IN THE HIGH COURT OF SOUTH AFRICA
WESTERN CAPE DIVISION, CAPE TOWN

Appeal Case: A225/2024
Magistrates Court Case No: 6359/2019

In the matter between:

RESOURCE AFRICA TRUST **APPELLANT**

And

FRANCISCO MIJA **RESPONDENT**

Coram: Cloete J and Siyo AJ

Delivered: This Judgment was handed down electronically by circulation to the legal representatives by email. The date and time for hand-down is deemed to be 10h00 on 7 March 2025.

ORDER

On appeal from: The Magistrates Court for the District of Cape Town (Magistrate, Ms. MJE Kgorane sitting as court of first instance):

1. The appeal is upheld with costs.

2. The order of the Magistrates Court is set aside and replaced with the following:

"a. The defendant's special plea of prescription is upheld.

b. The plaintiff's claim is dismissed with costs, including the costs of counsel where so employed."

JUDGMENT

SIYO AJ (CLOETE J concurring):

Introduction

1. This is an appeal against the whole judgment and order of the learned Magistrate, Ms. MJE Kgorane, of the Magistrates Court for the District of Cape Town ("court *a quo*"). This matter concerns the prescription of a claim which Mr. Francisco Mija ("respondent") had instituted against Resource Africa Trust ("appellant") for unpaid wages for the period January 2016 to 12 July 2016.

2. Before the court *a quo* the appellant raised a special plea of prescription on the basis that summons was served on it more than 3 years after the date on which the respondent alleges the claim fell due. The special plea was separated from the merits of the matter and was set down for adjudication on 29 April 2024. After argument on 29 April 2024, the matter was adjourned for judgment.

3. Although judgment was handed down by the court *a quo* on 13 May 2024, the written judgment was only availed to the parties for collection on 27 June 2024. In its judgment, the court *a quo* found that the respondent's claim had not prescribed.

Factual background

4. The respondent was employed by the appellant as a project manager on a fixed term contract, which expired on 31 December 2015.

5. Whilst the respondent contended that his employment with the appellant continued after the expiry of the fixed-term contract and was terminated by the appellant on 12 July 2016, the appellant however contended that after the expiry of the fixed-term contract, the respondent agreed to work for the appellant as a volunteer and to receive an honorarium subject to the appellant's ability to secure funding thereof. That notwithstanding, it is common cause that the respondent ceased working for the appellant on 12 July 2016.

6. On 11 August 2016, the respondent referred a dispute to the Commission for Conciliation, Mediation and Arbitration ("CCMA") wherein he claimed reinstatement and financial compensation from the appellant on the basis that he had been dismissed on 12 July 2016 and that his dismissal was substantively and procedurally unfair.

7. A dispute arose between the parties as to whether the respondent was required to apply for condonation for the late referral of his dispute to the CCMA. The genesis of this dispute was a disagreement as to when the employment relationship between the appellant and the respondent had terminated.

8. On 28 October 2016, the CCMA issued a ruling which found that the employment relationship between the appellant and respondent terminated on 12 July 2016 and that the respondent had referred the dispute within 30 days of such termination. Consequently, the CCMA found that condonation was not necessary. There was no further hearing of this matter after this ruling.

9. On 2 December 2016, the CCMA issued a further ruling which read as follows "*the Applicant party has decided not to pursue this matter as a dismissal dispute and thus the remedy of compensation but rather approach the Department of*

Labour, or the Civil Courts to pursue a claim for under/non-payment of salary for the period January 2016 to 12 July 2016."

10. The respondent issued summons against the appellant for unpaid wages for the period January 2016 to 12 July 2016. Summons were served on the appellant on 26 August 2019. It is this claim that forms the subject of this appeal.

Court a quo's judgment

11. Faced with this common cause factual background, the court *a quo* characterized the issue for determination as a "*simple question*" as follows: "*has the claim by the Plaintiff prescribed? Even after the referral and the ruling of the CCMA?"*

12. In determining this issue, the court *a quo* emphasized the binding nature of the CCMA's rulings on the parties. In the court *a quo's* view, the CCMA's ruling of 28 October 2016 made definitive findings on two crucial issues: first, that the employment relationship between the appellant and respondent terminated on 12 July 2016; second, and as a consequence of the first finding, that the respondent was indeed an employee of the appellant.

