union and the respondent before this.
- [14] For reasons which are not explained, it was only much later on 2 August 2013 that the applicant obtained an *ex parte* order calling upon the second respondent, Mr S De Walt, to show cause by 23 August 2013 why he should not be found guilty of contempt. According to the respondent, it was Mr S Gebhardt who should have been cited as the second respondent in the contempt application. Although the court order also stated that the second respondent was guilty of contempt, it would appear that the honourable judge had intended to hold Engen Basson in contempt and that the reference to the second respondent was probably a patent error, because one of the objects of the obtaining the order was to summons the second respondent to court to answer to the contempt charge.

- [15] Be that as it may, on 23 August 2013 the court ordered Engen Bassons to re-employ the applicant from 2 September 2014. It is common cause that it did so. The court also ordered that the question of arrear payments should be dealt with by way of separate process, which is what these proceedings are concerned with.
- [16] On the evidence, I am satisfied that the applicant took every reasonable step to fulfil his side of the settlement agreement by tendering his services, but his efforts had simply been stonewalled by the respondent which had done nothing to enable him to take up employment at Willow Creek Motors as agreed. The applicant took the next logical step which was to apply to have the settlement agreement made an order of court and succeeded in that on 10 December 2010. His evidence that the employer was non-committal when he served the order on it and never came back to him is uncontradicted.
- [17] By the time he obtained the court order, he should have been employed already for approximately six months. Instead, he had been out of work and going from pillar to post to enforce the agreement. He was obviously anxious to obtain financial relief as soon as possible. He claimed he was advised that the respondent was clearly set against taking him back and that he should demand monies owing to him. This evidence was not disputed. This advice appears to have prompted him to depose to the affidavit on 11 December 2010 and serve it on the respondent in the hope it would at least elicit the payment of backpay to him by the respondent.
- [18] There was no evidence Engen Bassons did anything when it became aware of the affidavit. If it indeed accepted it as a representation that the applicant was tendering a resignation, it gave no indication of this and did not elect to respond to his claim for arrear wages or leave pay up to that date. In the absence of any evidence from the respondent itself, it cannot be said that the respondent acted on the representation it claims the applicant made. It seems it had adopted a tactic of simply not responding to any communication from the applicant. It is trite that a party that wishes

to rely on estoppel must show not only that it relied on a representation made but that it acted to its detriment.¹

- [19] In its answering statement, the respondent claimed that the applicant's affidavit amounted to a resignation. In the pre-trial minute, the court was asked to determine two issues relating to the effect of his affidavit, but not whether he had terminated his service on 11 December 2010. The first issue related to the preliminary point I have just dealt with as to whether the applicant was barred or estopped from claiming remuneration after that date on the basis of the representation in the affidavit. In addition, in framing the issues the court was required to determine, one of them was framed thus:

"4.4 Whether the applicant by deposing to the affidavit of 11 November 2010 abandoned any claim for remuneration which he might have had subsequent to the said date."

(emphasis added)

- [20] This alternative reframing of the problem amounts to asking the court to decide if he had waived his claim to reinstatement. The basic requirements of waiver are that, waiver is first and foremost a matter of intention' and 'the knowledge and appreciation of the party alleged to have waived is furthermore an *axiomatic* aspect of waiver'. Furthermore, the onus of proving waiver is on the party alleging it.²
- [21] Apart from the fact that waiver had never been pleaded, it was never put to the applicant that he must have realised when he said he was not going back to work for Engen Bassons that he was abandoning any right he had under the settlement agreement to demand employment and that he was abandoning the judgment in his favour he had just obtained. His own statement to the effect that the longer he remained at home the more the respondent owed him does not suggest that he believed all his claims against the respondent had come to an end on 11 December 2010, but that he still had a claim against it as long as he was not taken back.

¹ Barclays Western Bank Ltd v Fourie 1979 (4) SA 157 (C) at 161A-C

² **Road Accident Fund v Mothupi** 2000 (4) SA 38 (SCA) at 49E-50G

Moreover, to the extent that he believed he had to abandon his claim to employment in order to secure his backpay that was clearly based on advice that his prospect of securing employment in terms of the settlement agreement was bleak and without a proper appreciation of his rights.

[22] It was suggested in argument that in the absence of a recurrent tendering of his service, the applicant had no basis for an ongoing wage claim. If this was correct, it would mean that a person whose tender of service has not been accepted even though it was made in terms of an agreement, must incur the indefinite expense of regularly re-tendering his service despite the non-compliance of the employer with a reciprocal undertaking it made to ensure that person's employment provided they reported for duty on an agreed date. Once a tender of service under these circumstances has been expressly or implicitly rejected by the employer's conduct, as long as the employee takes further steps to enforce the agreement, I do not believe it is necessary for him to repeatedly tender his services. Nonetheless, he did make a representation that he would not be tendering his services going forward when he sent the respondent his affidavit of 11 December 2010.

