IN THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not reportable

Case no: JS 857/16

In the matter between:

PUBLIC SERVANTS ASSOCIATION OF SOUTH AFRICA obo MEMBERS	**Applicant**
and	
MINISTER OF DEFENCE AND MILITARY VETERANS	**First Respondent**
DEPARTMENT OF DEFENCE	**Second Respondent**
SECRETARY FOR DEFENCE	**Third Respondent**
MINISTER OF THE PUBLIC SERVICE AND ADMINISTRATION	**Fourth Respondent**
DEPARTMENT OF THE PUBLIC SERVICE AND ADMINISTRATION	**Fifth Respondent**

Heard: 30 August 2019

Delivered: 18 December 2019

Summary:

JUDGMENT

MABASO, AJ

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Introduction:

[1] In November 2016, the Public Servants Association of South Africa (PSA), acting on behalf of its members (the Applicants) caused a civil action[1] against the First to Fifth Respondents (collectively referred hereinafter as "the State"). The State delivered a statement of response wherein it raised two special pleas, namely, (a) that the Applicants' claim has prescribed **(The prescription plea)**, and (b) that the Applicants failed to comply with the Institution of Legal Proceedings Against Certain Organs of State Act 40 of 2002[2] **(The Section 3 notice plea)**. The Applicants delivered a replication, in a form of a condonation application (the condonation), as an answer to the State's latter special plea. The State is opposing the condonation.

[2] Mr Mkhari (with Ms Kgatla) ,for the State, submitted that the pleadings in this matter indicate that the matter relates to unfair labour practice. Therefore, this Court will have to decide whether it has jurisdiction or not. The Applicants opted to approach this Court in terms of section 77 of the BCEA, I do not think that the Applicants are not allowed to approach this Court ,as they have done, because the BCEA and the LRA do not expressly prevent parties from doing so. Instead section 77(1) read with subsection (3) of the BCEA allows a party to approach this Court if they have a claim emanating from a contract of employment, as this section provides that,

> *"77. Jurisdiction of Labour Court.—(1) Subject to the Constitution and the jurisdiction of the Labour Appeal Court, and except where this Act provides otherwise, the Labour Court has exclusive jurisdiction in respect of all matters in terms of this Act.*
>
> *…*
>
> *(3) The Labour Court has concurrent jurisdiction with the civil courts to hear and determine any matter concerning a contract of employment,*

[1] Section 77 of the Basic Conditions of Employment Act 75 of 1997 ("the BCEA).
[2]("the Institution of Legal Proceedings Act").

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irrespective of whether any basic condition of employment constitutes a term of that contract."

[3] It is settled law that prescription does apply to dismissal disputes, and unfair labour practice disputes relating to the promotion. In determining the issue of prescription, one has to first establish the nature of the claim. I propose to narrow the issues hereinafter as follows.

The prescription plea

[4] Prior 1998, the Applicants were employed by SANDF as uniform members , under the Defence Act[3], performing finance duties. In 1995 the Defence Act was amended and introduced *inter alia* the transfer of the function of the accounting officer of the Department of Defence (the Third Respondent). The process called demilitarisation of the finance staff was introduced and then discussed with the Applicants, which they accepted. Demilitarisation was finally implemented on 01 November 1998. Contracts of employment of the Applicants were amended accordingly.

[5] The Applicants assert that before and after the implementation of demilitarisation they were made to believe that it was not going to disadvantage them. However, its implementation resulted to unfavourable terms and conditions of their employment i.e. monthly remuneration and pension benefits. As a result, they are claiming that the State breached the terms and conditions of the contracts alternatively committed misrepresentation, therefore, they have suffered financial loss. Reliefs sought are that:

"56.1 Declaring that the [Applicants] are entitled not to be in the worse off position with regard to the ***monthly salaries***

[3] Act 44 of 1957.

