

IN THE LABOUR COURT OF SOUTH AFRICA

HELD AT CAPE TOWN

CASE NO: C207/2003

In the matter between:

SOLIDARITY

First Applicant
Second to further applicants

And

ESKOM HOLDINGS LIMITED

Respondent

JUDGEMENT

1. In and during July 1998 an agreement was concluded between the respondent and the first applicant, a trade union, for and on behalf of its members who held the positions of licensed operators within respondent's employ. The agreement related to the qualification for, calculation and payment of a bonus, as well as an early retirement scheme that would be applicable to the licensed operators. This agreement was reduced to writing on 2 November 1998 and was referred to as MANDIR 102.

2. On 15 January 1999 the respondent withdrew the early retirement scheme for licensed operators as contained in MANDIR 102. On the same day a joint statement was issued by the respondent and the first Applicant confirming to the licensed operators that the early retirement scheme had been withdrawn.

3. The first applicant was however aggrieved by the withdrawal of the scheme and declared a dispute in respect thereof. In terms of the agreed process to resolve grievances an internal conciliation committee was convened on 22 January 1999. At the meeting of this committee, respondent explained why the early retirement scheme had been totally withdrawn adding that those seeking early retirement could nevertheless approach management for such a benefit and their request would be considered on a case by case basis. The dispute however remained unresolved.

4. Since 22 January 1999 other than expressing dissatisfaction the applicants took no further formal steps in terms of the dispute resolution processes that applied at respondent's workplace, to have their grievance addressed.

5. Some three and a half years later on 5 August 2002 the licensed operators collectively filed a grievance alleging that the respondent had breached MANDIR 102 in relation to the early retirement scheme that was to be applicable to them. The grievance remained unresolved after being considered. Following thereon the applicant declared a dispute on 27 August 2002. Again the matter remained unresolved after a grievance meeting, which was held on 4 September 2002. A conciliation meeting followed on 25 November 2002, this also failed to resolve the dispute.

6. On 13 May 2003 about 6 months after the conciliation meeting the applicants filed their statement of claim with this Court. The relief sought by the applicants is for an order:

6.1 declaring the respondent to be bound to the early retirement scheme as set out in the MANDIR 102; and

6.2 that the respondent takes all the necessary steps to implement the early retirement scheme as set out in MANDIR 102

7. The respondent in opposing the application has raised two preliminary points in the form of a special plea, upon which it seeks for this Court to dismiss the application. The first is that the applicants claim has prescribed and second, that this Court should dismiss the application because of the unreasonable delay in prosecuting this action.

8. With regard to the issue of prescription the respondent relies on sections 12(1) and (3) of the prescription Act 68 of 1969 (the Act). The said sections provide as follows:

"12 When prescription begins to run-

- 1) *Subject to the provisions of subsections (2) and (3), prescription shall commence to run as soon as the debt is due.*
- 2) *...*
- 3) *A debt shall not be deemed to be due until the creditor has knowledge of the identity of the debtor and of the facts from which the debt arises: Provided that a creditor shall be deemed to have such knowledge if he could have acquired it by exercising reasonable care".*

9. Relying on the decisions of **Drennan Maund and Partners v Rennington**

Town Board 1998 (3) SA 200 (SCA) and **Cape Town Municipality and Another v Allianz Insurance Co Ltd** 1990 (1) SA 311(C) at 331, respondent argues that the word debt in the Act must be given a meaning which broadly equates to mean “claim”

10. Arguing that the word “debt” should be given the same meaning as the word “claim” the respondent contends that in seeking an order declaring it to be bound to and implement the terms of MANDIR 102 in relation to the early retirement scheme for licensed operators, applicants seeks enforcement of a right, this relief – the enforcement – is a claim and it is a claim that is no different to claiming payment of a debt and as such the claim falls to be dismissed because it has prescribed in terms of the Act.

11. The applicants disagree. According to the applicants the relief they seek is a declaratory order which is a claim for specific performance. Seeking enforcement of a contract which was breached unilaterally cannot, so they continue, amount to payment of a debt as contemplated by the Act and the issue of prescription therefore does not arise.

12. While it is so that applicants pray for a declarator the purpose for seeking this order is to ensure that the early retirement scheme that the respondent had agreed to is enforceable. In effect applicants argue that once the first applicant and the respondent concluded MANDIR 102 certain rights accrued to their members and respondent’s unilateral action in reneging on that agreement is of no legal force. The applicants contend that they are entitled to seek implementation of the scheme agreed to at any time and that prescription does not apply. The argument is that where an agreement is properly concluded and relates to the creation of a right and then unilaterally cancelled by one of the parties and such cancellation is communicated to the other party, the other (innocent) party, is not obliged to act thereon at the pain of the right created in terms of the agreement prescribing because rights even where there are created by agreement cannot prescribe, only claims can. The order sought by the applicants so they argue is not for an enforcement of a claim but a declarator granting of which shall merely ensure that the rights agreed to by the respondent in favour of the second to further applicants still exist.

