LABOUR APPEAL COURT OF SOUTH AFRICA, JOHANNESBURG

Reportable
Case No: JA 91/22

In the matter between:

DIRK WILLEM POTGIETER **Appellant**

and

SAMANCOR CHROME LIMITED t/a
TUBATSE FERROCHROME **Respondent**

Heard: **19 September 2023**
Delivered: **10 March 2025**
Coram: **Molahlehi DJP, Smith AJA et Malindi AJA**

JUDGMENT

MALINDI, AJA

Introduction

[1] The appellant, Mr Potgieter, was dismissed by the respondent on 24 October 2006. He referred the matter to the Metal and Engineering Industries Bargaining Council (MEIBC) for arbitration, where he obtained an award in his favour on 25 June 2008.

[2] This appeal lies against the whole judgment and order of the Labour Court which upheld the respondent's special plea of prescription. The Labour Court held that:

2.1. prescription applied in respect of this claim;

2.2. that the period of prescription commenced to run from the date of the Labour Appeal Court's reinstatement order;

2.3. that the running of prescription was not interrupted; and

2.4. that the period of three years having elapsed, the debt had prescribed.

[3] The Labour Court refused leave to appeal, but leave was granted on petition by the Labour Appeal Court. The appeal is opposed by the respondent.

Background

[4] This dispute has a protracted history emanating from the dismissal of the appellant on allegations of misconduct. A dispute of alleged unfair dismissal was referred to the MEIBC. On 25 June 2008, the MEIBC issued an arbitration award in terms of which it found that the dismissal of the appellant was substantively and procedurally unfair and awarded compensation equivalent to 12 months remuneration.

[5] After the arbitration award, litigation proceeded in the following chronology:

5.1. The appellant approached the Labour Court seeking the review and setting aside of the award of compensation and sought an order of retrospective reinstatement. The review application was dismissed;

5.2. Mr Potgieter, with the leave of the Labour Court, appealed against the dismissal of the review application;

5.3. On 12 June 2014, the Labour Appeal Court (LAC) upheld the appeal and substituted the Labour Court's findings with an order that the appellant was reinstated retrospectively into his position with the respondent; and

5.4. The respondent, Samancor, appealed the LAC order to the Constitutional Court, and on 3 September 2014, the Constitutional Court dismissed the respondent's appeal against the judgment of the Labour Appeal Court.

[6] Consequently, the LAC's order of retrospective reinstatement was implemented by Mr Potgieter's reinstatement on 23 July 2015. He reported for duty and was accepted back into the respondent's employ.

[7] On 30 November 2015, the parties, through a mutual separation agreement, terminated the employment relationship.

[8] This matter is about what transpired after the LAC order, which Samancor unsuccessfully attempted to appeal at the Constitutional Court. Following a dispute between the parties as to the meaning of the Labour Appeal order, in particular whether Mr Potgieter was entitled to retrospective payment for the whole period from the date of the LAC order on 12 June 2014 (equal to eight years), or only from the date of his dismissal to the date of the MEIBC award on 25 June 2008 (equal to some one year and eight months).

[9] The chronology of this second round of litigation is as set out below.

[10] On 23 July 2018, Mr Potgieter instituted a claim for the payment of his outstanding remuneration consequent upon the reinstatement order. He claimed payment of monies owing from the date of his dismissal until the reinstatement order of the LAC. Samancor raised a preliminary point to the effect that the appellant ought to have instituted contempt proceedings or caused a writ of execution to be issued.

[11] The matter came before the Labour Court on 29 May 2020. On the date of the hearing, the parties reached an agreement, which was made an order of the Court by the Labour Court (per van Niekerk J, as he then was). The order reads as follows:

‘1. The applicant withdraws the action proceedings filed under the above case number.

2. The parties will engage with each other during the period 3 to 17 June 2020 with a view to formulating an agreed stated case pertaining to the effect of paragraph 2.1(ii) of the Labour Appeal Court’s order under case number JA 71/12, insofar as it pertains to the respondent’s payment liability for the period between the days of the applicant’s dismissal and the date of the delivery of the Labour Appeal Court’s order.