[23] I accept that between 11 December 2010 and the launch of the contempt proceedings, the employer might conceivably taken the view that he had terminated his services, even though it did nothing to obtain clarity on whether the applicant was abandoning the judgement. However, the respondent gave no evidence as to its actual understanding and failed to take any steps to act on the applicant's demand for his arrear wages and leave pay, which he claimed was owing to him and which the respondent never disputed was due to him. The respondent could have clarified whether the applicant had unequivocally abandoned any ongoing claim to employment in exchange for accepting payment of his arrear wages and leave pay 31 May 2010, by paying him out and confirming his acceptance of the arrangement but it never did. It is also important to remember that in this instance, the respondent would have been assuming not merely that the applicant was no longer trying to enforce the settlement agreement, but that he was knowingly abandoning his right to enforce a judgement he had only just obtained the day before after much perseverance.

[24] He then launched the contempt application which was clearly at odds with someone who had unequivocally abandoned his rights. I am not satisfied that there is enough evidence to show that the applicant most probably knew that by making the representations in the affidavit of 11 December that he was surrendering all further right to rely on the settlement agreement, even if the respondent still did not pay him his arrear wages up to that date.

[25] However, I accept that between sending the affidavit to the respondent and when it became aware he was persisting with enforcing the settlement agreement by means of contempt proceedings in March 2011, it was not obvious he was still asserting his right to employment during that time, on the evidence available. Nevertheless, once it received notice of the contempt proceedings there is no reason, in the absence of evidence to the contrary, to believe there was any reason to doubt that the applicant was still persisting with his claim to be employed.

[26] In the circumstances, the respondent was liable for payment of the applicant's remuneration for the following periods:

26.1 From the date he tendered his services on 31 May 2011 until he withdrew the tender of his services on 11 December 2010, and

26.2 From 10 March 2011 when the applicant's union first served the contempt application on the respondent until 23 August 2013 when the respondent was ordered to employ the applicant with effect from 2 September 2013.

The special plea of prescription

[27] The respondent argues that the applicants claim is for settlement of an ordinary debt and any portion of the claim due more three years prior to that date has prescribed if s 11(d) of the Prescription Act, 68 of 1969, applies. Consequently the portion of the applicant's claim which might be affected is the period from 31 May 2011 until 16 October 2011.

[28] The applicant contends that on the authority of recent Constitutional Court judgements dealing with prescription, the referral of the original dismissal

dispute to MIBCO in March 2010 interrupted prescription until the conclusion of these proceedings.

- [29] Alternatively, when the applicant filed his application to make the settlement agreement an order of court in terms of section 158 (1) (
- [30] C) that interrupted prescription. In the further alternative, the filing of the contempt application on 18 March 2011 interrupted prescription until the Labour Court judgment handed down in September 2013.
- [31] The first Constitutional Court judgement in the case of ***Sizwe Myathaza v Johannesburg Metropolitan Bus Services (SOC) Limited t/a Metrobus and Others***³ dealt comprehensively with the issue of the relationship between the Prescription Act and the LRA was unanimous in effect but regrettably lacked a common ratio. This was recognised in the constitutional court's subsequent judgement in ***Maria Jane Mogaila v Coca Cola Fortune (Pty) Limited***⁴ where it also had to deal with an award ordering reinstatement which was more than three years old when the employee tried to enforce it after unsuccessful review proceedings had run their course. The court looked at the outcome of the *Myatha* despite the differing rationales for the three judgments in that matter and concluded that on any approach Mogaila's award had also not prescribed, viz:

“[28] Whether the arbitration award in [the employee's] favour could not have prescribed because the Prescription Act does not apply at all to LRA matters, as the first and third judgments held (or because, even if that statute were applicable, the reinstatement order was “not an obligation to pay money, deliver goods or render services”), or because, as the second judgment held, the CCMA referral interrupted prescription, persisting until the finalisation of the review proceedings in October 2013, Ms Mogaila must succeed.

[29] On the second judgment's approach, the arbitration award would have prescribed only in October 2016. Ms Mogaila filed her application in this Court timeously, in April 2016. Prescription was therefore interrupted, again, pending the

³ CCT 232/15 (15 December 2016)

⁴ CCT 76/16 (2 March 2017)

finalisation of these proceedings. On either approach, Ms Mogaila is entitled now to proceed with the certification of the award under section 143 of the LRA.”

