



IN THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Reportable

Case no: JS 895/16

In the matter between:

TILLY LABE

Applicant

And

LEGAL AID SOUTH AFRICA

First Respondent

BRAIN NAIR

Second Respondent

PATRICK HUNDERMARK

Third Respondent

FLAVIA ISOLA

Fourth Respondent

AYSHA ISMAIL

Fifth Respondent

**THE CURRENT BOARD MEMBERS OF
THE LEGAL AID SOUTH AFRICA**

Sixth Respondent

Heard: 12 May 2017

Delivered: 20 June 2017

JUDGMENT

TLHOTLHALEMAJE, J.

Introduction:

- [1] The applicant was dismissed from the first respondent's employ on 6 May 2016 after a disciplinary enquiry into various allegations of misconduct. She

subsequently referred an alleged unfair dismissal dispute to the CCMA. As appears from the ruling issued by the CCMA on 25 August 2016, the applicant's representative at the arbitration proceedings had informed the Commissioner that the issues in dispute pertained to alleged victimisation, intimidation, harassment, and discrimination based on arbitrary grounds, and that the applicant '*would like to pursue this matter at the Labour Court*'. Based on this request, the Commissioner issued a ruling to the effect that the CCMA lacked jurisdiction to determine the dispute.

- [2] It is now trite that the CCMA cannot decline jurisdiction over a dispute simply on the say-so of a party without an attempt at determining what the dispute is about. The Labour Appeal Court has long held in *South African Motor Industry Employers' Association v NUMSA*¹ that the Court cannot assume jurisdiction over a matter to be ordinarily determined by the CCMA, even if the parties purported to confer such jurisdiction by agreement. It therefore follows that a party cannot choose to confer jurisdiction on this court unless the nature of the dispute referred is one capable of adjudication.
- [3] The applicant approached this court with a statement of case on 26 October 2016, and alleged that her dismissal was both procedurally and substantively unfair. Her contention was that the dismissal was in contravention of the provisions of section 191(1)(a)² of the Labour Relations Act³ and/or in the alternative, in contravention of section 187(1)(f)⁴ read with section 6⁵ of the Employment Equity Act.⁶

¹ [1997] 9 BLLR 1157 (LAC)

² Section 191. **Disputes about unfair dismissals and unfair labour practices**

- (1) (a) If there is a *dispute* about the fairness of a *dismissal*, or a *dispute* about an unfair labour practice, the dismissed *employee* or the *employee* alleging the unfair labour practice may refer the *dispute* in writing to -
 (i) a *council*, if the parties to the *dispute* fall within the registered scope of that *council*; or
 (ii) the Commission, if no *council* has jurisdiction

³ Act 66 of 1995

⁴ Section 187. **Automatically unfair dismissals**

- (1) A *dismissal* is automatically unfair if the employer, in dismissing the *employee*, acts contrary to section 5 or, if the reason for the *dismissal* is -

...

- (f) that the employer unfairly discriminated against an *employee*, directly or indirectly, on any arbitrary ground, including, but not limited to race, gender, sex, ethnic or social origin, colour, sexual orientation, age, disability, religion,

- [4] The applicant further seeks various forms of relief, including maximum compensation; 24 months remuneration if her dismissal is found to have been automatically unfair; pension pay-out in the amount of R233 586.00; compensation for unfair discrimination, intimidation, harassment, victimisation and invasion of her privacy in the amount of R10m; and compensation in the amount of R10m for personal injury, psychological damage and/or pain and suffering.
- [5] The first respondent in its answering statement of case raised a special plea, contending *inter alia* that the applicant's claim has prescribed in terms of the provisions of the Prescription Act.⁷ Secondary to the special plea, the respondent also raised two points *in limine* being the failure by the applicant to cite the second to fifth respondents in their *nomine officio*. Differently put, the applicant has cited the second to fifth respondents in their personal capacities. The first respondent further takes issue with the citation of the sixth respondent as it was lacking in specificity.

