THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Reportable

Case no: JR 2121/2022

In the matter between:

PUBLIC INVESTMENT CORPORATION	**Applicant**
and	
FAITH MATSHEPO MORE	**First Respondent**
COMMISSION FOR CONCILIATION, MEDIATION AND ARBITRATION	**Second Respondent**
COMMISSIONER CAMERON MORAJANE *N.O.*	**Third Respondent**
COMMISSIONER NTHABISENG THOKOANE *N.O.*	**Fourth Respondent**

Heard: **11 March 2025**

Delivered: **16 April 2025**

This judgment was handed down electronically by consent of the parties' legal representatives by circulation to them via email. The date for hand-down is deemed to be 16 April 2025.

JUDGMENT

PRINSLOO, J

Background

[1] The First Respondent (Ms More), a chartered accountant, was employed by the Applicant (PIC) as its CFO, reporting directly to the then CEO, Dr Matjila.

[2] In 2014, VBS Mutual Bank (VBS) applied to the PIC for a R350 million revolving credit facility that was to be utilised solely for VBS's contract finance scheme.

[3] On 9 July 2014, at a meeting attended by Ms More, the fund investment panel (FIP) ratified/approved the VBS transaction, and its resolution listed six terms and conditions for the investment, including that the loan amount was R200 million initially and then R150 million in line with performance, and that the minimum drawdown was R20 million and thereafter in multiples of R5 million.

[4] A revolving credit facility agreement was subsequently prepared, regulating the VBS transaction together with a cession of underlying contracts and the right to cash flow relating thereto (the facility agreements).

[5] On or about 10 June 2015, Ms More was provided with a memorandum compiled by Ms Leroke (legal associate), the purpose of which was to seek approval from the CEO for the PIC to execute the facility agreements (the Leroke memorandum). By the time Ms More received the Leroke memorandum, it had been recommended by Ms Mdluli (investment associate), Mr Nesane (executive head: legal) and Mr Rajdhar (executive head: developmental investments), and Dr Matjila (CEO) had written on it "*CFO must recommend*". The CEO's instruction fell outside

of the Delegations of Authority (DOA) in the sense that the DOA did not require the CFO’s recommendation.

[6] Ms More went on to sign the Leroke memorandum under her annotation, “*I recommend*”. On 30 June 2015, the facility agreements were entered into.

[7] Subsequent investigations revealed that the revolving credit facility agreement did not correspond with the terms of the FIP approval in at least the three respects set out in the charge of misconduct brought against Ms More – it contained a subordination clause, did not provide for a R200 million/R150 million split in funding, and contained different drawdown amounts.

[8] On 26 June 2020, Ms More was charged with misconduct relating to the VBS transaction. The nub of the charge is that she recommended that the CEO enter into the revolving credit facility agreement in breach of her “*duty to ensure that the terms of the RCF agreement complied with the [FIP approval] prior to providing the confirmation and recommending that the RCF agreement be signed*”.

[9] Adv. Redding SC was appointed as the chairperson of the disciplinary hearing.

[10] In a finding dated 16 June 2021, Adv. Redding dismissed various objections that Ms More had raised against the disciplinary proceedings, to wit prescription, waiver and undue delay, and he found Ms More guilty of misconduct.

[11] Ms More subsequently brought an application for Adv. Redding’s recusal, which was opposed by the PIC and ultimately rejected. Adv. Redding’s recommendation on sanction followed, and he recommended to the PIC board that Ms More be issued with a final written warning valid for a year. The board, however, decided not to accept the recommendation and instead decided to dismiss Ms More.

[12] Ms More was accordingly dismissed on 8 October 2021, and she was paid *in lieu* of three months’ notice.

[13] Ms More referred an unfair dismissal dispute to the Second Respondent (CCMA), and her dispute was arbitrated. Being a high-profile matter, Ms More's CCMA arbitration was presided over by two senior commissioners.

[14] At the CCMA arbitration, in addition to challenging guilt and sanction, Ms More persisted with the same special pleas of prescription, waiver and undue delay that she had raised at her disciplinary enquiry.

[15] An arbitration award was issued on 6 September 2022, and the Third and Fourth Respondents (commissioners) found that Ms More's dismissal was substantively and procedurally unfair; she was reinstated, and the PIC was ordered to pay the costs. In a supplementary award, the commissioners quantified the backpay and costs due as being R6 741 173.75 and R39 000, respectively.

<u>The findings of the commissioners</u>

[16] In the introduction of the arbitration award, the commissioners recorded that:

> '[7] This matter is fairly complex given the novel issues raised. As a result of novel complexities raised in this matter, we thought it apt to start the award first with a ruling on the special defences raised by Ms More. These special defences raised are prescription, waiver and delay. For the record and clarity, these special defences are not raised to challenge the jurisdiction of the CCMA, but are defences against the charge and dismissal of Ms More. The intended effect of these defences is to quash the charge as well as the dismissal of Ms More by the PIC. If any one of the defences is granted or upheld, we will proceed to deal with the remedies, as it will be moot to proceed and deal with the other defences and merits of the case.
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> [8] We will proceed to deal with the evidence only of the objections or defences are dismissed or not upheld. The approach is that we will start with the evaluation of prescription first. Should we grant or uphold the prescription defence we will not proceed to consider waiver and delay because it would be moot. This is because prescription is extinctive in its effect. The first defence that we are going to consider is prescription.'

[17] It is evident from paragraphs 7 and 8 of the arbitration award that the commissioners' approach was to deal with the 'special defence' of prescription first and if it was upheld, they would not deal with the issue of waiver or delay or the merits of the case as all of that would be moot because "*prescription is extinctive in its effect*". They repeated their approach in paragraph 13 of the award, where it was recorded that:

> 'With regards to procedure, there are two issues raised by Ms More – which issues are in dispute. The first relates to the legal objections of prescription, waiver and undue delay. These special defences that are raised in the alternative have an effect of quashing the whole charge and outcome against Ms More, if granted or upheld. Consequently they affect both the substance and procedure.'