13. The court *a quo* reasoned that if the binding nature of the CCMA's ruling is accepted, it cannot be held on the other hand that "*those proceedings were not finalized to the point of informing further proceedings in continuation based on the CCMA's ruling*…"

14. Relying on the Constitutional Court's judgment in *Food and Allied Workers Union obo Gaoshubelwe v Pieman's Pantry (Pty) Ltd*[1] ("*Pieman's Pantry*") in dismissing the special plea and concluding that the respondent's claim had not prescribed, the court *a quo* held as follows:

> *"… this court finds that the determination contained in the ruling of the CCMA made on the 28th October 2016, carried finality to the relevant issues of the*

[1] Food and Allied Workers Union obo Gaoshubelwe v Pieman's Pantry (Pty) Ltd (2018) 39 ILJ 1213 (CC) para 199. ("Pieman's Pantry")

position of the Plaintiff as employee and that the date the dispute arose is 12 July 2016. Having considered case law (paragraph 14 of this judgment) [such proceedings before the CCMA constitute ***the commencement of legal proceedings in an independent and impartial forum. For those reasons I would conclude on this aspect that the referral of disputes to the CCMA for conciliation constitutes the service of a process commencing legal proceedings****] this court finds that the nature of the proceedings in this regard impacted prescription. Especially with the ruling being made for the matter to go ahead for hearing. The decision was made by the Plaintiff to proceed with action out of this court (which is a matter for trial). He instituted the proceedings and the summons was served on the Defendant in August 2019. This was done within the period of 3 years after the important and relevant determinations were made by the CCMA."*

15. Dissatisfied with the outcome, the appellant lodged an appeal before this court.

Grounds of Appeal

16. The appellants grounds of appeal as outlined in the notice of appeal can be articulated as follows:

    16.1. First, the appellant alleges that the learned Magistrate erred in conflating the claim lodged by the respondent for reinstatement and compensation which was referred to CCMA on 11 August 2016 with the claimed instituted by the respondent before the court *a quo* on 26 August 2019 for the payment of the amount alleged to be outstanding in respect of his salary.

    16.2. Second, the appellant alleges that the learned Magistrate erred in finding that the referral by the respondent of an unfair dismissal dispute to the CCMA on 11 August 2016 interrupted prescription in respect of his subsequent claim for unpaid salary as contemplated in section 15 of the Prescription Act 68 of 1969 ("Prescription Act").

16.3. Third, the appellant alleges that the learned Magistrate erred in finding that the effect of the CCMA's ruling, that it had the requisite jurisdiction to entertain the respondent's unfair dismissal dispute, constituted a prosecution of the respondent's claim to final judgment as contemplated in section 15 (2) of the Prescription Act.

16.4. Fourth, the appellant alleges that the learned Magistrate further erred in finding that prescription commenced to run afresh upon the ruling handed down by the CCMA on 28 October 2016 in respect of the points in *limine* raised by the appellant.

16.5. Fifth, the appellant alleges that the learned Magistrate erred in failing to consider that the respondent expressly abandoned his unfair dismissal dispute before the CCMA on 2 December 2016, electing to instead pursue a contractual claim for the alleged non-payment of his salary.

16.6. Sixth, the appellant alleges that the learned Magistrate erred in finding that the Respondent's claim for unpaid salary had not prescribed.

Evaluation of the Appeal

17. It has now become trite that the remedies of an employee whose contract of employment has been terminated can be found in either the concept of breach of contract under common law or unfair dismissal under the Labour Relations Act 66 of 1995 ("LRA").[2] In terms of section 191 of the LRA, the LRA rights are enforceable only through the Commission for Conciliation Mediation and Arbitration ("CCMA"), Bargaining Council or the Labour Court. On the other hand, common law rights are generally enforceable in the High Court and Labour Court.[3]

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[2] Fedlife Assurance Ltd v Wolfaardt 2002 (1) SA 49 (SCA) para 22; Mangope v SA Football Association [2011] JOL 26612 (LC) para 17.
[3] Makhanya v University of Zululand 2010 (1) SA 62 (SCA) para 13 ("Makhanya").