3. If the parties are unable to agree to a stated case by 17 June 2020, the respondent will deliver an application within 14 days from 17 June 2020 seeking a declaration order pertaining to the effect of paragraph 2.1(ii) of the Labour Appeal Court’s order under case number JA 71/12 insofar as it pertains to the respondent’s payment liability for the period between the date of the applicant’s dismissal and the date of delivery of the Labour Appeal Court’s order, and seeking consequential or associated relief.

4. The parties shall approach the Court to request that it hear the matter in an expedited manner.

5. There is no order as to costs.’

[12] The parties could not agree on the stated case contemplated in the aforementioned order, and on 10 July 2020, Samancor delivered its application for a declaratory order in accordance with the order of the Labour Court. The issue to be considered in terms of the application was whether the effect of the reinstatement order was that the appellant was entitled to his full salary for the entire period despite having engaged in alternative employment between the date of his dismissal and the reinstatement order.

[13] On 7 December 2020, the application served before the Labour Court (per Snyman AJ).

[14] On 16 February 2021, the Labour Court delivered a judgment wherein it concluded that the dispute before the Court gave rise to two distinct rights *viz.* a judgment debt for the period between the dismissal and the arbitration award, and a

contractual claim in respect of Mr Potgieter's remuneration for the period between the date of the arbitration award and the reinstatement order of the LAC.

[15] The order of the Labour Court (per Snyman J) read as follows:

'1. It is declared that for the period between the date of dismissal of the respondent on 26 October 2006 and the date of the arbitration award on 25 June 2008 under case number MEGA14544, the respondent is entitled to be paid his full salary by the applicant, as if he was not dismissed, without moderation or adjustment.

2. It is declared that for a period between 26 June 2008, being the date following the reinstatement of the respondent in terms of the arbitration award of 25 June 2008 under case number MEGA14544 and the date of the order of the Labour Appeal Court on 1 June 2014 under case number JA 71/12, the respondent is not entitled to be paid his full salary by the applicant, *such claim must still be determined* and is subject to moderation and adjustment depending on the damages the respondent is able to prove and any defences raised by the applicant.

3. The respondent is given leave to institute a claim as contemplated by paragraph 2 of this order within 90 days of this order.

4. The respondent is ordered to make/disclose to the applicant any information and/or documents in the possession of or known to the applicant, of any alternative income the applicant may have earned in the period from 26 June 2008 to 12 June 2014, from any third party other than the applicant, within 90 (ninety) days of the date of this order.'

[16] On 2 August 2021, Mr Potgieter instituted a claim for the arrear remuneration. This was for the period between the date of the award and the judgment of the LAC.

[17] In those proceedings, the respondent contended that the appellant's claim had prescribed. The contention was that the claim accrued each month between the date of the award and the reinstatement order of the LAC and that in terms of section 12(1) of the Prescription Act[1], the debt became due on 14 June 2014, being the date

[1] Act 68 of 2969.

of the reinstatement order. It would, therefore, have prescribed three years thereafter, being 13 June 2017.

The Labour Court judgment

[18] The Labour Court held that monies owing consequent upon a reinstatement order constitute a debt within the contemplation of the Prescription Act and that the period applicable is in terms of section 11(d) of the Act, which stipulates that a debt prescribes after three years. On the authority of *National Union of Metalworkers of SA on behalf of Fohlisa and Others v Hendor Mining Supplies (a division of Marschalk Beleggings (Pty) Ltd)*[2] (*Hendor*), it held that a claim in arrears in salaries constitutes a contractual claim which becomes due once the employment contract has been restored subsequent to a reinstatement order. This is since, with reliance on *Coca Cola Sabco (Pty) Ltd v van Wyk*,[3] the reinstatement order does not include wages owing between the date of the order or award and the eventual restoration of the employment.

[19] It found that Mr Potgieter's claim between June 2008, being the date of the reinstatement award, and 12 June 2014, being the date of the LAC order granting reinstatement, constituted a contractual claim to which prescription applied. Moreover, that Mr Potgieter was constrained to issue proceedings to enforce the reinstatement order prior to the conclusion of the appeal processes which the respondent had pursued.

[20] As such, since the LAC restored the employment contract on 12 June 2014, the debt became due and enforceable on that date. This was even if the order of the LAC was suspended pending the finalisation of the appeal to the Constitutional Court; that application was finalised on 3 September 2014. Thus, the period of prescription either commenced to run on 12 June 2014 or 3 September 2014.