[18] The commissioners reiterated that if any one of the three 'special defences' was granted or upheld, they would "*immediately proceed with the remedies*".

[19] The commissioners considered the issue of prescription first.

[20] It was common cause that Ms More's alleged misconduct happened around June 2015 and that disciplinary action was instituted against her in June 2020.

[21] Ms More's argument was that the alleged misconduct constituted a breach of contract and that a breach of contract was a debt in the context of the Prescription Act[1] (Act), as the Act covers and includes the rendering of a service as being a debt. Ms More's contract of employment obliged her to render her services to the PIC, therefore, she owed the Applicant the debt of service delivery or rendering of service. If she performed her contractual duties defectively (misconduct), it would constitute positive malperformance, which is a form of breach of contract and therefore she is a debtor and once the debt has arisen, the PIC had three years to take action in terms of section 10(1), read with section 11(d) of the Act. As the PIC only instituted disciplinary action in June 2020, the debt had prescribed.

[1] Act 68 of 1969.

[22] The PIC's case was that Ms More's alleged breach of contract is not a debt in terms of the Prescription Act and when it instituted disciplinary proceedings against Ms More in June 2020, it was not claiming a debt from her, it was not claiming specific performance or damages but instead, was calling Ms More to account. Ms More conflated a debt and the right to discipline.

[23] The question that leapt out for the commissioners to decide was whether the Prescription Act was applicable. They tackled the question by considering that section 16(1) of the Act provides that it applies to any debt and by deciding the meaning and concept of '*debt*'. The commissioners ultimately found that Ms More owed a duty of service to the PIC, which constitutes a debt in terms of the Prescription Act.

[24] Thereafter, they considered whether the debt had prescribed, and they found that the PIC is deemed to have knowledge of the facts from which the debt arose and, therefore, as the debt arose in June 2015, prescription on the debt started to run on 10 June 2015. The commissioners found that the debt prescribed in June 2018, *"which would render the charges brought against Ms More in June 2020 incompetent".* They found that the failure to act within three years caused the debt to be extinguished by prescription.

[25] Ultimately the commissioners found that *"the claim (charging and dismissal) that the PIC has against Ms More is extinct through the running of uninterrupted prescription. The charges and the subsequent dismissal are incompetent"* and they confirmed once again that it was not necessary to consider the other defences, because they were pleaded in the alternative.

[26] Notwithstanding the aforementioned and the repeated confirmation that the other defences and the merits would not be considered if the plea of prescription is upheld, the commissioners did not resist the temptation to deal with the very issues they made clear they would not deal with.

[27] After finding that the charges and dismissal were incompetent as the case against Ms More was extinct through the running of prescription, it should have been

the end of that enquiry, and the commissioners should have moved to consider the appropriate relief, as they indicated that they would do. Instead, the commissioners considered the issue of delay and found that it took the PIC five years to charge Ms More, which delay was inordinate and unreasonable.

[28] They also recorded that *“before we proceed with the remedies applicable in this case, it is important that we also include another factor that has a bearing on the outcome of the case, namely the instruction given to Ms More”.* The commissioners found that *“as the instruction was in contravention of the delegation of authority, Ms More’s dismissal is therefore premised on an unlawful and unreasonable instruction. On this point alone, the charges and the subsequent dismissal are unfair”.*

[29] The commissioners then concluded that *“Ms More has succeeded in her claim for prescription. The outcome is that the dismissal is substantively and procedurally unfair. The instruction issued by Dr Matjila as found above was unreasonable and unlawful”.*

[30] The difficulty with the reasoning and the findings of the commissioners is that they recorded that they would first decide the ‘special defence’ of prescription, and if it succeeds, they would not consider the issue of the delay, waiver or the merits of the case. They ultimately found that Ms More was successful in raising the issue of prescription and that the effect thereof is that the charges brought against Ms More in June 2020 and the subsequent dismissal were incompetent and that her dismissal was substantively and procedurally unfair.

[31] Instead of deciding the issue of appropriate remedy, the commissioners strayed and made findings in respect of the issue of delay, which was an alternative ‘special defence’ that they had indicated would not be decided if the plea of prescription was upheld. They also touched on the merits of the case when they made findings on the lawfulness of the instruction which was given to Ms More and found that because the instruction was unlawful, the charges and subsequent dismissal were unfair. These findings not only contradict the approach the commissioners adopted from the onset, but they also contradict the finding that the

charges and subsequent dismissal were incompetent – it cannot be incompetent and unfair at the same time.

[32] Perusing the arbitration award in its entirety, it is evident that the commissioners' going off-route took its toll on the decision-making process.

[33] Be that as it may, Ms More was reinstated, and the PIC was ordered to pay her backpay of R6 741 173.75 and costs in the sum of R39 000.

[34] The Applicant filed an application for review, raising seven grounds for review and seeking an order to set aside the arbitration award.

<u>The grounds for review</u>

[35] The first ground of review is that the commissioners committed a material error of law in finding that *"the claim (charging and dismissal) that the PIC has against Ms More is extinct through the running of uninterrupted prescription. The charges and the subsequent dismissal are incompetent".*

[36] The Applicant's case is that the commissioners' legal conclusion that the Prescription Act applied to the employer's right to take disciplinary action against an employee for misconduct is a material error of law.

[37] The commissioners' finding that the Act applied is a legal conclusion, which is challenged on the ground that it is a material error of law. Errors of law are subject to correctness review[2],that is, the wrong is reviewable.