Background:

- [6] The applicant is an admitted attorney and was before her dismissal, employed as a Civil Professional Assistant by the first respondent. The first respondent is an independent statutory institution established in terms of the provisions of section 2⁸ of the Legal Aid South Africa Act⁹.

conscience, belief, political opinion, culture, language, marital status or family responsibility.

⁵ **6. Prohibition of unfair discrimination**

(1) No person may unfairly discriminate, directly or indirectly, against an employee, in any employment policy or practice, on one or more grounds, including race, gender, sex, pregnancy, marital status, family responsibility, ethnic or social origin, colour, sexual orientation, age, disability, religion, HIV status, conscience, belief, political opinion, culture, language, birth or on any other arbitrary ground.

⁶ Act 55 of 1998

⁷ Act 68 of 1969

⁸ Section 2 Provides: **Establishment of Legal Aid South Africa and its relationship with Board**
2.

(1) There is hereby established a national public entity as provided for in the Public Finance Management Act, to be known as Legal Aid South Africa, which is governed by a Board appointed under section 6.

(2) The Board, of which the powers, functions and duties are set out in section 4, is represented by the chief executive officer and any director or directors as may be designated by the Board.

⁹ Act 39 of 2014

- [7] The dismissal of the applicant flowed from several charges of misconduct preferred against her.¹⁰ She was initially placed on precautionary suspension on or about 3 December 2015, and was thereafter called upon to appear before a disciplinary committee enquiry scheduled for 18 and 19 February 2016.
- [8] At the commencement of the disciplinary enquiry, the applicant made an application that the fourth respondent (Isola), who was appointed as initiator of the disciplinary hearing, and the fifth respondent (Ismail), who was appointed as the chairperson, should recuse themselves. The basis of the objection raised in respect of Isola was that she had prior knowledge of the facts of the matter, whilst that against Ismail was that her independence was questionable as she an employee of the first respondent.
- [9] Both objections were dismissed. Aggrieved by the decision of the chairperson, the applicant elected not to participate any further in the disciplinary proceedings, and accordingly left the hearing venue. The chairperson nevertheless proceeded with the enquiry in her absence, and dismissed her on 6 May 2016.

The citation of the second – sixth respondents:

- [10] The second respondent, Brain Nair is the first respondent's National Operations Executive.¹¹ The third respondent, Patrick Hundermark is its Chief Legal Executive.¹² The fourth respondent, Flavia Isola is the Justice Centre Pretoria Executive, and was the initiator of the Internal Disciplinary

¹⁰ On 2 February 2016, the applicant was charged with

- Conduct prejudicial to the maintenance of good order on the premises of the first respondent
- Unruly behaviour
- Threatening assault, fighting and/ or unacceptable aggressive behaviour that can cause physical injury to colleagues
- Attacking the honour, dignity or good name of Bawinile Tautswala, a colleague and other colleagues in that the applicant made unfounded and derogatory allegations
- Making racial remarks/statements
- Engaging in action that harms the team spirit and loyalty between employees
- Conduct resulting in or potentially resulting in damage to the reputation of the first respondent or bring the name of the first respondent into disrepute
- Gross dishonesty

¹¹ Para 5 of the applicant's statement of case

¹² Para 6 of the applicant's statement of case

hearing.¹³ The fifth respondent, Aysha Ismail is the Justice Centre Germiston Executive, and was the Chairperson of the internal disciplinary hearing.¹⁴ The sixth respondent is cited in the statement of case as the current board members of the first respondent.