[32] In ***Hendor Mining Supplies (a division of Marschalk Beleggings (Pty) Ltd) v National Union of Metalworkers of South Africa and others***⁵

the LAC held that an order of reinstatement was not prospective in effect and that any claim for remuneration of the date on which reinstatement took effect is a separate contractual claim. As I understand the respondent’s argument, it contends that the applicant’s claim for remuneration for the period after 31 May 2011, by parity of reasoning, is also simply a claim for a contractual debt and subject to the same prescription period applicable to other contractual debts.

[33] The first point to note is that in terms of paragraph 6 of the settlement agreement entered made an arbitration award in terms of section 142 A (1) of the LRA. Consequently, in terms of the outcome of the Constitutional Court decisions, it did not require a court order to preserve its longevity beyond three years, though it would still have been a necessary precursor to contempt proceedings as the events pre-dated the amendments to s 143 of the LRA concerning the enforcement of awards which only came into effect on 1 March 2015. However, the prescription issue in this case is not about the enforceability of the settlement as an award, in the sense that three years after it was concluded, prescription is being raised to bar the applicant from enforcing it. Firstly, the future enforceability of the award more than three years after it was concluded on 4 March 2010 was in any event assured by the order making it any order of court.

[34] Secondly, the jurisdiction of this court to deal with the claim for arrear wages does not arise out of the LRA but out of s 77(3) of the Basic Conditions of Employment Act, 75 of 1997 (‘the BCEA’), which states:

“(3) The Labour Court has concurrent jurisdiction with the civil courts to hear and determine any matter concerning a contract of employment, irrespective of whether any basic condition of employment constitutes a term of that contract.”

⁵ [2016] 2 BLLR 107 (LAC)

[35] In consequence of the settlement agreement, which was made an award and subsequently an order of court, the applicant acquired a right to reinstatement. That right would have been preserved for more than three years either on account of the effect of the Constitutional judgments, even in the absence of having been made an order of court. But this case is not concerned with whether his right to enforce his reinstatement prescribed. Rather, it is concerned about whether a claim for arrear wages which is essentially “an obligation to pay money” and therefore does constitute a debt in terms of the reasoning of the third judgment⁶ in *Myathaza* and the reasoning of the first judgement, *albeit* that this was an *obiter* point in the first judgment.⁷

[36] The applicant’s claim to wage for the period in question relates to whether or not he can sue for contractual damages on the basis that he was not employed in terms of the settlement agreement, not whether the court can enforce his claim for employment in terms of it. The dispute referred to MIBCO was an unfair dismissal dispute, not a claim for arrear wages. Consequently, I am satisfied the authority of *Hendor* is unaffected by the judgments in *Myathaza* and *Mogaila*. In this instance a claim for arrear remuneration is a claim within this court’s jurisdiction under s 77(3) of the BCEA and is a claim for payment due which this case is required to determine, not a claim for enforcement of an award already made. Consequently, the ordinary provisions governing extinctive prescription of debts apply. The only relevant one in this instance is s 15(1) of the Prescription Act which states:

“(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.”

In this instance, payment of the debt was only first demanded on 17 October 2014, and accordingly cannot extend to remuneration the

⁶ At [119].

⁷ At [59]: “But even if the Prescription Act were to apply, the main award granted in favour of the applicant could not prescribe because it is not an obligation to pay money or deliver goods or render services by Metrobus to the applicant..”

applicant ought to have earned prior to 16 October 2011 in terms of s 11(d) of the Prescription Act.

Order

[37] In the circumstances, the following order is made:

37.1 The respondent is liable to pay the applicant arrear remuneration for the following periods in the amounts stipulated:

37.1.1 From 16 October up to and including 10 November 2010, R 649.80 per week amounting to R 2109.33.

37.1.2 From 18 March 2011 until 31 August 2011, R 649.80 per week for 23.5 weeks amounting to R 15,270.30.

37.1.3 From 1 September 2011 until 31 August 2012, R 708.30 per week for 52 weeks amounting to R 36,831.60.

37.1.4 From 1 September 2012 until 31 August 2013, R 772.20 per week for 52 weeks amounting to R 40,154.40.

37.2 The respondent is further liable for payment of interest at 9 % per annum on the amounts due in terms of paragraph 35.1 above, calculated from the end of each month during the periods mentioned in which the arrear remuneration accrued.

37.3 The respondent must pay the applicant's costs.

[38] In the event parties are unable to agree on the amount of aggregate interest payable in terms of paragraph 3 of the order, either party may approach the court on notice for determination thereof.

Lagrange J

Judge of the Labour Court of South Africa

APPEARANCES

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