[38] In *MacDonald's Transport Upington (Pty) Ltd v Association of Mineworkers and Construction Union and others*[3]*,* the Labour Appeal Court (LAC) referred to

[2] *Genesis Medical Aid Scheme v Registrar, Medical Schemes and Another* [2017] ZACC 16; 2017 (6) SA 1 (CC) at para 21; *National Union of Metalworkers of SA v Assign Services and Others* [2017] ZALAC 44; (2017) 38 *ILJ* 1978 (LAC) at para 32; *MacDonald's Transport Upington (Pty) Ltd v Association of Mineworkers & Construction Union and Others* [2016] ZALAC 32; (2016) 37 *ILJ* 2593 (LAC) (*MacDonald's Transport*) at para 30.

[3] *MacDonald's Transport supra*.

Democratic Nursing Organisation of SA on behalf of Du Toit and Another v Western Cape Department of Health and Others[4], and held that:

> '[21] Since the advent of the Constitution of the Republic of South Africa 1996 (the Constitution), the concept of review is sourced in the justifications provided for in the Constitution and, in particular, that courts are given the power to review every error of law provided that it is material; that is that the error affects the outcome …

[22] To recap, Navsa AJ said in *Sidumo* at para 105 that the review powers in terms of s 145 "must be read to ensure that administrative action by the CCMA is lawful, reasonable and procedurally fair". Given that the section must be interpreted to be in compliance with the Constitution, it would appear that the concept of error of law is relevant to the review of an arbitrator's decision within the context of the factual matrix as presented in the present dispute; that is a material error of law committed by an arbitrator may, on its own without having to apply the exact formulation set out in *Sidumo*, justify a review and setting aside of the award depending on the facts as established in the particular case.'

[39] This question was recently considered by the LAC in *National Bargaining Council for the Road Freight and Logistics Industry v Deysel NO and Others*[5] where the question of material errors of law committed by an arbitrator was considered. The LAC referred to the reasonableness standard established in *Sidumo*[6] and found that the 'threshold of reasonableness' established by the judgment recognises that in relation to the penalty of dismissal, value choices may differ in relation to the same factual matrix but nonetheless fall within a range of decisions to which a reasonable decision-maker could come. The metaphor of an elastic band has been usefully employed to illustrate the applicable threshold – the function of the review court is to determine the point to which the elastic of reasonableness can stretch without snapping.[7]

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[4] [2016] ZALAC 15; (2016) 37 *ILJ* 1819 (LAC).
[5] Unreported judgment under case no: DA 19/2023, delivered on 7 April 2025 (*Deysel*).
[6] *Sidumo and Another v Rustenburg Platinum Mines Ltd and Others* [2007] ZACC 22; [2007] 12 BLLR 1097 (CC).
[7] *Deysel* ibid at para 31.

[40] The LAC then considered the test or the standard to be applied when the subject of the review admitted a single, correct answer and where the enquiry on review is not whether the arbitrator's ruling was justifiable rational or reasonable, but whether objectively speaking, it was correct.

[41] The LAC held that:

'[39] In the constitutional era, the proper basis for a correctness challenge brought in terms of section 145 of the LRA is section 33 of the Constitution of the Republic of South Africa 1996, and in particular, the right to administrative action that is lawful. Section 6 of PAJA establishes a material error of law as a ground for the review of administrative action. *Sidumo* holds that PAJA does not apply to arbitration awards issued in terms of the LRA – at least in the case of the CCMA and bargaining councils, the permitted grounds for review are those reflected in section 145 of the LRA. But *Sidumo* also holds that section 145 is to be read subject to section 33 of the Constitution. In that instance, the Constitutional Court held that *"… section 145 is now suffused by the constitutional standard of reasonableness"*. But reasonableness is not a universal standard, nor should it be applied as such. Section 33 (1) treats lawfulness separately from reasonableness.[8] In *Duncanmec (Pty) Ltd v Gaylard NO and others*[9] the Constitutional Court held:

'Since an award like the one we are concerned with here constitutes administrative action, the Constitution requires it to be procedurally fair, lawful and reasonable. This means that an award that fails to meet these requirements is liable to be set aside on review. <u>These requirements are in addition to the grounds of review listed in s 145 of the LRA</u>. However, to some extent the latter grounds may overlap …' (own emphasis)

[40] Reading down section 145 to incorporate a requirement of reasonableness is wholly appropriate in a case such as *Sidumo*, concerned as it was with the exercise of a value judgment by an arbitrator in relation to fairness as a penalty for misconduct, a judgment that by definition admits a range of responses. Matters such as the present, where the administrative action in issue involves a question of law

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[8] Hoexter and Penfold (supra) at 400.

[9] (2018) 39 *ILJ* 2633 (CC); [2018] 12 BLLR 1137 (CC) at para 40.

that can produce a single correct answer, are best understood and assessed when section 145 of the LRA is read as suffused by the constitutional standard of lawfulness. Put another way, just as the constitutional standard of reasonableness was found in *Sidumo* to have suffused section 145, the constitutional standard of lawfulness does likewise.'[10]

[42] The LAC concluded that:

> '[42] What this approach recognises is that the right to review established by s 145, where the applicant seeks to review an arbitration award on the basis of a material error of law committed by an arbitrator, is not limited to circumstances where the alleged error resulted in an unreasonable award.[11] A material error of law is a discrete, substantive ground for review under s 145 of the LRA. It follows that a reviewing court, when faced with what is alleged to be an error in law in relation to the interpretation of an instrument, is empowered to interpret the relevant text itself, rather than assessing whether the arbitrator's decision was reasonable.[12]

[43] In short: although a material error of law may previously have been viewed as no more than a side car on the motorcycle of reasonableness,[13] the constitutional right to administrative action that is lawful requires that the grounds for review established by s 145 of the LRA be understood as admitting a material error of law as a discrete, legitimate ground for review.'