- [11] The first respondent's contention was that the second to fifth respondents were cited in their personal capacities and not in their capacities *nomine officio* and that the applicant had therefore failed to establish *locus standi* against them. In her statement of claim, the applicant seeks an order '*declaring that the conduct and behaviour of the second, third, fourth and fifth respondents in handling the entire disciplinary process and dismissal constitute abuse of power and authority*'¹⁵. It was further submitted on behalf of the applicant that these individuals were acting in their *nomine officio* capacity and in the course and scope of their employment with the first respondent when they conducted the disciplinary enquiry.
- [12] In regard to the sixth respondent (Board members), the first respondent's objection was that the applicant sought relief against them without identifying who in particular the relief was sought against and the basis thereof. The applicant's contention was that the sixth respondents were cited on the grounds that the relief sought against them was for them to institute disciplinary action against 'the respondents' as they had abused their position and authority. In argument however, it was contended that no relief is sought against the board members in their individual capacity, and that the first respondent's objection to their citation was overly technical and elevating form over substance.
- [13] It is trite that for parties to be joined to particular proceedings, they must have a direct and substantial legal interest¹⁶ in the matter such as to make them necessary parties to the proceedings. It is further trite that only parties

¹³ Para 7 of the applicant's statement of case

¹⁴ Para 8 of the applicant's statement of case

¹⁵ Para 7 Under Relief Sought.

¹⁶ A 'direct or substantial interest' is defined as "*an interest in the right which is the subject matter of the litigation and not merely a financial interest*"; '*a legal interest in the subject matter of the litigation*' See *Henry Viljoen (Pty) Ltd v Awerbuch Brothers* 1953 (2) SA 151 (O) at 169-170; and *Amalgamated Engineering Union v Minister of Labour* 1949 (3) SA 637 (A)

that would be directly affected by the Court's order are necessary parties to the proceedings¹⁷.

- [14] Having had regard to the applicant's statement of case, the written heads of argument and submissions made on her behalf, it is not clear on what basis the second to sixth respondents were cited in these proceedings. The second respondent (Nair) is cited simply on the basis that he allegedly never attempted to resolve the applicant's grievance pertaining to the alleged sexual harassment and the failure to appoint her to the position of supervisor. It is not clear from her statement of case when this grievance was lodged and when it was escalated to Nair. Other than this omission, Nair does not appear anywhere else in the statement of case, and as to what interest he has in the matter and what relief is sought from him is unknown. To the extent that the dispute in regard to the alleged automatically unfair dismissal arising from the alleged grievance is to be determined, it might be necessary to call him as a witness, and I fail to appreciate the reason he was cited in these proceedings. He should therefore not have been joined in these proceedings, whether in his personal or official capacity.
- [15] Similarly, Hundermark is cited as the third respondent. There is however nothing in the statement of case that indicates the reason he was cited, what interest he has in the matter whether direct or substantial, or what relief is sought from him. The applicant merely made a bald allegation that he together with the other respondents had abused their position and power by proceedings with the charges against her. As to what Hundermark's role in these allegations is remains unknown. He should also not have been joined to these proceedings in whatever capacity.
- [16] The citation of the fourth and fifth respondents who had acted as initiator and chairperson of the disciplinary enquiry is equally baffling. These two individuals did not appoint themselves in those positions, nor did they act in those positions in their personal capacities. They were mandated by the first respondent to conduct the disciplinary hearing. To the extent that the applicant is not satisfied with the manner with which they had conducted the

¹⁷ *Rosebank Mall (Pty) Ltd v Cradock Heights (Pty) Ltd 2003 (4) All SA 471*

disciplinary proceedings (bearing in mind that she had declined to participate in those proceedings), that is an issue that goes to the procedural fairness of the dismissal, and which might lead to a necessity to call them as witnesses in the event of a trial. To therefore simply cite them in these proceedings amounts to an abuse of the court's process, and the applicant has not laid a basis to indicate that they have any direct or substantive interests in the outcome of this adjudication.

- [17] The citation of the first respondent's board members is equally in my view unnecessary and meant to cause irritation. The only basis upon which they were cited is that the applicant seeks an order directing them to institute disciplinary proceedings against the other respondents for alleged abuse of authority and power in dealing with the disciplinary processes and her dismissal. As to whether the board members have such powers under the provisions of section 4 of Legal Aid South Africa Act is something else. Be that as it may, even if the board could exercise such a power, it is not for this court to make orders directing members of a board of a statutory body to take disciplinary action against employees involved in the institution of a disciplinary process against another employee. It is within employer's prerogative to discipline its own employees where the need arises, and it is not for this court to interfere with that prerogative. The sixth respondents therefore have no direct or substantial interests in the proceedings, and should not have been cited.