18. In endorsing the approach adopted in *Makhanya*, the Constitutional Court in *Baloyi vs Public Protector & Others* ("*Baloyi*") held:

"The mere potential for an unfair dismissal claim does not obligate a litigant to frame her claim as one of unfair dismissal and to approach the Labour Court, notwithstanding the fact that other potential causes of action exist. In other words, the termination of a contract of employment has the potential to found a claim for relief for infringement of the LRA, and a claim for enforcement of a right that does not emanate from the LRA (for example, a contractual right)."[4]

19. The Constitutional Court in *Baloyi* emphasized that contractual rights exist independently of the LRA. Furthermore, the Constitutional Court held that section 23 of the Constitution does not deprive employees of a common law right to enforce the terms of a fixed-term contract of employment and the LRA, in turn, does not confine employees to the remedies for "unfair dismissal" provided for in the Act.[5]

20. However, in terms of section 11 (d) of the Prescription Act, a claim in common law must be instituted within three years from the date upon which the cause of action, which is dismissal in this case, occurred.

21. In the analogous case of *Jeewan v Transnet SOC Limited and Another (*"Jeewan"), the Supreme Court of Appeal ("SCA") was called upon to consider whether Mr Jeewan's claim against Transnet had prescribed within a period of three years from the date of his alleged unfair dismissal on 14 May 2010 in terms of section 11 *(d)* of the Prescription Act, as contended for by Transnet, or whether, the debt which Mr Jeewan relied on for the relief claimed in his action against Transnet, only arose on 1 February 2012 when the arbitration award was issued, as contended for by Mr Jeewan.[6]

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[4] Baloyi v Public Protector and Others 2022 (3) SA 321 (CC) para 40 ("Baloyi").
[5] Baloyi above n 4 para 46.
[6] Sanoj Jeewan v Transnet SOC Limited and Another (696/2023) **[2024] ZASCA 108** para 9 ("Jeewan").

22. Following the outcome of disciplinary proceedings that were instituted against him, Mr Jeewan was dismissed with immediate effect in terms of a letter that was signed by Transnet on 14 May 2010.[7]

23. The termination letter further informed Mr Jeewan that he had the right to refer his dismissal to either the CCMA or to the Transnet Bargaining Council (TBC) within thirty days of his dismissal. Mr Jeewan indeed referred a dispute of unfair dismissal to the TBC in terms of section 191 of the Labour Relations Act 66 of 1995 (LRA) on the grounds that his dismissal was procedurally and substantively unfair. The relief he sought before the TBC was reinstatement to his former employment.[8]

24. Arbitration of the dispute between Mr Jeewan and Transnet took place before the TBC on 1 and 2 September 2011, and thereafter on 24 and 25 January 2012 before Commissioner, Ms Esther van Kerken (Ms Van Kerken). On the last day of the hearing, Mr Jeewan withdrew the ground predicated on substantive unfairness, but persisted with the ground that his dismissal was procedurally unfair. On 1 February 2012 Ms Van Kerken issued an award in terms of which she held that Mr Jeewan's dismissal was procedurally fair. Neither Mr Jeewan nor Transnet sought to review the arbitration award or make it an order of court.[9]

25. Relying on established authority on the provisions of section 12 (1) of the Prescription Act, the SCA held that:

"*Section 12 (1) of the Prescription Act provides that 'subject to the provisions of ss (2), (3) and (4), prescription shall commence to run as soon as the debt is due'. For purposes of the Act, the term 'debt due' means a debt, including a delictual debt, which is owing and payable. A debt is due in this sense when the creditor acquires a complete cause of action for the recovery of the debt, that is when the entire set of facts which the creditor must prove in order to succeed with his or her claim against the debtor is in place or, in other words, when*

[7] Jeewan n 6 above para 4.
[8] Jeewan n 6 above para 5.
[9] Jeewan n 6 above para 7.