[43] The LAC confirmed that a material error of law is a discrete, substantive ground for review under section 145 of the LRA and that a reviewing court, faced with what is alleged to be an error in law in relation to the interpretation and

[10] Myburgh and Bosch *Reviews in the Labour Courts* (LexisNexis 2016) at 244.
[11] At least in relation to an irregularity in the conduct of arbitration proceedings, this Court has, reasonableness aside, previously acknowledged the remaining s 33 requirements as suffusing s 145 of the LRA. In *Arends & others v SA Local Government Bargaining Council & others* (2015) 36 *ILJ* 1200 (LAC); [2015] 1 BLLR 23 (LAC) at para 19, Murphy AJA found: "*the undertaking of the enquiry in the wrong or in an unfair manner by an arbitrator is an irregularity in the conduct of the proceedings reviewable in terms of s 145 of the LRA* <u>*as suffused by the constitutional right to administrative action that is lawful and procedurally fair"*</u>.
[12] Hoexter 3 ed at 400.
[13] The image is drawn from Alan Hyde "What is Labour Law?' in Davidov and Langille (eds) *Boundaries and Frontiers of Labour Law* (Hart 2006) at p 60, in relation to the relationship between subordinate employment and labour law as a collection of regulatory techniques.

application of a statute, is empowered to interpret the relevant statute itself rather than assessing whether the arbitrator's decision was reasonable.

[44] It is on this basis that the grounds for review will be decided.

Did the commissioners commit a material error of law?

[45] In my view, the first ground of review sets out the main question of law to be decided: Does the Prescription Act apply to an employer's right to take disciplinary action against an employee?

[46] The Applicant's case is that the commissioners' finding that the charging and dismissal of Ms More was extinct through the running of prescription is reviewable because the Act only applies to civil litigation and not disciplinary enquiries, alternatively because a disciplinary enquiry does not involve a claim for a '*debt*' under the Prescription Act.

[47] Ms More's case is that her alleged failure to render her services in terms of her employment contract – as she had been charged – constituted a debt owed to the PIC, which debt had prescribed after three years, thus by June 2018, more than two years before she was charged. This debt is to be understood to be a debt in terms of the Act, and as such, it prescribed after three years.

[48] The chairperson, Adv. Redding, did not agree with Ms More's submissions, and he found that the Act had no application in the disciplinary proceedings instituted by the PIC. Adv. Redding found that the charge against Ms More was one of misconduct, and he accepted that misconduct generally constitutes a breach of an employment contract, usually the implied obligations to further the employer's business and to behave properly during employment. However, the alleged breach of contract by Ms More did not constitute a debt and the employer's right to discipline and, if appropriate, dismiss her is not a claim for a debt. As a result, he rejected Ms More's special plea of prescription.

[49] The commissioners found that Adv. Redding's approach was "*illogical and not cogent*", and they even recorded that they share Ms More's view that Adv. Redding's ruling was "*absurd because it is contradictory and lacks legal logic*".

[50] The question to be decided is whether the commissioners committed a material error of law by interpreting the provisions of the Prescription Act and drawing the legal conclusions as they did. Errors of law arise in relation to questions of law and refer to a wrong or mistaken interpretation of a legislative provision. Questions of law are all issues that are determined by authoritative legal principles and include questions which a court is bound to answer in accordance with a particular rule or law, and questions as to what the law is.[14]

[51] Chapter III of the Prescription Act provides for the prescription of debt, and the said chapter, save for the exceptions set out in section 16, applies to any debt arising after the commencement of the Act. The Act regulates the periods of prescription, and section 11 provides for the specific periods of prescription of debts. Section 11(d) provides that, save where an Act of Parliament provides otherwise, the prescription period of three years applies in respect of any other debt. Prescription, in general, shall commence to run as soon as the debt is due.

<u>Application of the Prescription Act</u>

[52] The Applicant's case is that the Act only applies to civil litigation and not disciplinary enquiries.

[53] Ms More's answer to this is that the Act "*applies to debts, not to litigation*", and prescription of a debt may be raised in any context. This is supported by section 16(1) of the Act, which provides that the Act applies 'to any debt'.

[54] In my view, the position adopted by Ms More is too simplistic and not sound in law. Ms More's argument lost sight of the scope and the purpose of the Act, and it

[14] *Media Workers Association of SA and Others v Press Corporation of SA Ltd* (1992) 13 *ILJ* 1391 (A) (*Press Corp*) at 1396F-H and 1397J.

seeks to introduce an application of the Prescription Act, which is at odds with the correct legal position.

[55] The Constitutional Court has deliberated, on three occasions, on the application of the Prescription Act to disputes under the Labour Relations Act[15] (LRA).

[56] The first decision in *Myathaza v Johannesburg Metropolitan Bus Services (SOC) Ltd t/a Metrobus and others*[16] *(Myathaza),* contained three separate judgments without yielding any majority *ratio*. Despite the differences in the judgments, there was agreement on the order.

[57] The Constitutional Court's subsequent decision in *Mogaila v Coca Cola Fortune (Pty) Ltd*[17], did not decide whether the Prescription Act was applicable to arbitration awards — the Court reasoned on the basis of the factual similarities between the case before it and those in *Myathaza* that the outcome would be the same.