[21] The Labour Court held that Mr Potgieter instituted his first claim in July 2018, which was withdrawn and further instituted a second claim on 2 August 2018. It

[2] [2017] ZACC 9; (2017) 38 ILJ 1560 (CC).
[3] [2015] ZALAC 15; (2015) 36 ILJ 2013 (LAC).

concluded that the claim was instituted more than three years after the debt became due and enforceable.

[22] In considering whether the period of prescription was interrupted, the Labour Court held that in terms of section 15 of the Prescription Act, the running of prescription shall be interrupted by the service on the debtor of any process whereby the creditor claims payment of the debt. The Labour Court rejected Mr Potgieter's contention that his claim emanated from the judgment of Snyman AJ of 16 February 2021, which granted the appellant leave to institute the claim for arrears in salaries. It held that the said judgment was not in relation to the issue of prescription but rather that it interpreted the LAC order granted on 12 June 2014, which was subject to any contractual defences. Moreover, the order granting leave to initiate a claim could not be construed to eliminate the accrued right of a party to raise prescription as a defence.

[23] Thus, the Labour Court held that Mr Potgieter did not serve any process within the meaning of section 15 of the Prescription Act claiming performance from the respondent, nor were any other legal proceedings initiated within the period of three years after the debt became due and enforceable. This includes the claim which was instituted in July 2018, which was initiated subsequent to the expiry of the three-year period. Effectively, the claim prescribed either in June or September 2017.

Submissions before this Court

[24] It was contended on behalf of Mr Potgieter that a debt is claimable once the creditor has acquired the right to institute an action for the recovery of the debt. This entails that there must be a complete cause of action in respect of the debt. In this case, the cause of action partly arose on 23 July 2015, being the date of his actual reinstatement by the respondent. Moreover, that the running of the period of prescription was interrupted on 20 July 2018, when he instituted an action for recovery of the debt, which claim was withdrawn in accordance with the order of the Labour Court (per van Niekerk J) on 29 May 2020.

[25] In the alternative, the contention was that prescription commenced after the judgment of Snyman AJ, which declared that the judgment debt in terms of the LAC judgment was distinguishable from the claim for arrears in wages. It was contended that prior to that judgment, the appellant had not come to the full realisation that he had to institute a claim separate from the reinstatement claim. Thus, the appellant became aware of his claim because of the judgment of Snyman AJ.

[26] It was contended on behalf of Samancor that the claim for arrears in wages accrued on 12 June 2014, being the date of the LAC judgment and the claim prescribed three years after that date, being 13 June 2017. The appellant having instituted his claim on 20 July 2018 entails that the claim was initiated 13 months after the deadline. It was contended that, in any event, these proceedings did not interrupt prescription as they were never pursued but were withdrawn by agreement between the parties on 29 May 2020. Moreover, to compound matters, the claim was not instituted in terms of section 77(3) of the Basic Conditions of Employment Act[4] (BCEA), being the competent procedure for a claim for arrears in wages.

Evaluation

[27] The issue is when the debt became due and payable. The Labour Court found that the debt became due and payable at the date of the reinstatement order or at the date on which Samancor's application for leave to appeal was dismissed by the Constitutional Court.

[28] Emanating from the authority in *Hendor*[5], a reinstatement order merely revives the employment contract between the parties and therefrom the reciprocal obligations to tender services, acceptance of the tender and payment of wages arises. This entails that for reinstatement to occur, the employee must tender services after the reinstatement order, and the employer must accept the employee back into her previous position. In articulating this position, this Court in *Kubeka Others v Ni-Da*

[4] Act 75 of 1997, as amended.
[5] *Hendor* at paras 37 – 51 and 173 - 177.