Prescription:

- [18] The first respondent's contention was that when the dispute was referred to the CCMA, it was the first time that the applicant had raised issues surrounding victimisation, and that this issue in any event dates back to September 2011, when she had lodged a grievance. To this end, it was submitted that the provisions of section 10¹⁸ of the Prescription Act provides

¹⁸ Section 10. Extinction of debts by prescription

for the extinction of a debt after the expiration of a period as provided for by the provisions of section 11¹⁹ of the Prescription Act. In the current dispute, the period of prescription was three (3) years taking into consideration the provisions of section 11(d), and that the claim therefore prescribed or on before 27 September 2014.

[19] The first respondent further contended that in order for the applicant to have adequately raised the claim, she would have had to refer the matter to the CCMA within 90 days of becoming aware of her claim, and that she had not done so. To the extent that she had not done so, her claim prescribed on 27 September 2014, and that the claim of victimisation ought to be dismissed with costs.

[20] The applicant in her answer to the special plea places reliance on section 15²⁰ of the Prescription Act. She contends that prescription would only start

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- (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.
 - (2) By the prescription of a principal debt a subsidiary debt which arose from such principal debt shall also be extinguished by prescription.
 - (3) Notwithstanding the provisions of subsections (1) and (2), payment by the debtor of a debt after it has been extinguished by prescription in terms of either of the said subsections, shall be regarded as payment of a debt.

¹⁹ Section 11. Periods of prescription of debts

The periods of prescription of debts shall be the following:

- (a) thirty years in respect of—
 - (i) any debt secured by mortgage bond;
 - (ii) any judgment debt;
 - (iii) any debt in respect of any taxation imposed or levied by or under any law;
 - (iv) any debt owed to the State in respect of any share of the profits, royalties or any similar consideration payable in respect of the right to mine minerals or other substances;
- (b) fifteen years in respect of any debt owed to the State and arising out of an advance or loan of money or a sale or lease of land by the State to the debtor, unless a longer period applies in respect of the debt in question in terms of paragraph (a);
- (c) six years in respect of a debt arising from a bill of exchange or other negotiable instrument or from a notarial contract, unless a longer period applies in respect of the debt in question in terms of paragraph (a) or (b);
- (d) Save where an Act of Parliament provides otherwise, three years in respect of any other debt.

²⁰ 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

to run from the date that the CCMA issued a certificate of outcome in a dispute. She further contends that her matter was still subject to internal grievance process and as such, the dispute was not ripe to be referred to the CCMA for conciliation and/ or adjudication. On that basis, she contends that she had not acquired the right to approach the CCMA for a referral of the dispute as that would have been premature. In her view, the period of prescription would only run from the date the jurisdictional ruling was issued by the CCMA.

- [21] The applicant further places reliance on section 12(1)²¹ of the Prescription Act for the proposition that her claim is not a debt for the purposes of the Prescription Act. In her view, the claim only becomes a debt once an award is certified presumably in terms of section 143(3)²² of the Labour Relations Act or once the award is made an order of court.

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.

²¹ Section 12. **When prescription begins to run**

- (1) Subject to the provisions of subsections (2), (3) and (4), prescription shall commence to run as soon as the debt is due.

...

²² 143. **Effect or arbitration awards**

- (1) 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 in respect of which a writ has been issued, unless it is an advisory arbitration award.
- (2) If an arbitration award orders a party to pay a sum of money, the amount earns interest from the date of the award at the same rate as the rate prescribed from time to time in respect of a judgment debt in terms of section 2 of the Prescribed Rate of Interest Act, 1975 (Act No. 55 of 1975, unless the award provides otherwise.
- (3) An arbitration award may only be enforced in terms of subsection (1) if the director has certified that the arbitration award is an award contemplated in subsection (1).