13. The applicants are correct in their submissions with regard to the applicability of the Prescription Act to a right as opposed to a claim. However viewing this application simply as a declarator without taking into account the consequential relief that would result if the order sought is granted, would be to defeat the whole purpose of entertaining this matter. If this Court is required to disregard that the logical and real purpose for the seeking of the order is only to claim the early retirement benefit why should this Court entertain this application at all. This Court will not entertain a matter that is only of academic interest unless there is some compelling reason to do so. This is not one such case. As there is a claim or claims that will flow from the declarator sought it is not appropriate for this court to

consider the declarator sought without taking into account the consequence of granting it –that is if the consequence of granting the declarator is only that the applicants would now be able to enforce a claim or claims then what is sought under the guise of a declarator is a right to proceed with a claim.

14. I am in agreement that what applicants seek is for an enforcement of a right to claim early retirement benefits and this claim amounts to an enforcement of a debt as defined in the Act. As the claim amounts to a debt the Prescription Act is applicable thereto.

15. In terms of the Act if the applicants failed to prosecute their claim within three years of it being due their claim has prescribed and cannot be enforced. The respondent is thus required to satisfy this Court that the applicants claim was due more than three years before the action was launched. Respondent contends that the applicants claim became due at the very latest on 15 January 1999 when the withdrawal of the early retirement scheme was communicated to the applicants. This is not correct. On 15 January 1999 it was only the right to the scheme that was withdrawn. There is no evidence before me to the effect that at the same time as the right to the scheme had been withdrawn any of the licensed operators were entitled to claim the benefit that the early retirement scheme had created. The claim or the “debt” is the enforcement of the benefits of the scheme, not simply the creation of it. The right that the agreement created does not fall under the purview of the Prescription Act only the benefit created by that right. Since there is nothing placed before this Court as to when that benefit became/was due the time limit as provided in the provisions of the Act cannot be calculated.

16. Respondent’s first special plea must therefore fail.

17. Turning next to the issue of unreasonable delay. The applicants have allowed a period of more than four years to lapse before launching this application. The respondent argues that the delay in launching this application is therefore so unreasonable that it should not be entertained particularly since the applicant has given no reason for the delay.

18. The applicants on the other hand argue that there is no reason to explain why the application had been launched only now as there is no requirement that it is obliged to launch its application within any prescribed period or as respondent argues within reasonable time.

19. The Labour Court has in respect of any matter arising from the employment relationship between two or more parties the same power as the provincial division of the High Court [see s157(2) and s151(2) of the Labour Relations Act] this includes the inherent power to dismiss an application or action, the prosecution of which is unreasonably delayed. The approach that the Court adopts in determining whether or not to dismiss an application or action by reason of unreasonable delay is in the first instance, to consider the period of delay and the reasons therefore and thereafter the prejudice that will be caused to the respondent/defendant if the

application or action is allowed to continue. If the period of delay is substantial and unexplained or the explanation totally inadequate or totally unsatisfactory then the Court need not enquire into the issue of prejudice to the respondent or the defendant. Where the explanation is adequate or satisfactory or even one which is not totally unsatisfactory then the issue of prejudice is crucial as that will determine whether or not the application or action should be dismissed.

20. In the present matter the respondent withdrew the early retirement scheme on 15 January 1999 –just over two months after it was reduced to writing—applicants raised a grievance in respect thereof and the grievance was unsuccessfully dealt with on 22 January 1999. From 22 January until 5 August 2002, that is for some three and a half years applicants took no formal steps at all to pursue the matter further. On 5 August they again filed a grievance and then declared a dispute on 27 August 2002 this dispute remained unresolved following a conciliation meeting held on 25 November 2002. Applicants then waited a further six months before they launched the present proceedings.

21. Not only is the delay in prosecuting this action by the applicants substantial they fail to provide any explanation for their delay. The first applicant is a trade union and by its nature an expert on the actions it needs to take to protect its member's interest, in any event it does not claim that it was uncertain of the actions it was required to take. The second to further applicants like the first applicant were aware of the respondent's withdrawal of the early retirement scheme from 15 January 1999 they also took no steps to prosecute this action nor do they explain the reason for their failure to do so. The fact that the applicants may have repeatedly raised the issue with senior officials of the respondent does not assist them as they were well aware of the processes with which they were obliged to comply.

22. The delay of prosecuting this action, that of nearly four and a half years after being informed of the withdrawal of the early retirement scheme is as stated substantial and the explanation—insofar as it is provided—is totally unsatisfactory and as such the application is liable to be dismissed.

23. With respect to cost I see no reason why cost should not follow the result.

24. In the result the second point raised by the respondent in the form of a special plea is upheld and the application is dismissed with costs.

WAGLAY J

DATE OF JUDGEMENT: 19 JANUARY 2005.

FOR THE APPLICANTS: ADV S C KIRK-COHEN instructed by De Lange Attorneys.

FOR THE RESPONDENT: ADV A SCHIPPERS SC instructed by J Ramages
Attorneys.