everything has happened which would entitle the creditor to institute action and to pursue his or her claim."[10]

26. Furthermore, the SCA held that Mr Jeewan was fully aware of the sequence of events that led to the holding of the disciplinary hearing against him on 14 and 17 May 2010. He was also fully aware of the fact that despite the hearing being postponed to 17 May 2010, he was effectively dismissed on 14 May 2010 when Transnet had signed the termination letter. He was consequently aware, on 14 May 2010, of the fact that his dismissal was unlawful. He was aware of the identity of the debtor. The SCA found that all this points to the fact that his 'cause of action' for contractual damages arose on 14 May 2010.[11]

27. Moreover, the SCA took the view that the fact that Mr Jeewan referred his unfair dismissal to the TBC for arbitration, as he was advised to do by Transnet, is an election that he made at the time. In the SCA's view, this does not, in any way, detract from the fact that his contractual debt became due on 14 May 2010 and as such was hit by the provisions of section 11 (d) of the Prescription Act.[12]

28. Last, the SCA held that the running of prescription was triggered from the date of dismissal. The court also highlighted that it was only when the award was made against him that Mr Jeewan decided to follow a different route, that is, sue for damages. By then it was already five years down the line and his claim had already prescribed.[13]

29. In argument, Ms. Stein who appeared for the appellant, correctly crystallized the issue as whether the respondents' claim before the Magistrates Court for unpaid wages in terms of his contract of employment with the appellant has prescribed.

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[10] Jeewan n 6 above para 39; Also see: Truter and Another v Deysel 2006 (4) SA 168 (SCA) para 16 (Truter); Evins v Shields Insurance Co. Ltd 1980 (2) SA 814 (A) (Evins) at 838D-H, and Deloitte Haskins & Sells Consultants (Pty) Ltd. v Bowthorpe Hellerman Deutsch (Pty) Ltd [1991] 1 All SA 400 (A) at 532H-I.
[11] Jeewan n 6 above para 41.
[12] Jeewan n 6 above para 43.
[13] Jeewan n 6 above para 44.

30. While Mr. Whitcomb, who appeared for the respondent, did not dispute that there is a distinction between the debt pursued by the respondent before the CCMA and the Magistrates Court, he argued that referral to the Labour Court versus referral to the Magistrates Court in respect of a claim for unpaid wages is a distinction without a difference insofar as prescription is concerned.

31. It was further submitted that the respondent's claim for "*reinstatement/financial compensation*" is substantially the same as his claim subsequently lodged before the Magistrates Court for unpaid wages allegedly owed by the appellant. Thus, so the argument proceeded, this court should adopt the flexible approach propounded by the Constitutional Court in *Food and Allied Workers Union obo Gaoshubelwe vs Pieman's Pantry Pty Limited*[14] ("*Pieman's Pantry*") to the effect that the institution of proceedings in a court without jurisdiction will interrupt prescription.

32. This argument is unsustainable. In terms of section 193 of the LRA, reinstatement is the primary remedy available to employees who have been found to have been unfairly dismissed.[15] While reinstatement is concerned with the restoration of the original contract of employment[16], damages relate to monetary award for patrimonial loss, and compensation relates to monetary award for non-patrimonial loss, including a solatium.[17]

33. In this regard, the Labour Appeal Court elaborated as follows:

"The purpose of an award of damages for patrimonial loss by means of a monetary award, is to place the claimant in the financial position he or she would have been in had he, or she, not been unfairly discriminated against. This is the common purpose of an award of damages for patrimonial loss in terms of the South African law in both the fields of delict and contract. In the case of compensation for non-patrimonial loss, the purpose is not to place the person in a

[14] Pieman's Pantry n 1 above.
[15] Jacobs v CCMA and Others (2024) 45 ILJ 1009 (LC) para 7.
[16] Steel Engineering and Allied Workers Union of SA and Others v Trident Steel (Pty) *Ltd* (1986) 7 ILJ 418 (IC) at 437F.
[17] South African Airways (Pty) Ltd v Jansen Van Vuuren and Another (2014) 35 ILJ 2774 (LAC) para 76. ("Jansen Van Vuuren")

position he or she would have otherwise been in, but for the unfair discrimination, since that is impossible, but to assuage by means of monetary compensation, as far as money can do so, the insult, humiliation and dignity or hurt that was suffered by the claimant as a result of the unfair discrimination."[18]