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and pension benefits than the position they would have been in had they not demilitarised,

56.2 Declaring that the respondents are in breach of an implied alternatively tacit terms of the demilitarisation contract, that [the Applicants] would not be worse off after demilitarisation, alternatively declaring that the respondents made a fraudulent alternatively negligent misrepresentation giving rise to the demilitarisation contract, alternatively declaring that the respondents cause [the Applicants] pure economic loss

56.3 Ordering the respondents to with immediate effect. restore the pension benefits for [the Applicants] to that which would have applied to him or her had he or she not demilitarised, including extension of the compulsory retirement age to 65 instead of 60 alternatively restoring the extra 1 in every 4 years' service for purposes of pension…,

56.4 Ordering the respondents to with immediate effect place [the Applicants] on a salary scales/notches respectively that they would have been only had they not been demilitarisation, and to pay each member the concomitant monthly salary henceforth;

56.5 Ordering the respondents with immediate effect to pay the amount as set out in Annexure "C"… as damages with regard to salary losses to the members.

56.6…":

[6] The Applicants aver that they lodged grievances, and on or about 2010 the grievances about the worse off conditions relating to some of their colleagues,

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belonging to a different union, were resolved by the State. They further contend that "*[a]s later as November 2014 then continued to be indications that the respondents were attending to the members' concerns concerning pension benefits however without any resolution".* They aver that the alleged worse off is on-going.

[7] The State contends that since the contracts which are the genesis to this matter were concluded in November 1998, the date of the implementation of the demilitarisation, therefore, the claim, if there is any, arose and became enforceable in 1998. Consequently, it prescribed in 2001, meaning after a period of three years following the conclusion of the demilitarisation. The State further avers that the Applicants claim was launched during "October 2014".

[8] The Rules of this Court do not provide provisions for replication, as is the case in the High Court and Magistrate Court, wherein a party has an opportunity to deliver a replication to the special plea. Taking into account the nature of the dispute, in reply, the Applicants delivered an application for condonation for their non-failure to comply with the provisions of section 3. This Court if it were to uphold this special plea, the prescription plea, there would be no need for condonation application to be decided considering that the condonation application depends on this point. As section 3(4) (b) Institution of Legal Proceedings Act (the ILPA) provides thus,

> *"…the court may grant an application referred to in paragraph (a) if it is satisfied that-*
>
> *(i) the debt has not been extinguished by prescription"*[4]

As a result, this Court is bound to consider the condonation in deciding the issue of prescription.

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[4] Links v Members of Executive Council Department of Health Northern Cape Province 2016 (5) BCRL 656 (CC) (Links), paras 15 and 16.

[9] The Applicants defence is that the alleged breach emanate from the contracts which were entered into in 1998 but contend that the alleged breach and misrepresentation was based on the future, *inter alia*, refers to "*their future careers", "as late as November 2014 there continued to be indications that the Respondents were attending to the member's concerns concerning pensions benefits, however without any resolution"/ "various grievances were raised*". And due to the alleged misrepresentation "*members are indeed worse off after demilitarisation with regard to* ***monthly remunerations*** *and* ***pensions benefits*****"**.[5] One of the examples given is a retirement age which is alleged that now is the age of 60, whereas civilian employees in the public sector may retire at the age of 65.

[10] A party raising prescription has the onus to prove that the claim has prescribed.[6] It can do so by indicating the date that prescription began to run against the claim of the other party. [7] *In casu*, the State does not accept a breach of contract or any liability. Therefore, the statement of case and the condonation application will assist this Court.

When did the prescription begin to run?

[11] It is not disputed that the claim is a debt, under Prescription Act (the Act), any debt which is not covered under ss 11(a) to (c) of the Act prescribes after three years.[8] Section 12 (1) of the Act provides that:

> *"Subject to the provisions of subsections (2) and (3), the prescription shall commence to run as soon as* ***the debt is due***".[9]

[5] Court emphasis
[6] Ibid, at 24.
[7] Ibid, at 24.
[8] SS 11(d) of the Act.
[9] See also FAWU obo Gaoshubelwe v Pieman's Pantry (Pty) Ltd 2018 (5) BCLR 527 (CC), at para52

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[12] Before a debt could be said it is immediately enforceable, it has to be claimed. Therefore, one does not look at the date when it arises but the date when it is due, for example, if a debtor is expected to perform on a particular date, such date is the date which can be said it is the date of enforcement. Section 12(2) and (3) of the Act read thus,