[29] *Transport (Pty) Ltd*[6] held the following:

'[23] In *Equity Aviation Services (Pty) Ltd v Commission for Conciliation, Mediation & Arbitration & others (Equity Aviation Services)* the Constitutional Court held:

> 'The ordinary meaning of the word "reinstate" is to put the employee back into the same job or position he or she occupied before the dismissal, on the same terms and conditions. Reinstatement is the primary statutory remedy in unfair dismissal disputes. It is aimed at placing an employee in the position he or she would have been but for the unfair dismissal. It safeguards workers' employment by restoring the employment contract. Differently put, if employees are reinstated they resume employment on the same terms and conditions that prevailed at the time of their dismissal.'
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> [24] These dicta do not clearly affirm that the effect of a reinstatement order is merely to direct the employer to accept a tender of the employees' services and that no right to arrear wages arises until it elects to do so; though the 'resuming' of employment implies that the contract of employment was not extant during the period of litigation. However, the dicta can be interpreted equally to mean that the reinstatement order itself 'puts the employee back into the same job or position he or she occupied before the dismissal on the same terms and conditions'. Likewise, the reinstatement order (not the employer's acceptance of the tender of services) 'is aimed at placing an employee in the position he or she would have been but for the unfair dismissal'.'
>
> And –
>
> '[35] The decision of the Constitutional Court in *Hendor* therefore leaves little doubt that a reinstatement order does not restore the contract of employment and reinstate the unfairly dismissed employees. Rather, it is a court order directing the employees to tender their services and the employer to accept that tender. If the employee fails to tender his or her services or the employer refuses to accept the tender, there is no restoration of the employment contract. If the employer fails to accept the tender of services in accordance with the terms of the order, the employee's remedy is to bring

[6] [2020] ZALAC 55; (2021) 42 ILJ 499 (LAC) at paras 23 – 24 and 35 – 38.

contempt proceedings to compel the employer to accept the tender of services and thereby to implement the court order.

[36] As the employees in *Hendor* in fact tendered their services and were reinstated, the Constitutional Court was not called upon to decide what the position would have been had the employees failed to take up reinstatement pursuant to the order. However, it follows plainly from the reasoning in both judgments that an employee granted retrospective reinstatement is not entitled to any of the contractual benefits of reinstatement, including backpay, without the contract being restored through actual reinstatement.

[37] As pointed out earlier, this seems at first glance to put an unfairly dismissed employee at a disadvantage when compared to an employee seeking specific performance at common law. That is not entirely true. The protective scope of the unfair dismissal jurisdiction is of course much wider. Specific performance is available only for unlawful termination, whereas a lawful dismissal may be held to be unfair under the LRA. But still, at common law, employees seeking specific performance are not required to tender prospective services to obtain arrear wages for which they have tendered services.

[38] A requirement that backpay is only due and payable on reinstatement is in keeping with the remedial scheme and purpose of s 193 of the LRA. As Mr Watt-Pringle SC, counsel for the respondents, correctly submitted, if an employee in receipt of a reinstatement order could on the strength of the order alone claim contractual payment for the retrospective part of the order without actually seeking reinstatement (tendering prospective services), it would convert a reinstatement remedy (which requires a tender of services) into a compensation award (which does not), in excess of the statutory limitation on compensation awards. Such an outcome would be inconsistent with the purpose of ss 193 and 194 of the LRA. An unfairly dismissed employee must elect his or her preferred remedy and, if granted reinstatement, must tender his or her services within a reasonable time of the order becoming enforceable. If reinstatement has become impracticable through the effluxion of time, for instance where the employee has found alternative employment, he or she should seek to amend his or her prayer for relief to one seeking compensation.' [Own emphasis]

[30] It follows that any contractual claim that arises as a result of the reinstatement order accrues once the employee is actually accepted back into his previous position. This is because an employee granted retrospective reinstatement is not entitled to any of the contractual benefits of reinstatement, including backpay, without the contract being restored through actual reinstatement. In this instance, the LAC judgment did not entitle the appellant to contractual claims but rather bestowed them with the right to restore the contract through a tender and a reciprocal acceptance.

[31] Thus, it follows that any claim in respect of arrear wages only became due and payable on 23 July 2015, being the date Mr Potgieter was accepted back into his previous position. Thus, on the objective facts, the period of three years would have elapsed on 24 July 2018. It is common cause that the appellant instituted an action in the Labour Court to recover, *inter alia,* arrears in wages on 20 July 2018. Moreover, that the action was withdrawn on 29 May 2020 on account of a question of whether enforcement procedures were competent in the circumstances.