34. Thus, the the debt pursued by the respondent before the CCMA and the Magistrates Court should be understood within this context. The claim before the CCMA was in pursuit of remedies outlined in the LRA, namely reinstatement and compensation, and the claim before the Magistrates Court was in pursuit of common law remedies, namely, a claim for unpaid wages. They are not the same. These are distinct and self-standing remedies that should not be conflated. In my respectful view, the court *a quo* erred in failing to appreciate this distinction.

35. The respondent's reliance on *Pieman's Pantry* is, with respect, similarly misplaced, *Pieman's Pantry* being distinguishable from this case. One of the issues that the Constitutional Court was called upon to consider in *Pieman's Pantry* was whether the unfair dismissal dispute for reinstatement referred by Food and Allied Workers Union (FAWU) to the Labour Court on behalf of the employees of *Pieman's Pantry* had prescribed.[19] In the matter before us, the claim before the Magistrates Court was a contractual claim for unpaid wages, not reinstatement.

36. The Constitutional Court in *Pieman's Pantry* held that the referral of disputes to the CCMA for conciliation constitutes the service of a process commencing legal proceedings.[20] In this regard, the Constitutional Court reasoned that referral to conciliation activated the jurisdiction of the CCMA, which obliged the CCMA to conciliate the dispute, and such proceedings may involve a determination of the facts. Thus the Constitutional Court reasoned that all these processes strongly point in the direction that those proceedings are indeed the commencement of proceedings for the enforcement of a debt.[21]

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[18] Jansen Van Vuuren n 17 above para 80.
[19] Pieman's Pantry n 1 above para 1 and 5.
[20] Pieman's Pantry n 1 above para 199.
[21] Pieman's Pantry n 1 above para 201.

37. For these reasons, the Constitutional Court concluded by holding that although prescription began to run when the debt became due on 1 August 2001, it was interrupted by the referral of the dispute to the CCMA on 7 August 2001 and continued to be interrupted until the dismissal of the review proceedings by the Labour Court on 9 December 2003. Thus, when the dispute was referred to the Labour Court for adjudication on 16 March 2005, it had not prescribed.[22]

38. Ms. Stein argued that a single set of facts may give rise to more than one debt for purposes of section 15 (2) of the Prescription Act 68 of 1969 ("Prescription Act"), which is the section dealing with judicial interruption of prescription. The question whether prescription in respect of each debt has been interrupted will be determined with reference to the steps taken to enforce the specific debt in question.

39. In elaboration, Ms Stein also argued that there is a distinction to be drawn between the debts pursued by the respondent. The first debt, which was referred to the CCMA, is a claim for reinstatement and compensation arising from the alleged unfair dismissal of the respondent. The purpose of this relief is to remedy a breach of an employee's right to fairness. This remedy operates as "*a solatium for the harm suffered*" as a result of treatment found to be unfair.

40. The second debt, which was referred to the Magistrates' Court, is a claim for unpaid wages arising from the terms of an alleged contract of employment between the appellant and respondent. This claim is directed at placing the respondent in the position he would have been had the contract been honoured.

41. From this it follows, so the argument proceeded, that the referral by the respondent of his unfair dismissal dispute to the CCMA could have only interrupted prescription insofar as his claim for reinstatement and compensation is concerned. There had not been interruption of prescription in respect of the respondents' contractual claim.

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[22] Pieman's Pantry n 1 above para 204.

42. Furthermore, it was also argued that in the event that the referral by the respondent of an unfair dismissal dispute did interrupt prescription in respect of the respondents' contractual claim, the effect of the respondent's abandonment of his claim at the CCMA in favour of a claim in the Magistrates' Court is that prescription is deemed not to have been interrupted by virtue of section 15(2) of the Prescription Act.