> *(2) If the debtor willfully prevents the creditor from coming to know of the existence of the debt, the prescription shall not commence running until the creditor becomes aware of the existence of the debt. (hereinafter referred to as* ***"Exception 1")***
>
> *(3) A debt shall not be deemed to be due until the creditor has knowledge of the identity of the debtor and* ***of the facts from which the debt arises****: Provided that a creditor shall be deemed to have such knowledge if he could have acquired it by exercising reasonable care." (hereinafter referred to as "****Exception 2")***

[13] Exception 1 is not an issue herein, but part of the exception 2 is. It is not contested that by December 1998 the Applicants knew the identity of the debtor (being the State). The only issue before this Court relates to facts from which the debt arises. The SCA in *Minister of Finance and Others v Gore NO* [10] rehashed this aspect thus:

> *"This court has in a series of decisions emphasised that time begins to run against the creditor when it has* ***the minimum facts that are necessary to institute the action****. The running of prescription is not postponed until a creditor becomes aware of the full extent of its legal rights,* ***nor until the creditor has evidence that would enable it to prove a case 'comfortably.****"*

[10] (230/06) [2006] ZASCA 98; [2007] 1 All SA 309 (SCA); 2007 (1) SA 111 (SCA).

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[14] The facts of this case were known to the Applicants back in December 1998, as they aver that the demilitarisation commenced on 01 November 1998, and the alleged worse off occurred immediately thereafter. December 1998 is when *part* of the debt was due (I deal with this issue below). The Applicants proceeded to launch grievances although they do not state as to when same were recorded. The Applicants further contend that by 2010 grievances concerning their allegations of worse off the terms and conditions of employment of their colleagues were addressed although they were excluded. Clearly, the Applicants by December 1998 had the facts of the new contracts entered into and according to the pleadings they started to experience worse off back then, then this enabled them to institute an action against the State since that time.

[15] Does the alleged monthly worse off have an effect on the "debt due" date. Or put it differently: Does the repetition of the alleged conduct interrupt prescription? The Applicants contend that since "*worse off financially with regard two monthly remunerations continues and increases on a monthly basis - this is a continuous call on-going wrong*". In respect of monthly remuneration and benefits, the Applicants clearly knew since December 1998 that on a monthly basis they were not getting what they were supposed to get, therefore, prescription in respect of remuneration and benefits was immediately enforceable on the date when it was due, which is monthly starting from December 1998. I therefore conclude that since the Applicants launched the claim during October 2014, as pleaded by the State, a claim relating to damages and/or salaries and/or benefits that the Applicants might have had against the State in October 2011 backwards, has prescribed because the Applicants at each and every end of the month, after their respective paydays, when they received their respective remunerations which are allegedly "worse off", that is the time when they had "*the minimum facts that are necessary to institute action*".

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Was the prescription interrupted by the launching of a grievance?

[16] In *casu*, the Applicants seem to suggest that they also rely on the fact that the State had made indications that it was attending to the grievances of the employees. I say this because they aver that various grievances were allegedly raised by them as late as November 2014, there were continued indications that the State was attending to the concerns that were raised. I conclude that the lodging of grievances would have "enable[d] [the Applicants] to prove [their] case 'comfortably", which is what the SCA, in the Minister of Justice case above, discourages. Even in respect of the pension benefits which should have been contributed on the monthly basis the Applicants have been having the minimum requirements to institute an action after realising on the monthly basis, since December 1998. And I do not consider the conduct of the State(when it indicating that was attending to the concerns) as an "*acknowledgement of liability*".[11]

[17] The running of the prescription can be judicially interrupted in terms of the provisions of section 15 of the Act, which provides that,

> *15. Judicial interruption of prescription*
>
> *(1) The running of prescription shall, subject to the provisions of subsection (2), **be interrupted by the service on the debtor of any process** whereby the creditor claims payment of the debt.*
>
> *(2) Unless the **debtor acknowledges liability**, the interruption of prescription in terms of subsection (1) shall lapse, and the running of prescription shall not be deemed to have been interrupted, **if the creditor does not successfully prosecute his claim under the process in question to final judgment** or*

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[11] See section 14 of the Act.

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."