[32] The provisions of section 15 of the Prescription Act 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.
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> (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.
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> (3) If the running of the 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.' [Own emphasis]

[33] Samancor contended that it did not, at any stage, concede to Mr Potgieter's claim and that there were no completed proceedings which interrupted prescription as the relevant action was abandoned by Mr Potgieter. The effect of this contention is that in terms of section 15(2) of the Prescription Act, the action instituted on 23 July 2018 did not interrupt prescription.

[34] The Constitutional Court in *Food and Allied Workers Union on behalf of Gaoshubelwe v Pieman's Pantry (Pty) Ltd*[7] (*Pieman's Pantry*), held the following in respect of the commencement of proceedings within the meaning of section 15(1) of the Prescription Act:

'[202] In addition, given the mandatory nature of conciliation as a requirement for arbitration or a referral to the Labour Court, it follows, in my view that the proceedings for the recovery of the debt, that arise from an unfair dismissal, commence when a dispute is referred to conciliation. To hold otherwise would simply mean airbrushing the important and legally mandated process of conciliation, from what can only be seen as a continuum in the legal process from conciliation to adjudication that the LRA evidences. In *Cape Town Municipality*, the Court held that a process that initiates proceedings for enforcement of payment of a debt interrupts prescription:

"It is sufficient for the purposes of interrupting prescription if the process to be served is one whereby the proceedings begun there under 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 final, executable judgment, not only when the process and the judgment constitute the

[7] [2018] ZACC 7; (2018) 39 ILJ 1213 (CC) at paras 202 – 203.

beginning and end of the same action, but also where the process initiates an action, judgment in 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."

[203] 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.' [Own emphasis]

[35] It is clear that the Constitutional Court (within the context of conciliation proceedings) interpreted section 15(1) of the Prescription Act not to require that the instituted process must culminate in a judgment in the same proceedings. It is sufficient for the party to approach the recovery of the debt in a staggered fashion. In this instance, it cannot be said that the proceedings initiated on 23 July 2018 were not proceedings competent in terms of section 15(1) of the Prescription Act. As mentioned above, the action was withdrawn for the delivery of a legal question, which ultimately served before Snyman AJ. Clearly, the proceedings before van Niekerk J were aborted with the *proviso* that the respondent would initiate proceedings for declaratory relief within the stipulated timeframes. That relief was contemplated to discern the form and extent of the claim prosecutable. This evinces proceedings which sought to finally dispose of some element of the claim, that is, whether the claim for arrears in wages constituted a judgment debt or a contractual claim.

[36] This was in line with the order per van Niekerk J, which required that a legal question as to whether the claim was a judgment debt or a contractual debt should be resolved first before the appellant could proceed with the action proceedings for the recovery of the debt. Clearly, the proceedings before van Niekerk J and those before Snyman AJ were intertwined, as alluded to in *Pieman's Pantry*. Thus, it cannot be said that the appellant did not successfully prosecute his claim within the meaning of section 15(2) of the Prescription Act when he withdrew the claim. It is

clear from the reading of the order of the Labour Court (per van Niekerk J) that albeit the action was withdrawn, nevertheless the appellant did not abandon his claim and merely sought to crystallise his claim by finally disposing of some of the elements of the claim.

[37] This is discernible from the fact that when the parties could not agree on a stated case as mandated by the aforesaid order, the parties hastily initiated the proceedings, which ultimately served before Snyman AJ. It follows that, as at the time that declaratory judgment was delivered on 20 May 2020, the period of prescription was not exhausted on 16 February 2021. Therefore, it cannot be said that the aborted proceedings did not interrupt the running of prescription. They did.

[38] I conclude, therefore, that the appeal stands to succeed, and that the following order be made:

Order

1. The late delivery of the respondent's heads of argument is condoned.
2. The appeal is upheld with no order as to costs.
3. The order of the Labour Court is set aside and substituted with an order that reads as follows:

'1. the respondent's special plea of prescription is dismissed with no order as to costs.'

G. MALINDI AJA

Molahlehi DJP and Smith AJA concur.

APPEARANCES:

For the Appellant:	A. Goldberg, of Goldberg Attorneys Incorporated
For the Respondent:	A. Redding SC, instructed by Solomonholmes Incorporated attorneys