THE LABOUR APPEAL COURT OF SOUTH AFRICA, CAPE TOWN

Not Reportable
Case no: CA5/2023

In the matter between:

SOUTH AFRICAN MUNICIPAL WORKERS UNION (SAMWU) obo KOOPMAN — **Appellant**

and

CITY OF CAPE TOWN — **First Respondent**

LUNGELO MBANDAZAYO: CITY MANAGER CITY OF CAPE TOWN — **Second Respondent**

SOUTH AFRICAN LOCAL GOVERNMENT BARGAINING COUNCIL — **Third Respondent**

I DE VLIEGER-SYNHAEVE N.O — **Fourth Respondent**

Heard: **12 September 2024**
Delivered: **22 January 2025**
Coram: **Savage ADJP, Mlambo JA, and Davis AJA**

Summary: **Reinstatement – employment contract – reciprocal duties on employees and employers – reinstatement order is not self-executing – duty on employee to tender services following reinstatement – failure to tender**

services is fatal to execution of arbitration award or judgment ordering reinstatement – appeal dismissed.

JUDGMENT

MLAMBO, JA

Introduction

[1] This appeal, with the leave of the court *a quo,* turns on a question of law of whether an arbitration award is a debt and if certified, whether it becomes a judgment prescribing after 30 years, as defined in the Prescription Act.[1] The court *a quo* found that the award was a debt and that certification does not affect this fact. However, it dismissed the application having found that it had already prescribed by the time it was certified.

Background

[2] In February 2014, the appellant (Mr Koopman) was dismissed by the first respondent (the City) following a disciplinary hearing. Aggrieved with the decision, a referral was made to the South African Local Government Bargaining Council (SALGBG or the council). The council ruled in his favour and issued an award ordering his retrospective reinstatement to 25 February 2014 with backpay. In August 2022, the applicant certified the award in terms of section 143(3) of the Labour Relations Act[2] (LRA). This was followed by an *ex-parte* contempt application against the City for failing to comply with the now-certified arbitration award. This application was launched on 30 June 2023 and on 25 July 2023, the Labour Court issued rule *nisi* calling on the respondents to show cause why they should not be held in contempt.

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[1] Act 68 of 1969.
[2] Act 66 of 1995, as amended.

In the Labour Court

[3] There were three issues before the court *a quo*. First was whether the amended section 143(4) of the LRA applied to the matter. The section, which provides for the enforcement of certified arbitration awards through contempt proceedings only took effect for awards that were issued after 1 January 2015. The second was urgency and the third related to the respondents' defence of prescription. Only this last issue is relevant for purposes of this appeal.

[4] The court *a quo* found that the award had prescribed. It reasoned that arbitration awards are debts for the purposes of the Prescription Act and that they prescribe after a period of three years. This was on the basis that the Constitutional Court had not conclusively dealt with the matter in *Myathaza v Johannesburg Metropolitan Bus Services (SOC) Limited t/a Metrobus and Others*[3] (*Myathaza*), and *Mogaila v Coca Cola Fortune (Pty) Limited*[4] (*Mogaila*), in which that Court did not make a definitive finding on the issue. Instead, it took the view that this Court had correctly dealt with the issue in its decisions in *NUM obo Majebe v Civil and General Contractors*[5] (*Majebe*) and *Motsoaledi and Others v Mabuza*.[6] In these decisions, this Court conclusively determined that arbitration awards are debts prescribing in three years in line with section 11(d) of the Prescription Act.

[5] The court *a quo* thus concluded that the award had prescribed in 2017, five years before it was certified. Further that there was no evidence of a review application being filed which would have interrupted prescription. It further concluded that based on the decision in *Tony Gois t/a Shakespeare's Pub v Van Zyl and Others*,[7] certification does not clothe an arbitration award with the status of a judgment as it would still prescribe after three years. Lastly, it found that there was no evidence that the appellant had to tender his services and that the City prevented

[3] [2016] ZACC 49; (2017) 38 ILJ 527 (CC).
[4] [2017] ZACC 6; [2017] 5 BLLR 439 (CC).
[5] [2020] ZALAC 56; [2021] 4 BLLR 374 (LAC).
[6] [2018] ZALAC 43; (2019) 40 ILJ 117 (LAC).
[7] [2003] 11 BLLR 1176 (LC); 2011 (1) SA 148 (LC).

him from returning to work. In the result, the contempt application was dismissed on the grounds of the award having prescribed.