- [22] The starting point in the determination of the special plea raised would be to examine the nature of the dispute referred to this Court. In her statement of claim, the applicant contended that her dismissal was procedurally unfair in the light of the refusal of both the initiator and the chairperson to recuse themselves as per her request, and further since the enquiry was held in her absence after she had excused herself. She contended that she was denied the right to a fair hearing.
- [23] The applicant in regards to the substantive fairness of her dismissal contended that despite not being guilty of the charges, she was victimised, intimidated, harassed and unfairly discriminated upon based on arbitrary reasons. The basis of allegations of harassment and intimidation emanate from the alleged refusal by Hananusha, the senior legal manager, to move the disciplinary enquiry from 8.30 to 14.00; and her alleged altercation with Isola in the hearing room prior to the enquiry, and/or the latter's alleged conduct towards her. She had further contended that despite not being guilty of the charges, she was victimised, intimidated and harassed.
- [24] The allegations of sexual harassment and victimization arise out of incidents with one Andries Nchebe who allegedly had a tendency to call the applicant 'baby' at the workplace. The applicant further complained of Nchebe's change of attitude towards her after she had asked him not call her 'baby', and the failure by Nchebe to shortlist her for an interview in respect of an advertised position. Despite being called for an interview, the applicant was not appointed and she holds the view that this was as a consequence of '*quid pro quo harassment and victimisation*'.
- [25] The allegations of unfair discrimination on arbitrary grounds according to the applicant arise from the allegation that she was the only one charged and subjected to a disciplinary hearing whereas 'there were other employees against whom the employer had sufficient grounds to discipline.'
- [26] Prior to determining whether the applicant's claim in respect of the alleged victimisation or harassment has prescribed in terms of the provisions of the

Prescription Act, a few general remarks need to be made in respect of the applicant's other claims as referred to above.

- [27] It is apparent from the background illustrated somewhere in this judgment that the dismissal came about because of allegations of misconduct being levelled against the applicant. The allegations of harassment and intimidation emanating from the alleged refusal by Hananusha to move the disciplinary enquiry from 8.30 to 14.00 and the applicant's alleged altercation with Isola in the hearing room prior to the enquiry, and the latter's alleged conduct towards her are mere ancillary issues to the disciplinary process and as to how much weight they will add to a finding of unfairness of her dismissal is unknown. I further fail appreciate the applicant's contention that she was subjected to victimisation and harassment despite not being guilty of the charges against her. This contention is however unsubstantiated in that she had on her own version, refused to participate in the disciplinary enquiry which had ultimately found her guilty of the charges preferred against her, and it is not clear how she was victimised or harassed.
- [28] The applicant's contention that the discrimination against her emanates from the fact that other employees were not charged or disciplined despite having committed misconduct is equally problematic. Ordinarily, this contention pertains to the substantive fairness of the dismissal, and in particular, allegations of inconsistent application of discipline. Even if there was any semblance of discrimination in these allegations, there is nothing in the statement of case that demonstrates what that alleged discrimination entailed or alternatively, what arbitrary grounds are relied upon as mentioned in section 6 (1) of the EEA. The applicant has not identified any arbitrary ground upon which the discrimination is based.
- [29] Other grounds upon which it was alleged that the dismissal was unfair related to the alleged violation of her privacy in that her private information was used to formulate charges against her; that the employer had no grounds for formulating certain charges against her; and the psychological and emotional harm because of her dismissal. These factors are either ancillary to or are a consequence of a dismissal.

- [30] Having had regard to the above factors, it appears that the statement of case is merely a mixed pot, wherein everything and anything thought of by the applicant was thrown in to make up a case outside of the ordinary alleged unfair dismissal dispute, with the sole purpose of justifying why this court should assume jurisdiction over this dispute.
- [31] The above observations are made within the context of the point made at the beginning of this judgment that the CCMA cannot decline jurisdiction over disputes simply because parties *would like to pursue their matters in this court*²³. In *Hospersa obo Tshambi v Department of Health, KwaZulu-Natal*²⁴, it was held that there is an obligation on Commissioners to determine the true dispute between the parties, to establish the relevant facts, to construe the category of dispute correctly, and to make an objective finding about what is the dispute to be determined. This exercise might appear onerous, but it is however necessary in order to prevent instances where disputes end up in this Court when they should have been arbitrated. Equally so, this court is enjoined to ascertain the true nature of the dispute between the parties²⁵, and it does not necessarily have to rely on how the parties have pleaded their cases.
- [32] Within the context of the various disputes dealt with above, it appears that the alternative claim in terms of section 187 (1) (f) of the LRA, and to the