[58] The third decision bearing on the application of prescription to claims under the LRA is that of *Food and Allied Workers Union on behalf of Gaoshubelwe v Pieman's Pantry (Pty) Ltd*[18] *(Pieman's Pantry)* in which there was a majority decision yielding a *ratio* for the judgment. *Pieman's Pantry* concerned the question of if and when a claim of unfair dismissal prescribes. Contrary to the views expressed in the first and third judgments in *Myathaza*, the majority held that the Prescription Act was not inconsistent with the LRA. Also, that a claim of unfair dismissal which sought to enforce three possible kinds of obligations against an employer, namely reinstatement, re-employment and compensation, amounted to an obligation to pay or render something. As such, a claim for unfair dismissal constitutes a debt as contemplated in section 16(1) of the Prescription Act, and there was no

[15] Act 66 of 1995, as amended.
[16] [2016] ZACC 49; (2017) 38 *ILJ* 527 (CC).
[17] [2017] ZACC 6; (2017) 38 *ILJ* 1273 (CC).
[18] [2018] ZACC 7; (2018) 39 *ILJ* 1213 (CC).

inconsistency between the Prescription Act and the LRA. The crux of the Court's reasoning appears in the following paragraphs[19]:

> '[177] Are the time periods provided for in s 191 of the LRA inconsistent with the provisions of the Prescription Act? As I have demonstrated, while they both deal with time periods, they do so for different reasons and to achieve different objectives. The time periods in the LRA indicate when a litigant is expected to take the necessary steps in the dispute-resolution process to properly prosecute a claim, while the Prescription Act provides a cut-off point when those steps are no longer available to a litigant on account of the claim having prescribed.
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> [178] Simply on that analysis, it can hardly be said that there is inconsistency between the provisions of the LRA and the Prescription Act, insofar as they relate to time periods. …'

[59] The decision in *Pieman's Pantry* resolved the uncertainty regarding the application of the Prescription Act to the LRA.

[60] The scope and purpose of the Act too has been articulated in a number of Constitutional Court judgments. In *Myathaza[20],* it was held that:

> 'The purpose of the Prescription Act is to prompt creditors to institute legal proceedings without inordinate delays which may adversely affect the quality of adjudication if witnesses are no longer available or their memories have faded. Unquestionably the focus here is on having a claim settled without undue delay. It is a legitimate government purpose.'

[61] In *Road Accident Fund and Another v Mdeyide[21],* it was held that:

> '[7] Rules of prescription — providing that claims become extinct after a period of time — are common in our legal system and apply to all civil claims. The Prescription Act and other Acts of Parliament, including the RAF Act, provide for specific periods in respect of claims brought in terms of those Acts. The origin of rules of prescription in our legal system dates back to Roman

[19] Ibid at paras 177 – 179.
[20] *Myathaza supra* at para 28.
[21] [2010] ZACC 18; 2011 (2) SA 26 (CC) (*RAF*) at paras 7 and 10.

times. Under the common law the prescription period was generally 30 years. These rules were codified in the Prescription Act 18 of 1943, which was replaced by the current Prescription Act 68 of 1969 (Prescription Act).

…

[10] The Prescription Act deals with prescription in general. In terms of s 10 a debt is extinguished by prescription after the lapse of the period which applies in respect of the prescription of the debt. A claim is thus after a certain period of time no longer actionable and justiciable. It is a deadline which, if not met, could deny a plaintiff access to a court in respect of the specific claim.'

[62] In *Pieman's Pantry*[22], it was held that:

'[179] The time periods in the LRA and in the Prescription Act regulate different features of the litigation process and are not only reconcilable but can exist in harmony alongside each other.

[180] The application of the Prescription Act to the LRA would advance the speedy resolution of employment disputes by firstly, leaving wholly intact the mandated time periods for referrals that s 191 provides for. The application of the Prescription Act cannot have as an unintended consequence the implied extension of those time periods to coincide with the period of prescription. Secondly, subjecting claims under the LRA to an outer time limit would considerably enhance the efficiency of the dispute-resolution process. Placing an outer limit beyond which the litigation process simply cannot continue prevents employment disputes from being litigated after a considerable passage of time. This may impact negatively on both the quality of adjudication as well as I the important policy considerations that relate to the quick and speedy resolution of employment related disputes, the ability of workers to continue to earn a living, as well as the ongoing ability of businesses to continue operating.'

[63] It is evident from the above mentioned authorities that the purpose of the Act is to prompt creditors to institute legal proceedings without delay, that certain Acts of Parliament, including the LRA, indicate timeframes when a litigant is expected to

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[22] *Pieman's Pantry supra* at paras 179 – 180.

take the necessary steps to properly prosecute a claim and that the Prescription Act provides a cut-off point when those steps are no longer available to a litigant on account of the claim having prescribed. It is a deadline which, if not met, could deny a plaintiff access to a court in respect of the specific claim.

[64] All of this shows that the Act is about the litigation of claims or debts in civil court proceedings. There is no indication in any of the authorities that the Act applies to informal and internal disciplinary proceedings. This is so, of course, because internal disciplinary proceedings are not regulated by any act which prescribes a timeframe within which the necessary steps must be taken, failing which a claim would prescribe.

[65] Consistent with this, there are two key sections of the Act which manifestly cannot apply to disciplinary enquiries. Those are sections 15 and 17.

[66] Section 15 provides for the interruption of prescription and the relevant parts read as follows:

> '15. Judicial interruption of prescription
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> (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 if he does so prosecute his claim but abandons the judgment or the judgment is set aside.
>
> …
>
> (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.'

[67] The Act provides for the interruption of the running of prescription, and the courts have confirmed that it would be untenable if a party cannot interrupt the running of prescription, where prescription runs against a claim or debt.

[68] For the purposes of interrupting the running of prescription, process must be served on the debtor and '*process*' has been defined in section 15(6). It is evident, considering what '*process*' is for purposes of interrupting prescription, that a disciplinary charge sheet does not constitute '*process*' whereby '*legal proceedings*' are commenced — a clear indication that the Act does not and cannot apply to internal disciplinary proceedings.

