

# DOES THE PRESCRIPTION ACT APPLY TO CLAIMS UNDER THE LABOUR RELATIONS ACT?

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## SUMMARY

The applicability or otherwise of the Prescription Act 68 of 1969 to claims under the Labour Relations Act 66 of 1995 (LRA) is a hot topic in contemporary labour law. In particular, questions as to whether an arbitration award, an unfairly dismissed employee's claim, an order of reinstatement, or a claim for arrear wages could be thrown out of court for having prescribed have been encountered in at least four recent decisions of the Constitutional Court of South Africa – *Myathaza v JHB Metropolitan Bus Service (SOC) Ltd t/a Bus Metrobus* 2018 (1) SA 38 (CC); *Mogaila v Coca-Cola Fortune (Pty) Ltd* 2018 (1) SA 82 (CC); *FAWU obo Gaoshubelwe v Pieman's Pantry (Pty) Ltd* (2018) 39 ILJ 1213 (CC); and *NUMSA obo Fohlisa v Hendor Mining Supplies (A Division of Marschalk Beleggings) (Pty) Ltd* (2017) 38 ILJ 1560 (CC). Given the environment in which labour disputes take place, and that expedition is of the essence in a regulated dispute resolution process, one could conceive of a reinstatement claim arising from a labour dispute being caught by the general limitation on lodging civil claims after three years. The rationale for limiting the period during which civil claims may be made ought, *mutatis mutandis*, also to apply to matters arising from employment claims – especially if it is borne in mind that expedition is at the heart of the settlement of labour disputes. In the absence of any mention of a time-bar for laying reinstatement claims under the LRA (except for the 30 days for referring a dispute of unfair dismissal or 90 days for unfair labour practice to a bargaining council or the Commission for Conciliation, Mediation and Arbitration (CCMA) (s 191)), it is not surprising that the applicability or otherwise of the prescription period of three years has been in issue in a number of reinstatement claims.

## 1 INTRODUCTION

Since claims for unfair dismissal, reinstatement and accompanying arrear wages are matters regulated by the Labour Relations Act 66 of 1995 (LRA), one might, at first blush, consider them to be outside the range of

the prescription legislation.<sup>1</sup> On further reflection, the question becomes whether such a claim could linger indefinitely. Could the dismissed employee leave the issue of his or her unfair dismissal claim and return to make a claim only several years later? Or is there a civil claim arising from a contractual relationship that can be allowed to remain outside the prescription period? Or are labour matters, regulated as they are by the LRA, exceptions to the law of general prescription? Given the environment in which labour disputes take place, and the time frames in which parties to such disputes are meant to act in a literally regimented process where expedition is of the essence, should one immediately conceive of an unfair dismissal claim or an order of reinstatement being in a class of its own and outside the general limitation in lodging civil claims? Or could it be argued that since labour disputes are *par excellence* civil claims, the rationale for limiting the period during which civil claims can be made ought, *mutatis mutandis*, to apply to matters arising from employment – especially if it is borne in mind that expedition is at the heart of the settlement of employment matters. Or are there reasons that labour relations matters are not covered by the prescription legislation?

Except for the 30-day requirement for referring a dispute of unfair dismissal (or 90 days for unfair labour practice) to a bargaining council or the CCMA,<sup>2</sup> there is no stipulated time-bar<sup>3</sup> for laying unfair dismissal claims under the LRA as one would find in the Prescription Act. It is therefore not surprising that the applicability or otherwise of the prescription period of three years has been raised in a number of unfair dismissal, reinstatement and other claims that have reached the Labour Court, the Labour Appeal Court, the Supreme Court of Appeal and, recently, the Constitutional Court of South Africa. Quite apart from dealing with the question whether a claim for reinstatement is subject to the Prescription Act,<sup>4</sup> the Constitutional Court has also been called upon to determine whether the applicant could enforce an arbitration award issued in his favour in terms of the LRA and whether the enforcement of the award was excluded by the intervention of the Prescription Act. The Constitutional Court not only ruled on that issue; it also delivered what was thought to be its last word on the subject.<sup>5</sup> However, the recent litigation in *FAWU obo Gaoshubelwe v Pieman's Pantry (Pty) Ltd*<sup>6</sup> (raising the question whether the Prescription Act applied to unfair dismissal claims under section 191 of the LRA) has shown that the last word on the issue might not have been heard. Accompanying the foregoing is the question whether arrear wages can be recovered as a judgment debt – that is, whether back pay arising

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<sup>1</sup> See the Prescription Act 68 of 1969.