[18] Are the facts of this matter show that the Applicants took "any *process*"? Subsection 15 (6) provides that,

*"for the purposes of this section " process" includes a petition, a notice of motion, a rule nisi, a pleading in reconvention, a debt party notice referred to in any rule of law, and **<u>any document</u>** whereby legal proceedings are commenced."*

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[19] The Constitutional Court in *FAWU v Gaoshubelwe v Pieman's Pantry (Pty) Ltd*[12] held that the term "any document" has to be given a wide meaning. Before this court, there is no document that was exchanged between the Applicants and the State and / or any of the Respondents between 1998 and 2014 which can be classified as a document that commenced legal proceedings.

Ongoing effect

[20] The Applicants further aver that the claim cannot prescribe because the "unfair labour practice" is ongoing, as it occurs monthly. They rely on *SABC Ltd v CCMA [2010] 3 BLLR 251 (LAC)*. The alleged compulsory of retirement age, which is 60, is on-going but has to be decided based on each Applicant's case, for example if Mr X reached 60 years about three years back then his claim will be calculated from the date of retirement and if it happens that is beyond three years then their claim might be affected by the provisions of the Prescription Act, because that is when the debt was due. Further, in respect of monthly remuneration the Applicants contends that is ongoing.

[21] The facts in the SABC matter are distinguishable from the facts in *casu*, in that in the SABC matter, the issue was about a continuous discrimination allegedly perpetrated by the SABC and the LAC said the following about the employees' referral document

> "*the dispute was on-going and that the dispute had its genesis in 1998 when the appellant promoted or upgraded three artisans from a salary scale of 403 to 300. Furthermore, the correspondence from the respondent's attorneys explained that the respondent* ***was only proceeding with a claim that fell within a time frame over which the CCMA had jurisdiction"***.

Based on those facts the LAC held that "the date of dispute does not have to coincide with the date upon which the unfair labour practice/ unfair

[12] 2018 (5) BCLR 527 (CC).

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discrimination commenced because it is not a single act of discrimination but one which is repeated monthly." Therefore, my understanding of the SABC case, relating to "ongoing effect" confirmed that the cause of action would be regarded as a factor if by the time of referral the conduct was still there, but the LAC did not say the issue of prescription cannot be successfully raised. In this matter, my view is that the ongoing effect supports the Applicants cause of action only relating a period of 3 years from October 2011 onwards.

Condonation application

[22] Based on the conclusion above, that the claim relating to the remunerations was due each and every end of the month when remunerations were supposed to have been paid, now I have to deal with the condonation for the period from October 2011 to the date of the launching of this application. The condonation for the period prior October 2014 is not necessary because I have concluded that the debt for that period is extinguished by prescription.

[23] Section 3 provides that a party before instituting a claim against an organ of state for recovery of the debt has to issue a notice in writing and this must be done within six months from the date on which the debt becomes due.

[24] The applicant contend that following the demilitarisation, the formal grievances were launched, and as late as November 2014 there continued to be indication that the State were attending to their concerns in respect of the pension funds however without any resolution . In a condonation application a court has to take into account an interest of justice. Section 3 (4)(a) of the ILPA provides that this Court may grant condonation if good cause exists for the failure and the organ of state was not unreasonable prejudiced by the failure. Based on the reasons provided for the non-compliance with the

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provisions of section 3 notice and that parties were engaging each other and that before me there is no suggestions that the State was unreasonable prejudiced by the failure to comply with the provisions of section 3. I have considered the facts of this case and the explanation provided for the delay and am of the view that it would not be in the interest of justice if condonation is not granted for the period that I have mentioned above, October 2011 onwards.

Costs

[25] In respect of costs, I am of the view that since each party herein has partially succeeded it would not be in the interest of justice that cost order be made in this matter.

[26] **Order:**

1. The special plea of prescription, relating to claims **before** the period of October 2011 is upheld.

2. The special plea of prescription, relating to claims **after** October 2011 is dismissed.

3. The Applicants failure to comply with section 3 of the Institution of Legal Proceedings Against Certain Organs of State Act condoned.

4. There is no order as to costs.

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S Mabaso

Acting Judge of the Labour Court of South Africa

Appearances

For the Applicant: Adv F Van der Merwe

Instructed by: Otto Krause Inc.

For the Respondent: Adv W Mkhari SC with Adv M Kgatla

Instructed by: The State Attorney, Pretoria

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