



**IN THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG**

Case No: JS 85/18

In the matter between:

**PENNYLYNE ZONDO**

Applicant

and

**BRAKPAN BUS COMPANY**

Respondent

**Heard: 20 May 2024**

**Delivered: 6 November 2025**

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**JUDGMENT**

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**KUMALO, AJ**

Introduction

- [1] At the commencement of trial proceedings, the respondent raised a point *in limine*, contending that it was dispositive of the applicant's claim. The respondent argued that the relief sought by the applicant fell outside the jurisdiction of this Court, due to the applicant's failure to refer the dispute to conciliation. It was submitted that the declaratory relief sought in the main claim was academic, as the dispute had not undergone the requisite conciliation process. Additionally, the respondent challenged the permissibility of the applicant's late amendment of the action, given the procedural and

factual context. It is noted that the applicant has since abandoned the claim for specific performance and now seeks compensation and/or damages. The respondent contended that this claim for damages had prescribed. The applicant opposed the points *in limine*.

### Background

- [2] The applicant commenced employment with the respondent on 17 July 2013 in the capacity of Acting Managing Director. Subsequently, the respondent advertised the position of Chief Executive Officer (CEO), for which the applicant applied and was considered. According to the applicant, during a meeting of the respondent's board of directors held on 30 November 2016, the board resolved to appoint her to the position of CEO. She asserts that the minutes of that meeting reflect that the appointment was for a fixed term of five years, commencing on 2 January 2017 and concluding on 28 February 2020.
- [3] Following the board meeting, the applicant received a telephone call from the Chairperson of the Board concerning the exit process of the Acting Managing Director. This was subsequently followed by the receipt of the board meeting minutes and a draft employment contract relating to the CEO position. The applicant alleges that she did not sign the contract due to discrepancies in its terms. Thereafter, she was suspended from duty on allegations of misconduct. On 30 November 2017, the applicant received a letter from the Chairperson of the Board purporting to terminate her appointment as Acting Managing Director.
- [4] On 1 February 2018, the applicant filed a statement of claim seeking a declaratory order confirming the existence of an employment contract for the position of CEO between herself and the respondent. This claim was based on the resolution adopted at the respondent's board meeting held on 30 November 2016. The applicant sought enforcement of the alleged employment contract and the implementation of her appointment to the CEO position.

- [5] On 21 May 2024, during the trial proceedings, the applicant filed a notice to amend the statement of claim. The amendments were prompted, inter alia, by the expiry of the alleged contract, which rendered specific performance no longer feasible. On that basis, the applicant now seeks compensation for the unfulfilled portion of the contract. The relief sought is framed in terms of the Employment Equity Act.<sup>1</sup>

*The respondent's case*

- [6] The respondent contended that the applicant sought to amend her claim approximately six years after it was initially filed. This amendment followed the applicant's persistent election to pursue specific performance rather than contractual damages. The respondent noted that this persistence continued despite its submission in the practice note dated 17 May 2024, wherein it was contended, inter alia, that specific performance had become impossible due to the expiry of the disputed contract. In support of its position, the respondent relied on the authority of *Cook v Morrison and Another*,<sup>2</sup> which underscores the legal consequences of undue delay and the limitations of amending claims under such circumstances.<sup>3</sup> It was argued that this entailed that the applicant had waived the right to cancel the contract and claim damages.
- [7] The respondent further contended that the applicant's claim for contractual damages had prescribed, as the alleged breach occurred more than six years prior. It argued that a party cannot validly cancel a contract for non-performance at a time when the underlying obligation has already prescribed. In this case, the cancellation was introduced through an amendment to include a claim for contractual damages, even though the obligation had already prescribed. The respondent submitted that such an amendment is impermissible in law.

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<sup>1</sup> Act 55 of 1998, as amended.

<sup>2</sup> *Cook v Morrison and Another* [2019] ZASCA 8; [2019] 3 All SA 673 (SCA); 2019 (5) SA 51 (SCA) at para 30.

<sup>3</sup> *Cook v Morrison and Another* [2019] ZASCA 8; [2019] 3 All SA 673 (SCA); 2019 (5) SA 51 (SCA) at para 30.