²³ See *CUSA v Tao Ying Metal Industries and Others* (2008) 29 ILJ 2461 (CC) at para 66, where the Court held that;

“In deciding what the real dispute between the parties is, a commissioner is not necessarily bound by what the legal representatives say the dispute is. The labels that the parties attach to a dispute cannot change its underlying nature. A commissioner is required to take all the facts into consideration including the description of the nature of the dispute, the outcome requested by the union and the evidence presented during the arbitration ...The dispute between the parties may only emerge once all the evidence is in”

²⁴ [2016] 7 BLLR 649 (LAC) at para 16

²⁵ See *National Union of Metalworkers of SA and Others v Bader Bop (Pty) Ltd and Another* (2003) 24 ILJ 305 (CC) at para 52, where the Court held that;

“It is the duty of a court to ascertain the true nature of the dispute between the parties. In ascertaining the real dispute, a court must look at the substance of the dispute and not at the form in which it is presented. The label given to a dispute by a party is not necessarily conclusive. The true nature of the dispute must be distilled from the history of the dispute, as reflected in the communications between the parties and between the parties and the Commission for Conciliation, Mediation and Arbitration (CCMA), before and after referral of such dispute. These would include referral documents, the certificate of outcome and all relevant communications. It is also important to bear in mind that parties may modify their demands in the course of discussing the dispute or during the conciliation process. All of this must be taken into consideration in ascertaining the true nature of the dispute.”

extent that the applicant alleged that her dismissal was automatically unfair, pertains to the lodging of a grievance in September 2011 in respect of the alleged sexual harassment and victimisation. If I understood the applicant's case, the dispute pertains to the incident with Nchebe, and the subsequent failure to gain promotion after she had applied for a supervisory position. The applicant regards this as *quid pro quo* harassment.

- [33] In her statement of case, the applicant omitted to state the details in regard to the allegation of sexual harassment, and merely contended that she had 'incidents' with Nchebe. The applicant failed to indicate when these alleged 'incidents' took place. It is not known when she had advised Nchebe to desist from his alleged conduct, or when she had applied for the particular position. It is further not known when she had raised the issue of her not being shortlisted, and when she had escalated the grievance to Nair. Be that as it may, it was not disputed that the applicant took no steps between the lodging of the grievance in or around September 2011, and the referral of the dispute to the CCMA in August 2016.
- [34] The applicant moves from the premise that this particular dispute had not yet matured for referral to the CCMA for the purposes of conciliation, as the internal processes had not yet been exhausted, and that to the extent that there was no prescription applicable to referral of disputes and resolution thereof internally, prescription had not begun to run.
- [35] The question to be answered is whether but for her dismissal, would the applicant ever have referred a dispute in regard to the alleged victimisation and harassment? Simply put, can an employee lodge a dispute outside the timeframes contemplated in section 191 of the LRA on the basis that it is only upon a referral of that dispute or the issuing of a certificate that prescription (to the extent that it is deemed applicable) is interrupted.
- [36] Whether the Prescription Act is applicable to the dispute resolution scheme of the LRA, and in particular, to the provisions under section 191 of the LRA, was a matter the Constitutional Court could not decisively pronounce upon in *Myathaza v Johannesburg Metropolitan Bus Services (SOC) Limited t/a*

*Metrobus and Others*²⁶, albeit within the context of the application of the Prescription Act to arbitration awards.