[69] The issue of whether a CCMA conciliation referral constitutes '*process*' for the purposes of section 15(1) and thus interrupts the prescription of an unfair dismissal claim was finally settled in *Pieman's Pantry*. The majority held that "*the referral of disputes to the CCMA for conciliation constitutes the service of a process commencing legal proceedings"*[23].

[70] The same cannot conceivably be said of a disciplinary charge sheet — it is not a process, and it does not commence legal proceedings.

[71] Section 17 provides that:

> '17 Prescription to be raised in pleadings
>
> (1) A court shall not of its own motion take notice of prescription.
>
> (2) A party to litigation who invokes prescription, shall do so in the relevant document filed of record in the proceedings: Provided that a court may allow prescription to be raised at any stage of the proceedings.'

[72] Considering the wording of section 17, it is clear that prescription cannot be raised at a disciplinary hearing because it does not involve litigation before a court and no document is filed of record. The LRA did not envisage the disciplinary process adopted by many employers and abused by some employees. On the contrary, and in its simplest terms, the LRA introduced a process that requires an

[23] *Ibid* at para 199.

investigation into any alleged misconduct, an opportunity by any employee against whom any allegation of misconduct is made, to respond after a reasonable period with the assistance of a representative, a decision by the employer and notice of that decision. It is a process far removed from civil proceedings. An employer and employee are just that — parties in an employment relationship and they are not and do not become parties in litigation when disciplinary proceedings are initiated.

[73] In the arbitration award, the commissioners, recorded that "*the novel part of the … case"* was that Ms More invoked prescription at the disciplinary enquiry stage, they also accepted that the facts and circumstances of *Pieman's Pantry* and Ms More's case were distinguishable, however, they found the principle of law to be the same. The commissioners understood the principles to demonstrate that the applicability of prescription is not limited to the enforcement of arbitration awards. Therefore, they found that the Act applies to disciplinary enquiries. In doing so, they relied on the following extracts of passages from *Pieman's Pantry*:

> '[206] While prescription has been broadly identified as limiting the right of access to courts, the operation of the provisions of the Prescription Act and in particular s 12 were described as striking the necessary balance between certainty and fairness by introducing the necessary flexibility in determining when a debt becomes due and, by implication, when such a debt prescribes.
>
> …
>
> [208] The unavoidable conclusion to be drawn from the above is that the manner in which our courts have interpreted the Prescription Act does indeed demonstrate a significant measure of flexibility, in striking the necessary balance between fairness and certainty. The application of the Prescription Act will accordingly import the same balance into the LRA processes, in the context of dealing with prescription.'

[74] It is significant that the commissioners found, as was confirmed by the Constitutional Court, that the conciliation process of the CCMA is indeed the commencement of proceedings for the enforcement of the debt. They even recorded that they are *"completely conscious of the fact that the Constitutional Court is referring to a process already at the CCMA".* How the commissioners made the leap from that position to one where they found that the principles are to be applied *"even*

at a time when the matter is at the workplace – before it is referred to the CCMA" is inexplicable.

[75] It seems that the commissioners relied on paragraph [203] of *Pieman's Pantry* to find that the various steps in the adjudication of disputes are intertwined and that disciplinary hearings or any process at the workplace is not exempt from this approach. The said paragraph reads as follows:

> 'What is instructive from this decision is that it recognises that the judicial process may consist of various steps that are intertwined and that it is not necessary that the process that commences proceedings must result in a judgment in the same action. Thus, it matters not that the process that constitutes a referral to conciliation does not result in a judgment. It may still, and does indeed, constitute the commencement of proceedings for the enforcement of a debt.'[24]

[76] A proper perusal and understanding of paragraph [203] shows that it refers to another decision, where the Court has held that it is sufficient for the purposes of interrupting prescription if the process to be served is one whereby the proceedings begun thereunder, are instituted as a step in the enforcement of a claim for payment of the debt. A creditor prosecutes his claim under that process to a final, executable judgment, not only when the process and the judgment constitute the beginning and end of the same action, but also where the process initiates an action, and the judgment which finally disposes of some elements of the claim, and where the remaining elements are disposed of in a supplementary action instituted pursuant to and dependent upon that judgment.

[77] In paragraph [203], the Constitutional Court clearly referred to the fact that the judicial process may consist of various steps that are intertwined. The commissioners' understanding and interpretation of the said *dicta* to mean that various steps in the "*adjudication of disputes are intertwined*" to include a disciplinary hearing, or "*any process at the workplace*" for that matter, is wrong.

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[24] *Ibid* at para 203.

[78] When the abovementioned paragraphs from *Pieman's Pantry* are read in full, within their proper context and meaning, it is patently obvious that they are no support for the commissioners' conclusion that the Prescription Act applies to internal disciplinary hearings. The Constitutional Court made it clear that the conciliation process of the CCMA is indeed the commencement of proceedings for the enforcement of the debt. It follows that the provisions of the Prescription Act are only triggered when proceedings commence at the CCMA, and they find no application before such process commences and do not apply to internal disciplinary hearings.

[79] Let this be clear: the Prescription Act applies to civil litigation in a court of law — it is about the litigation of claims or debts in civil court proceedings. A disciplinary process is not civil litigation, a disciplinary hearing is not a court of law, and there is no litigation of a debt involved in a disciplinary hearing. All this indicates that the Prescription Act is not applicable to disciplinary hearings, and the commissioners committed a material error of law in finding that it applies to disciplinary hearings.

[80] The question of waiver and delay may remain relevant in that an employer may have waived its right to rely on certain misconduct to institute disciplinary action, or the delay in doing so may render the dismissal procedurally unfair. But it does not mean that the employer cannot take disciplinary action because the disciplinary charges have prescribed.

[81] The first ground for review succeeds, and in my view, it is dispositive of the entire application, and it is not necessary to consider the other grounds for review.