- [8] The respondent further argued that the applicant failed to plead the claim for damages with sufficient particularity to enable the respondent to assess the quantum thereof. It was submitted that the amended claim is excipiable, as it does not specify the amount claimed in rands, nor does it set out the basis upon which that amount was calculated. The respondent contended that it remains unclear how the alleged breach gave rise to the damages claimed. This is because, in law, the breach must be the factual cause of the alleged loss. Accordingly, there must be an assessment of what would have occurred but for the respondent's wrongful conduct. The applicant cannot simply assert that salaries are owed for the unexpired portion of the purported contract without providing further substantiation. In addition, the applicant bears the duty to demonstrate efforts made to mitigate her loss and to claim only the residual amount, being the difference between what she would have earned under the contract and what she could reasonably have earned during the same period.

### Discussion

#### *Prescription:*

- [9] The provisions of section 12(3) of the Prescription Act<sup>4</sup> require that the creditor must know the complete cause of action for the recovery of the debt. This is when all the facts that the creditor must prove to succeed with the claim against the debtor are present.<sup>5</sup> The respondent is correct that the applicant proceeds from the incorrect basis that the claim for breach of contract is cojoined with that of contractual damages.
- [10] Recently, the Constitutional Court reinstated the principle that a claim for specific performance is mutually exclusive from a claim for damages.<sup>6</sup> It stated that when a party chooses to enforce a contract through a claim for specific performance, that legal action cannot interrupt the running of the prescription for a separate claim based on cancellation and damages arising

<sup>4</sup> Act 68 of 1969.

<sup>5</sup> *Food and Allied Workers Union obo Gaoshubelwe v Pieman's Pantry (Pty) Limited* [2018] ZACC 7; 2018 (5) BCLR 527 (CC); [2018] 6 BLLR 531 (CC); (2018) 39 ILJ 1213 (CC) at para 71.

<sup>6</sup> *Rademeyer v Ferreira* [2024] ZACC 24; 2025 (1) BCLR 73 (CC); 2025 (2) SA 1 (CC) at para 60.

from the same breach. These two remedies, specific performance and damages, are legally distinct and mutually exclusive.<sup>7</sup>

- [11] The law requires the innocent party to make a clear election between enforcing the contract or terminating it and claiming compensation. This principle reinforces the importance of timing and legal clarity in prescription law. A claim for damages cannot be interrupted by legal proceedings that were initiated before the debt arose. Judicial interruption under the Prescription Act only applies to debts that are already due and enforceable. Therefore, where the claim is focused solely on specific performance, it cannot interrupt the prescription for damages claim that had not yet come into existence.<sup>8</sup>
- [12] The respondent is therefore correct in asserting that a claim for specific performance is not a substitute for a claim for damages. A party must elect either specific performance or cancellation with damages. These remedies cannot be pursued simultaneously. This means that the original statement of claim could not have interrupted a debt that was not yet due and enforceable. The claim for damages in such instances arose at the time of impossibility, specifically, the date on which the contract would have terminated by effluxion of time. This is evident from the amended claim, which shows that the amendment was a consequence of the impossibility.
- [13] It follows from the objective facts that the prescription period commenced in February 2020. This conclusion is reinforced by the applicant's failure to plead an alternative date or to provide reasons why the objective facts should not be accepted as determinative. The applicant's position is further weakened by their insistence on treating the claim for damages as inseparable from the claims for breach and specific performance, despite established legal principles to the contrary. Consequently, it must be accepted that the claim for damages became prescribed in February 2023.

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<sup>7</sup> *Rademeyer* at paras 65 – 66.

<sup>8</sup> *Rademeyer* at para 69.