43. It is an established principle of law that a single set of facts may give rise to more than one debt as contemplated in section 15 (1) of the Prescription Act. According to the Appellate Division (as it then was) in *Evins vs Shield Insurance* ("*Evins*"), the question whether prescription in respect of each debt has been interrupted will be determined with reference to the steps taken to enforce the specific debt in question.[23] In this regard, the court elaborated as follows:

"Where a creditor has two rights, or causes, of action then there are two corresponding debts. When it comes to the judicial interruption of prescription in terms of section 15, then, if the process seeks to enforce two debts (or causes of action), it will only interrupt prescription in respect of both if it is effective as a means of commencing legal proceedings in respect of both. If it is effective only in respect of one, then this will not enure for the benefit of the creditor in respect of the other."[24]

44. More recently the Constitutional Court in *Rademeyer v Ferreira* endorsed the abovementioned dictum in *Evins* as authoritatively setting out the position regarding judicial interruption of prescription.[25]

45. In my judgment two separate claims arose when the respondent's employment was terminated on 12 July 2016. One claim related to the infringement of his LRA rights and the other related to the infringement of his common law rights. It is common cause that the respondent elected to utilise the LRA remedies at his disposal by referring his dispute to the CCMA wherein he sought reinstatement

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[23] Evins v Shield Insurance Co Ltd 1980 (2) SA 814 (A) at 642. ("Evins")
[24] Evins n 23 at 842C-F.
[25] Rademeyer v Ferreira 2025 (1) BCLR 73 (CC) paras 77-78.

and compensation from the appellant on the basis that his dismissal was substantively and procedurally unfair.

46. By so electing, the respondent was fully aware that his employment had been terminated by the appellant on 12 July 2016. In other words, he was aware of the debt and the identity of the debtor. His referral of a dispute to the CCMA was an election that he made which did not detract from the fact that his claim for unpaid wages arose on 12 July 2016 and that the running of prescription was triggered.

47. Although the respondent had taken the decision to abandon the CCMA process and to rather "*approach [the] Department of Labour, or Civil Courts to pursue a claim for under/non-payment of salary for the period January 2016 to 12 July 2016*" as far back as 2 December 2016, summons was only served on the appellant on 26 August 2019. By then, in my judgment, a period of three years had lapsed and his claim had prescribed.

48. In conclusion, the court *a quo* failed to appreciate the distinction between the different debts pursued by the respondent before the CCMA and the Magistrates Court. I am in agreement with the appellant. In my judgment the referral by the respondent of his unfair dismissal dispute to the CCMA could have only interrupted prescription insofar as his claim for reinstatement and compensation is concerned. The referral by the respondent of an unfair dismissal dispute to the CCMA did not interrupt prescription in respect of the respondents' contractual claim for unpaid wages.

49. It follows that the court *a quo* should have upheld the appellant's special plea for prescription. I would therefore allow the appeal with costs, including the costs of counsel where so employed.

50. It was argued by Ms. Stein, in the alternative, that in the event that the referral by the respondent of an unfair dismissal dispute did interrupt prescription in respect of the respondents' contractual claim, the effect of the respondent's abandonment of his claim at the CCMA in favour of a claim in the Magistrates' Court is that prescription is deemed not to have been interrupted as contemplated in section

15 (2) of the Prescription Act. Given the conclusion that I reach on interruption of prescription, it is unnecessary to consider this issue.

51. I would therefore make the following order:

1. The appeal is upheld with costs, including the costs of counsel where so employed.

2. The order of the Magistrates Court is set aside and replaced with the following:

"a. The defendant's special plea of prescription is upheld.

b. The plaintiff's claim is dismissed with costs, including the costs of counsel where so employed."

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LK SIYO, AJ
Acting Judge of the High Court
Western Cape Division, Cape Town

I agree and it is so ordered.

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JI CLOETE, J
Judge of the High Court
Western Cape Division, Cape Town

Date Heard: 1 November 2024
Date Handed Down: 7 March 2025

APPEARANCES

Counsel for the appellant:	Ms N Stein
Instructed by:	Harris Nupen Molabetsi Inc
Counsel for the Respondents:	Mr DG Whitcomb
Instructed by:	ODBB Attorneys c/o Harmse Kriel Attorneys