In this Court

[6] The appellant's main contention is that arbitration awards are not debts prescribing after three years for the purposes of the Prescription Act. Instead, once certified, their prescription period is 30 years, the same as Court judgments. They argue that the Constitutional Court decisions in *Myathaza* and *Mogaila* concluded that the Prescription Act does not apply to arbitration awards, while *Food and Allied Workers Union obo Gaoshubelwe v Pieman's Pantry (Pty) Limited*[8] (*Pieman's Pantry*) concluded that it is a claim for unfair dismissal and not an award finding such a dismissal unfair, that prescribes after three years. The appellants argued that the court *a quo* was incorrect in placing reliance on *PTAWU obo Xoloani and Others v Mhoko's Waste & Security Services*,[9] as, in their view, that case did not interpret the Constitutional Court cases correctly.

[7] The appellant therefore submits that because the unfair dismissal claim was filed and prosecuted timeously and the award granted in his favour was subsequently certified, it has the status of a judgment. Therefore, prescription played no role and the City remains in contempt of the arbitration award.

[8] The respondent argued, in the first place, that the Court *a quo* was incorrect in granting leave to appeal because the stringent test in section 17(1)(a)(i)[10] had not been met. This as, in its view, the appeal raises no novel issues nor does it involve any issue of public importance. Secondly that the correct position regarding the status of an arbitration award with regard to the Prescription Act is that set out in *Pieman's Pantry* and *Majebe*. The respondent further argued that, in any event, the appellant had failed to show that prescription had been interrupted and that, by the time the award was certified, it had already prescribed as certification does not

[8] [2018] ZACC 7; (2018) 39 ILJ 1213 (CC).
[9] [2018] ZALCCT 32; (2019) 40 ILJ 185 (LC).
[10] Superior Courts Act 10 of 2013.

change its status. Lastly, the respondent argued that the appellant had also failed to tender his services in line with the award so contempt did not arise.

[9] The conclusion I have reached only necessitates that I only deal with the respondent's argument that Mr Koopman failed to tender his services, subsequent to the issuing of the award. Counsel for the appellant conceded that if this was true, then that would be dispositive of the appeal rendering the question of prescription moot.

Tender of service

[10] A fundamental tenet of the employer-employee relationship is that the employee must tender their services and the employer must remunerate them in return.[11] When an employee is dismissed, it follows that he no longer has the obligation to tender his services. If such dismissal is found to be unfair by an arbitrator or a Court and the employer is ordered to reinstate or re-employ him, then the employee once again has a duty to tender his services.

[11] In *National Union of Metalworkers of South Africa obo M Fohlisa and Others v Hendor Mining Supplies (a division of Marschalk Beleggings (Pty) Ltd)*[12] (*Hendor*), the first judgment concluded that an order of reinstatement has the purpose of creating a reciprocal obligation on the employee and the employer, stating:

> '[A reinstatement] order [does] not itself reinstate the employees. Rather it order[s] [an employer] to do so. Although a reinstatement order places a primary obligation on the employer to reinstate, it creates an obligation in terms of which an employee must first present her- or himself for resumption of duties. The employer must then accept her or him back in employment. These are reciprocal obligations. The employee's obligation to present her- or himself for work and the corresponding obligation to accept her or him back to work flow from the court order.'[13] (Own emphasis)

[11] See: *Kubeka and Others v Ni-Da Transport (Pty) Ltd* [2020] ZALAC 55; (2021) 42 ILJ 499 (LAC) at para 16 (*Kubeka*).
[12] [2017] ZACC 9; [2017] 6 BLLR 539 (CC).
[13] Ibid at para 22, see also para 48.

[12] Despite there being no majority in *Hendor*, as this Court found in *Kubeka*, the Constitutional Court was "*unanimous about the governing principle that the contracts of … unfairly dismissed employees are terminated by a dismissal and revive only when they tender their services pursuant to a reinstatement order and the tender is accepted by the employer*"(Own emphasis).[14] Therefore, an employee has an election. If he wants reinstatement with backpay, he must tender his services within the period set out by the reinstatement order, or alternatively, on good cause shown, after a reasonable time following the expiry of that period. To illustrate this, I consider the decisions in *Sibiya v South African Police Service*[15] (*Sibiya*) and *Association of Mineworkers and Construction Union and Others v Northam Platinum Mine Limited*[16] (*AMCU*).

[13] In *Sibiya,* there was a long delay between the appellant's dismissal and this Court granting a reinstatement order. By the time this Court granted its order, the appellant had become employed elsewhere on more favourable terms, so a conditional order was granted to the effect that the appellant's backpay would depend on whether he tendered his services. If he did so in line with the timelines set out in the order, he would receive 14 months' backpay, whereas, if he did not, he would only receive 12 months' compensation for an unfair dismissal.[17] What this demonstrates is that the tender of services becomes a pre-requisite to the enforcement of the reinstatement order. Where an employee is unfairly dismissed, the default remedy is reinstatement, where reinstatement or re-employment are either not pursued or inappropriate then compensation becomes an appropriate remedy.