- [14] To further complicate matters, even if it is accepted that the applicant was permitted to amend its case on the date of trial, the respondent is correct in relying on the authority of *Cook v Morrison*.<sup>9</sup> This case supports the proposition that such amendments do not cure the defects arising from prescription or the improper formulation of the original claim.
- [15] A prolonged delay in cancelling a contract generally leads to the inference that the right to cancel has been waived. Furthermore, attempting to cancel a contract after the relevant obligations have already been prescribed raises serious legal concerns. Such a cancellation may be met with the defence that the underlying breach had already prescribed before the cancellation. In this case, a delay of approximately four years from the point at which it became necessary to amend the claim is excessive, particularly in the absence of any explanation for the delay. This is especially significant given that it was common cause that the contract was set to expire in February 2020. In those premises, the amendment of the claim is not competent since the principal claim has prescribed. The claim must accordingly be struck off the roll for want of jurisdiction. Based on the conclusion reached, the other points related to jurisdiction and exception to the pleadings are superfluous.

Costs:

- [16] The respondent argued that because the claim was brought under section 77 of the Basic Conditions of Employment Act (BCEA), the losing party should automatically be liable for costs. However, *albeit* based on precedent, this reasoning is incorrect. The Labour Court is a statutory body, and the issue of costs is governed by section 162 of the Labour Relations Act (LRA), not the BCEA.
- [17] The provisions of section 162 apply to the Labour Court as a whole, regardless of the type of dispute before it. There is no indication that the discretion it provides is limited only to matters arising under the LRA. In fact, section 77(3) of the BCEA gives the Labour Court concurrent jurisdiction with

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<sup>9</sup> *Cook v Morrison and Another* [2019] ZASCA 8; [2019] 3 All SA 673 (SCA); 2019 (5) SA 51 (SCA) at para 30.

civil courts to hear contractual employment disputes, reinforcing its role as a court of equity designed to be accessible and cost-effective.

- [18] The legislature intended to give employees the choice to bring contractual claims to this Court, and the protections outlined in the Constitutional Court's decision in *Zungu*<sup>10</sup> apply equally to such claims. In determining the issue of costs, this Court must consider both applicable legal principles and the overarching requirement of fairness. It is important to note that, when adjudicating contractual claims, this Court does not transform into a civil court. Rather, it exercises a jurisdiction conferred by statute. This statutory jurisdiction does not imply the wholesale adoption of civil court procedural norms. Instead, this Court is empowered to adjudicate contractual disputes within the framework of fairness as contemplated by the LRA.
- [19] It would be incongruous for parties who elect to litigate in a court of equity to be subjected to the rigid procedural standards of civil courts. It must therefore be accepted that, in conferring concurrent jurisdiction with civil courts, the legislature intended this Court to serve as a cost-effective and equitable alternative forum for resolving employment-related contractual disputes. Accordingly, even in matters involving contractual claims, the provisions of section 162 of the LRA remain applicable. To hold otherwise would undermine the fairness that underpins this Court's statutory mandate.
- [20] In the present matter, the applicant had a legitimate basis to seek enforcement of the alleged employment contract. The dispute centred on the enforcement of employment rights and obligations, which directly implicates the constitutional right to fair labour practices. Importantly, the matter was not determined on its substantive merits but rather on procedural grounds. Although the applicant delayed in amending her claim, she was legally represented, and any procedural missteps should be attributed to her legal representatives. It would be unjust to penalise the applicant twice, first through the dismissal of her claim on procedural grounds and again through

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<sup>10</sup> *Zungu v Premier of the Province of KwaZulu-Natal and Others* [2018] ZACC 1; (2018) 39 ILJ 523 (CC); [2018] 4 BLLR 323 (CC); 2018 (6) BCLR 686 (CC) pars 22 – 26.

an adverse costs order. On the whole, the applicant's conduct does not warrant the imposition of a punitive costs order. Accordingly, it is just and equitable that no order as to costs be made.

[21] In the premises, the following order is made.

Order:

1. The respondent's point *on prescription* is upheld.
2. The applicant's claim is struck off from the roll for want of jurisdiction.
3. There is no order as to costs.

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M. Kumalo

Acting Judge of the Labour Court of South Africa



**APPEARANCES:**

For the applicant: D. Malope, of Masondo Malope Attorneys.

For the respondent: P. Buirski, instructed by Nkadameng Attorneys.

LABOUR COURT