<u>A debt?</u>

[82] I deem it necessary to say something about the Applicant's alternative argument that the commissioners' finding is reviewable because a disciplinary enquiry does not involve a claim for a '*debt*' under the Prescription Act.

[83] The Prescription Act does not define the term '*debt*'. It has been given different interpretations by the courts, but the controversy was resolved by the Constitutional Court in *Makate v Vodacom Ltd*[25] (*Makate)*:

> '[92] However, in present circumstances it is not necessary to determine the exact meaning of 'debt' as envisaged in s 10. This is because the claim we are concerned with falls beyond the scope of the word as determined in cases like *Escom*, which held that a debt is an obligation to pay money, deliver goods or render services. Here the applicant did not ask to enforce any of these obligations. Instead, he requested an order forcing Vodacom to commence negotiations with him for determining compensation for the profitable use of his idea.
>
> [93] To the extent that *Desai* went beyond what was said in *Escom* it was decided in error.[26] There is nothing in *Escom* that remotely suggests that 'debt' includes every obligation to do something or refrain from doing something, apart from payment or delivery. It follows that the trial court attached an incorrect meaning to the word 'debt'. A debt contemplated in s 10 of the Prescription Act does not cover the present claim. Therefore, the section does not apply to the present claim, which did not prescribe.' (Own emphasis)

[84] In *Pieman's Pantry*, the Constitutional Court construed the *'debt'* as follows:

> '[155] To that extent, this Court cautioned against such a broad approach and supported the approach taken in *Escom*, that the word "debt" should be given the meaning ascribed to it in the Shorter Oxford Dictionary, namely:
>
> "1. Something owed or due: something (as money, goods or service) which one person is under an obligation to pay or render to another.
>
> 2. A liability or obligation to pay or render something; the condition of being so obligated."
>
> [156] If regard is had to this [i.e. the *Escom* definition of a 'debt'], then it must follow that a claim for dismissal is, as pointed out in the second judgment in *Myathaza*, a claim that seeks to enforce three possible kinds of obligations

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[25] [2016] ZACC 13; 2016 (4) SA 121 (CC).

[26] *Electricity Supply Commission v Stewarts and Lloyds of SA (Pty) Ltd* 1981 (3) SA 340 (A) (*Escom*) at 344E-G.

against an employer: reinstatement, re-employment, and compensation. All three obligations fit neatly within the definition of debt that *Escom* and *Makate* accepted, as they constitute either an obligation to pay or render something.' (Own emphasis)

[85] Also relevant is the Constitutional Court's judgment in *Off-Beat Holiday Club and Another v Sanbonani Holiday Spa Shareblock Ltd and Others Off-Beat Holiday Club*[27]:

> 'In my view the correct characterisation of a claim for purposes of the Prescription Act is the characterisation arising from the relevant legal provisions on which the claim is based. Here the claim is based on s 252 of the Companies Act, the plain text of which discusses an entitlement to an equitable judicial determination. Thus, according to s 252, the applicants' claim is for declaratory relief, not an alteration of the terms of a contract or a money award. … My solution is that courts restrict themselves to the text of the legal provision on which the claim is based. In order to identify what the relevant claim is, the court should use the applicants' cause of action as guidance. However, the court is not beholden to the applicants' characterisation of the claim, which might be at variance with the relevant legal provision. The latter governs.' (Own emphasis)

[86] It is now trite that an unfair dismissal claim brought by an employee in terms of section 191 of the LRA involves a claim for a '*debt*' of reinstatement, re-employment, or compensation.

[87] The commissioners found that Ms More's contract of employment expressly provides for rendering of service to the PIC as an obligation that Ms More must discharge. They construed the debt as being Ms More's breach of contract, described as the "*defective rendering of service*" or "*positive malperformance*", giving rise to the misconduct with which she was charged. They found that *"this begs the question why such service is not sufficient to be used and applied as a debt".*

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[27] [2017] ZACC 15; 2017 (5) SA 9 (CC) at para 34.

[88] The commissioners found that a disciplinary enquiry is "*an investigation into the circumstances of a breach of contract of employment*", and that "*upon confirmation of a breach the employer must make an election which includes termination of the contract (like they did with Ms More), claim damages which they did not and could have or call for specific performance which may involve counselling (PIC could have), training for the employee to meet the standard of performance depending on the nature and gravity of the violation (PIC elected not to). It may also elect to discipline (which the PIC did). However, it is still liable to be extinguished by prescription if the action is delayed for more than three years".*

[89] This finding is misconceived and lost sight of the fact that the LRA recognises three grounds on which a termination of employment might be legitimate – these are the conduct of the employee, the capacity of the employee and the employer's operational requirements. Those would constitute fair reasons for dismissal. An employer has to effect a dismissal on any of the permissible grounds in accordance with a fair procedure, which includes an employee's right to be informed of the allegation, be afforded an opportunity to state a case in response and be provided with an outcome or decision after the enquiry.

[90] A disciplinary hearing is held within the ambit of the LRA, and it is not purely an investigation into the breach of contract within the ambit of a contractual dispensation. It is not the enforcement of a contractual right to terminate, but it is the enforcement of a statutory right to terminate an employment relationship on the grounds recognised by the LRA.

[91] Considering the authorities on what would constitute a debt for purposes of the Prescription Act, what begs the question is what debt is claimed by an employer that calls an employee to a disciplinary enquiry, which may or may not result in dismissal?

[92] In my view, the PIC as an employer has the prerogative to take disciplinary action against its employees, and if appropriate and justified, it may terminate the employment relationship on account of the conduct of an employee. The disciplinary

process does not call upon an employee to comply with an obligation to render services, but it rather calls the employee to account for his or her conduct.