[14] In *AMCU,* the Labour Court had found the appellants' dismissals substantively unfair but instead of reinstatement, ordered compensation because reinstatement was not practicably possible. This as the employees had made certain demands

[14] *Kubeka supra* fn 11 at para 31.
[15] [2022] ZALAC 88 (LAC); (2022) 43 ILJ 1805 (LAC).
[16] [2021] ZALAC 32; (2021) 42 ILJ 2565 (LAC).
[17] The LRA limits compensation to a maximum of 12 months' salary for unfair dismissals and 24 months for automatically unfair dismissals.

relating to workplace safety before returning to work. On appeal to this Court, the ground that the Labour Court had erred in refusing reinstatement was dismissed because it was found that employees cannot make unreasonable demands as pre-conditions for their tender of services in line with a reinstatement order. What again emerges is the principle that tendering services is essential in the enforcement of a reinstatement order. This, I find forceful in this matter.

[15] In *Tshongweni v Ekurhuleni Metropolitan Municipality*,[18] this Court explained the effect of the unfair dismissal regime introduced following the recommendations of the Wiehahn Commission of Enquiry into Labour Legislation. It said:

> 'Reinstatement may be ordered from a date later than the date of dismissal (section 193(1)(a) of the LRA) and thus may be of limited retrospectivity. Re-employment implies termination of a previously existing employment relationship and the creation of a new employment relationship, possibly on different terms both as to period and the content of the obligations undertaken. In both instances, as in the case of the common law remedy of specific performance, the employee must make his services available if the remedy is to be maintained; there must be a willingness to resume employment. Aside from the requirements of the common law, that much follows in part, it would seem to me, as the corollary arising from the provision in section 193(2)(a) of the LRA that reinstatement or re-employment should be ordered unless the employee does not wish to be reinstated or re-employed.'[19] (Own emphasis)

[16] The appellant's counsel conceded that there was no tender of services by Mr Koopman. Even if we were to find in the appellants' favour on prescription, the failure to tender services is fatal to their cause. Once an employee has an award or order granted in his favour, reinstating or re-employing him, the duty falls on the employee, not the employer to ensure that services are tendered. The right to fair labour practices also extends to employers. It would be unfair and unreasonable to expect them to wait for an employee who was unfairly dismissed and subsequently

[18] [2012] ZALAC 17; (2012) 33 ILJ 2847 (LAC).
[19] Id at para 37; see also *Kubeka supra* fn 11 at paras 15 - 22.

reinstated, to decide for themselves when they feel it appropriate to return to work and to tender their services, whenever they deem this appropriate at their own time.[20] The appeal must therefore fail.

Postscript

[17] Before concluding, it must be stated that section 167(1) of the LRA establishes this Court as 'a court of law and equity'. The blunt effect of the dismissal of this appeal, on Mr Koopman, who has presumably been unemployed for over 10 years – despite being in possession of an award that reinstated him – is not lost on us. Unfortunately, no information was placed before us explaining the circumstances for his failure to tender his services. Nor was any reason provided by his union explaining any communication they may have had with the respondent regarding the date Mr Koopman was required to tender his services.

[18] In these circumstances, we are limited in the relief we can provide. At best, we think it appropriate to refer this judgment to the Minister of Employment and Labour for consideration of whether any legislative amendments might remedy similar situations in future. A simple suggestion might be a requirement that an employer be required to initiate communication with an employee after all review or appeal proceedings, if any. In the communication, the employer should be expected to inform the reinstated employee(s) by when they are expected to tender services, taking into account what the arbitration award or judgment has stated in relation to reinstatement or re-employment. This will provide both employers and employees with certainty and proof that a request for tender of services was made while keeping the onus on the employee to tender services.[21]

Costs

[20] *City of Johannesburg and Another v Independent Municipal & Allied Trade Union on behalf of Erasmus and Another* (2019) 40 ILJ 1191 (LAC) at para 30.
[21] See: *Insurance Banking Staff Association (Absa) and Others v Southern Life Association Limited* (C600/98) [1999] ZALC 198 (1 December 1999) where the Labour Court made a proposal for legislative reform of section 194 of the LRA which was ultimately enacted through the Labour Relations Amendment Act 12 of 2002.

[19] This matter has been protracted for years and bringing it to finality is paramount. It is therefore not appropriate to order costs in this matter and each party must bear their own costs.

[20] In the circumstances, the following order is granted:

Order

1. The appeal is dismissed.
2. There is no order as to costs.
3. The Registrar of this Court is directed to send a copy of this Judgment to the Minister of Employment and Labour, drawing their attention to paragraphs 17 and 18.

Mlambo JA

Savage ADJP and Davis AJA concur.

APPEARANCES:

FOR THE APPLICANT: E Geldenhuys

Instructed by MacGregor and Erasmus Attorneys

FOR THE FIRST AND SECOND RESPONDENTS: S Mbobo

Instructed by Mamatela Attorneys Inc