<sup>2</sup> S 191 of the LRA.

<sup>3</sup> Except that s 145(9) of the LRA was enacted in January 2015 to provide that an "application to set aside an arbitration award in terms of this section interrupts the running of prescription in terms of the Prescription Act, 1969 (Act 68 of 1969), in respect of that award".

<sup>4</sup> *Myathaza v JHB Metropolitan Bus Service (SOC) Ltd t/a Metrobus Bus* 2018 (1) SA 38 (CC) (*Myathaza v Metrobus*).

<sup>5</sup> *Mogaila v Coca-Cola Fortune (Pty) Ltd* (2017) 38 ILJ 1273 (CC) (*Mogaila*).

<sup>6</sup> [2018] ZACC 7.

from reinstatement constitutes a judgment debt that will only prescribe after 30 years in terms of section 11(a)(ii) of the Prescription Act?<sup>7</sup>

The discussion that follows is therefore based on four questions. First, is a claim for reinstatement subject to the Prescription Act? Of relevance here are the seven questions concerning the relationship between the Prescription Act and the LRA answered by the Labour Appeal Court in *Myathaza v JHB Metropolitan Bus Service Soc Ltd t/a Metrobus*,<sup>8</sup> despite the subsequent judgment of the Constitutional Court, which arrived at a contrary conclusion. Secondly, does the Prescription Act trump an arbitration award? Here, although the Constitutional Court delivered three separate opinions on the question posed in *Myathaza v JHB Metropolitan Bus Service (SOC) Ltd t/a Metrobus*,<sup>9</sup> all three judgments agreed on the final order made in the lead judgment. Thirdly, and this arose in the most recent case of *FAWU obo Gaoshubelwe v Pieman's Pantry (Pty) Ltd*,<sup>10</sup> does the Prescription Act apply to unfair dismissal claims under the LRA? Lastly, the question that the courts had to answer in *NUMSA obo Fohlisa v Hendor Mining Supplies (A Division of Marschalk Beleggings) (Pty) Ltd*<sup>11</sup> was whether arrear wages could be recovered as a judgment debt. In order to make for a clear understanding of the discussion and the answers to the questions posed, it is important to engage first and foremost in a brief discussion of the relevant provisions of the Prescription Act.

## 2 A BRIEF NOTE ON THE PRESCRIPTION ACT

It is clear from the Preamble to the Institution of Legal Proceedings Against Certain Organs of State Act 40 of 2002 that this Act would operate side by side with the Prescription Act, and that in considering an application for condonation under the 2002 Act, the court must be satisfied that the debt has not been extinguished in terms of the Prescription Act.<sup>12</sup> There is no such provision in the LRA, hence the debate on whether the provisions of the Prescription Act are applicable to claims under the LRA. While debate about the relationship between the Prescription Act and the LRA is at the centre of this enquiry, it is necessary to raise at least three preliminary issues that often arise in relation to the application of the Prescription Act, and which are inevitably encountered in further investigation of the question posed in this enquiry. The first is when the debt is due and payable, while the second question (which is literally inseparable from the first) is when the claimant become aware of the debt. Incidentally, these issues arise from the provisions of section 12(1), (2) and (3) of the Prescription Act and whenever a condonation application is made before a court in the face of an argument that the cause of action has prescribed.

<sup>7</sup> *NUMSA obo Fohlisa v Hendor Mining Supplies (A Division of Marschalk Beleggings) (Pty) Ltd* [2017] ZACC 9 par 51–52 (*NUMSA v Hendor Mining Supplies*).

<sup>8</sup> 2016 (3) SA 74 (LAC).

<sup>9</sup> 2018 (1) SA 38 (CC) (*Myathaza v Metrobus*).

<sup>10</sup> [2018] ZACC 7.