[93] Put differently, while a debt in terms of the Act is an obligation to pay money, deliver goods or render services, a disciplinary enquiry does not require the employee to perform any obligation at all, let alone one to pay money, deliver goods or render services. The employer merely invokes a labour law mechanism available to it to investigate a *prima facie* case of alleged misconduct and its impact on a continued employment relationship.

[94] When it comes to prescription, the plaintiff's claim is for the correlative '*debt*'. What is an employer's claim or cause of action when it elects to call an employee to a disciplinary enquiry? In my view, the institution of disciplinary action is the exercising of an employer's prerogative, which is generally guided by the terms of a disciplinary code or procedure, where there is a *prima facie* case of alleged misconduct. There is no correlative debt that is being claimed by the employer from the employee.

[95] It is wrong to characterise a disciplinary enquiry or any ensuing dismissal as a claim for a breach of contract, constituting the debt. A disciplinary enquiry or dismissal is rooted in labour law and its fairness dispensation, not in the common law of contract. At a disciplinary enquiry, the employer is not claiming contractual relief of specific performance or cancellation and damages arising from a breach of contract.

[96] A debt is an obligation to pay money, deliver goods or render services. Ms More rendered her services, but the Applicant's case is that in doing so, she misconducted herself and, therefore, the employer is entitled to take disciplinary action. The PIC did not seek to call upon Ms More to comply with her obligation to render a service, but rather it took disciplinary action, which is not a claim for a debt, and it terminated the employment relationship, which is also not a claim for a debt. No debt arises in the scenario of internal disciplinary action. To find differently would constitute an absurdity.

[97] The commissioners' findings, as alluded to *supra,* were wrong and are to be reviewed.

Relief

[98] Having found that the arbitration award is reviewable, it leaves the issue of relief.

[99] The Applicant submitted that an unusual feature of the award is that – given the commissioners' findings on substantive unfairness – they did not get around to deciding the merits of the charges against Ms More, save for the finding on Dr Matjila's instruction. The consequence of this is that if the Court were to set aside the commissioners' decision on substantive unfairness, there would be a gaping hole in the award. The difficult question that would then confront the Court is whether it should sit as a decision-maker of the first instance and determine what was the central factual issue at the arbitration (i.e. whether Ms More was guilty of misconduct), which the commissioners avoided doing.

[100] The Applicant submitted that this would not be appropriate.

[101] Mr Bishop for Ms More, on the other hand, submitted in his heads of argument that if the Court does not uphold the defence of prescription, this Court should find that the PIC had waived its right to bring charges against Ms More in respect of the VBS transaction. If this Court finds that the commissioners' finding on prescription should be set aside or if the Court does not uphold the defence of waiver, then Mr Bishop submitted that the Court should determine the defence of *undue delay*.

[102] Mr Bishop further submitted that there would be nothing improper about this Court making a determination on the questions of procedural and substantive fairness, outside of Ms More's special defences. A substantial portion of his heads of argument was dedicated to submissions on substantive and procedural fairness.

[103] The question I am faced with *in casu* is how does the Court get to decide the merits of Ms More's dismissal when this was not determined by the commissioners, where there is no decision on the merits to be set aside on review, and where there is nothing for this Court to substitute its own decision for?

[104] To ask the Court to finally determine the merits of Ms More's dismissal would be to call upon the Court not to act as a reviewing court, but to act as a decision-maker of first instance. However wide this Court's powers are under section 145(4), this would not be '*appropriate*'. Section 145, as a whole, makes it clear that this Court is here to scrutinise the legality and regularity of CCMA arbitration awards on review, not to do the work of CCMA commissioners.

[105] This leaves the option of remittal either back to the commissioners who heard the arbitration or to a new commissioner for a hearing *de novo.*

[106] The PIC submitted that it would be disinclined towards remittal to the existing commissioners. It may, in the circumstances, be unfair to expect of the commissioners to bring a fresh mind to bear on the matter and asking too much of them.

[107] Considering the matter, the findings made by the commissioners (as well as the findings not made) and the grounds for review raised by the PIC, I am of the view that the only just and equitable option is to remit the matter to a new commissioner for an arbitration *de novo*.

[108] In argument, this issue was canvassed with counsel, and Mr Bishop submitted that if this Court were to find that prescription does not apply, the matter must be remitted, and if this Court finds that it must be decided by another commissioner, the Court must give direction as to how the matter must proceed. Mr Bishop submitted that Ms More, as an individual, had already incurred great expense and the evidence already presented, should be the evidence before another commissioner, as may be supplemented by argument.

[109] Mr Itzkin for the Applicant submitted that a senior commissioner should decide the matter *de novo*. Mr Itzkin had no difficulty for the matter to be remitted and that it be determined on the existing record, with the right to adduce new evidence.

[110] I am mindful of the fact that the arbitration took place over five sittings between February and July 2022 and that the record of the arbitration runs to a whopping 4281 pages, including a 1358-page transcript and a 120-page pre-arbitration minute. It is for these reasons that I grant the relief as per the order *infra.*

[111] In the premises, I make the following order:

Order

1. The arbitration award issued on 6 September 2022 and the supplementary award issued under case no GATW13421-21 are reviewed and set aside;
2. The matter is remitted to the CCMA for arbitration *de novo* by a senior commissioner or commissioners, as the case may be, other than the Third and Fourth Respondents;
3. The record of proceedings generated under case number GATW13421-21 shall serve as the evidence before the appointed commissioner or commissioners;
4. The arbitration *de novo* is to be conducted on such terms and in such manner as the appointed commissioner or commissioners may determine;
5. The CCMA is directed to enrol the matter for arbitration;
6. There is no order as to costs.

Connie Prinsloo

Judge of the Labour Court of South Africa

Appearances:

For the Applicant: Advocate R Itzkin

Instructed by: Fasken Attorneys

For the First Respondent: Advocate A Bishop

Instructed by: Petersen Hertog Attorneys