- [37] In the first judgment written by Jafta J, with Nkabinde ADCJ, Khampepe J and Zondo J concurring, it was held that the Prescription Act was incompatible with the provisions of the LRA, particularly in the light of the fundamental differences between the statutes. The first judgment therefore concluded that the latter did not apply to the LRA.
- [38] In the second judgment in *Myathaza* written by Froneman J, with Madlanga J, Mbha AJ and Mhlantla J concurring, it was held that the Prescription Act was not inconsistent with the LRA, but complementary to it. It was further held that the relevant provisions of the two Acts were capable of complementing each other in a way that best protected the fundamental right of access to justice, whilst at the same time preserving the speedy resolution of disputes under the LRA²⁷. Having found that the two statutes were consistent, the second judgment further examined the meaning of “*process*” and “*debt*” in section 15 of the Prescription Act and held that service of process initiating the CCMA dispute resolution process interrupted prescription within the ambit of section 15 (1) of the Prescription Act²⁸. The applicant in this case relied upon this approach.
- [39] The third judgment written by Zondo J supported the first judgment’s finding that the Prescription Act was not applicable to LRA matters. In contrast to the second judgment, Zondo J further held that the referral form for conciliation either at the CCMA or Bargaining Council is not a “process” such as is contemplated in section 15(1) of the Prescription Act, and it could not interrupt the running of prescription as contemplated by section 15(1) read with subsection (6). The reasoning for this approach was that in terms of section 15(1) read with subsection (6) of the Prescription Act, the process contemplated in section 15(1) was a process that commenced legal proceedings, whereas conciliation proceedings could not be described as

²⁶ 2017 (4) BCLR 473 (CC); See also *Maria Jane Mogaila v Coca Cola Fortune (Pty) Limited* [2017] 5 BLLR 439 (CC)

²⁷ At para 66

²⁸ At para 75 and 82

legal proceedings²⁹. Second, the referral of a dismissal dispute to conciliation did not lead to a judgment, but only resulted with either an agreement resolving the dispute, or a certificate of outcome to the effect that the dispute remained unresolved or with neither an agreement nor a certificate but with the expiry of the 30-day period within which the parties are required to try and resolve the dispute³⁰.

- [40] As a result of the parity of votes in *Myathaza*, in which none of the judgments secured a majority, there is currently no binding basis of decision emerging from that Court's decision³¹. The prevailing Labour Appeal Court authority on the issue of whether the Prescription Act is applicable to the LRA remains that in *Fawu obo Gaoshubelwe and Others v Pieman's Pantry (Pty) Ltd*³². The Labour Appeal Court (per Sutherland JA) having considered previous pronouncements on the issue of prescription by the LAC alluded to the fact that those authorities, including *Myathaza*³³, did not propose that litigation under the LRA, prior to the rendering of an award, (or a judgment by the Labour Court) was subject to the Prescription Act.
- [41] The Labour Appeal Court held that the Prescription Act indeed applied to all litigations under the LRA, not least of all, litigations prosecuted in terms of section 191³⁴. The Court added that a referral *per se* played no role in interrupting prescription since it did not commence legal proceedings, and that a referral was no more than a condition to be fulfilled to obtain access to a forum that can adjudicate a dispute³⁵.
- [42] The Court further held that for a 'process' to be initiated for the purposes of interruption of prescription, the referring party must after the referral and exhaustion of conciliation in terms of section 191(5)(b) have referred the dispute to the Labour Court for adjudication, which involves, in accordance with Rule 6(1) of the Labour Court Rules, the filing of a statement of case,

²⁹ At para 140

³⁰ At para 141

³¹ Mogaila at para 27

³² [2016] 12 BLLR 1175 (LAC)

³³ 2016) 376 ILJ 413 (LAC).

³⁴ At para 45

³⁵ At para 60

which, in terms of section 191(11) (a), must be done within 90 days of the certificate of non-resolution³⁶.

[43] Applying the decision and reasoning of Sutherland JA in *Fawu obo Gaoshubelwe and Others* in this case, the dispute in respect of the alleged victimisation or harassment arose from incidents dating back to September 2011, and the applicant had not done anything to pursue that dispute until August 2016. It would therefore be impermissible to allow her to 'piggy-back' the alleged sexual harassment and victimisation dispute on the alleged unfair dismissal dispute that took place in May 2016. To hold otherwise would be to countenance the circumvention of the provisions of section 191 (1) (b) of the LRA, and those of section 10 (1) of the EEA to the extent that unfair discrimination is alleged. This is so in that the mere fact that the Prescription Act has been held to be applicable to the general scheme of section 191 of the LRA does not imply that the procedural requirements contemplated therein have become nugatory.

[44] In *Jabari v Telkom SA (Pty) Ltd*³⁷, this court confirmed that an employee has a statutory and constitutional right to pursue grievances, and that a dismissal pursuant to the lodging of a grievance is automatically unfair. In this case, the grievance was lodged in September 2011, whilst her dismissal, which *prima facie* appears unrelated to the alleged grievance, took place in May 2016. The fact that the certificate of outcome was issued in respect of this dispute does not assist the applicant as on the LAC authority relied upon, prescription started to run from when the alleged harassment or victimisation took place, and could only have been interrupted by initiation of adjudication through the filing of a statement of case. As at the time the statement of case was filed, the claim had accordingly long prescribed.

[45] Similarly, it is trite that the certificate of outcome, to the extent that it may be relied upon, is of no assistance to the applicant³⁸. There is further no

³⁶ At para 56

³⁷ (2006) 27 ILJ 1854 (LC)

³⁸ See *Bambardier Transportation (Pty) Ltd v Mtiya* [2010] 8 BLLR 840 (LC); *SAMWU v Ngwathe Local Municipalities* [2015] 9 BLLR 894 (LAC); *BMW South Africa (Pty) Ltd v Numsa obo members* [2012] 3 BLLR 274 (LAC)

substance to the contention that this particular dispute could not have been lodged earlier as it had not been exhausted internally, particularly since it is not stated in the pleadings as to what the applicant had done to get a resolution in that regard prior to her dismissal.

[46] In the light of the above, it follows the applicant's claim of an automatically unfair dismissal based on the alleged victimisation or sexual harassment that occurred in September 2011 has prescribed and thus, ought to be dismissed. Ordinarily, this court would not have jurisdiction to determine the alleged unfair dismissal dispute based on the case pleaded and the observations made in that regard as addressed somewhere in this judgment, and further in the light of the conclusions reached in respect of the alleged automatically unfair dismissal claim. To the extent that this court might have jurisdiction in respect of the alleged unfair dismissal dispute, this would only be for the purposes of the determination of whether the alleged failure by the first respondent to discipline other employees who had allegedly committed misconduct constituted a discrimination within the meaning of section 6 of the EEA against the applicant.

[47] In the applicant's heads of argument, it had been argued that to the extent that the court upheld the first respondent's special plea on prescription, she should be afforded an opportunity to amend her statement of claim. I however see no reason why the applicant should be granted such an indulgence, especially since the first respondent had not excepted to the statement of case other than raising the points already dealt with. In my view, the applicant should stand and fall by her pleadings in so far as she had claimed discrimination outside of the automatically unfair dismissal claim already declared to have prescribed. I have further considered the issue of costs, and I am of the view that these should be in the cause. Accordingly, the following order is made;

Order:

- i. The first respondent's preliminary points in respect of the citation of the second to sixth respondents is upheld, and it is declared that they are not party to these proceedings.
- ii. The first respondent's special plea is upheld and it is declared that the applicant's claim of an alleged automatically unfair dismissal has prescribed in accordance with the provisions of the Prescription Act.
- iii. The costs associated with the preliminary points and special plea as raised by the first respondent are to be costs in the cause.
- iv. The parties may approach the Registrar of this Court to set the matter down for trial.

E. Tlhotlhemaje

Judge of the Labour Court of South Africa

Appearances:

For the Applicant:

Mr M Mamatela of Mamatela
Attorneys Inc.

For the Third Respondent:

Mr. N Mohamed of Nadeem
Mohamed Attorneys

LABOUR COURT