<sup>11</sup> [2017] 6 BLLR 539 (CC).

<sup>12</sup> See Okpaluba "State Liability, Statutory Timeframe and Service of Process: A Decade of Reform" 2013 76(3) *THRHR* 339 345 par 4.

## 2 1 When is the debt “due and payable”?<sup>13</sup>

The meaning of “debt”, “debtor” and “creditor” as used in section 3 of the Institution of Legal Proceedings Against Certain Organs of State Act 40 of 2002 (which is similar to the present context) has been discussed elsewhere.<sup>14</sup> Suffice it to mention the recent case of *Vembe District Municipality v Stewards and Lloyds Trading (Booyens) (Pty) Ltd*<sup>15</sup> to illustrate the meaning of “debt” in the context of this discussion. Relying on a number of previous cases,<sup>16</sup> the High Court held in *Vembe District Municipality* that the first respondent’s claim was not a “debt” as envisaged in the 2002 Act, and so it was not required to give notice in terms of section 3 of the 2002. In effect, the claim did not arise from a delictual, contractual or any other liability, nor from any act performed under or in terms of any law, or from any failure to do anything that should have been done under or in terms of any law and for which an organ of state is liable for payment of damages.

On the other hand, the claim in *Links v MEC, Department of Health, Northern Cape Province*<sup>17</sup> was clearly a delictual action based on medical negligence, which no doubt qualified as a debt. The question was whether the applicant’s claim had prescribed, and the answer turned on when the appellant became aware of the facts upon which he sought to rely or at what point he would be deemed to have known of the facts for prescription to begin to run.<sup>18</sup> This raised the question of the correct interpretation of section 12(3) of the Prescription Act. The applicant had gone to hospital with a dislocated left thumb in June 2006 and came out with not only an amputated thumb but also permanent loss of the use of his whole arm after several operations. The applicant claimed he was never informed as to why his thumb had to be amputated, nor the cause of his problems; he was also not informed of the reason he lost the use of his left arm. Although the applicant consulted Legal Aid SA in December 2006, the summons for his claim was only served on 6 August 2009. The MEC pleaded that the applicant’s claim had prescribed in terms of the Prescription Act. The Constitutional Court held that the respondent had to prove: (a) what facts Mr Links was required to know before prescription would commence; and

<sup>13</sup> The issue in *Trinity Asset Management (Pty) Ltd v Grindstone Investments 132 (Pty) Ltd* 2018 (1) SA 94 (CC) did not concern a labour relations matter; rather, it concerned when a loan agreement debt became due, thus triggering the running of prescription for the purposes of the Act. Was it the date on which the loan was advanced (in which case, the debt would have prescribed), or was it the date on which a demand was made? It was held that without stipulation as to the time of repayment, a loan was “repayable on demand”. Unless the parties agree otherwise, such a loan was repayable from the moment the advance was made and no specific demand for repayment needed to be made for the loan to be immediately due and payable.

<sup>14</sup> Okpaluba 2013 *THRHR* 339 esp. fn 18–20.

<sup>15</sup> [2014] 3 All SA 675 (SCA).

<sup>16</sup> *NICOR IT Consulting (Pty) Ltd v North-West Housing Corporation* 2010 (3) SA 90 (NWM); *D-G, Department of Works v Kovac Investments* 2010 (6) SA 646 (GNP); *Thabani Zulu & Co (Pty) Ltd v Minister of Water Affairs* 2012 (4) SA 91 (KZD).

<sup>17</sup> 2016 (4) SA 414 (CC) (*Links v MEC*).

<sup>18</sup> In his article, “The Sands of Time: Prescription and the LRA” 2015 31(1) *Employment Law* 4, Grogan J reviews the divergent opinions of the Labour Court on the issue whether prescription applies to the LRA.

(b) that he had knowledge of those facts on or before 5 August 2006.<sup>19</sup> What he might have known thereafter – that is, by the time he was discharged in August 2006 – was irrelevant to prescription.<sup>20</sup> The Constitutional Court held that in cases involving professional negligence, such as the *Links* case, a defendant had to show that the plaintiff was in possession of sufficient facts to cause him or her to seek further advice.<sup>21</sup> But Mr Links's ability to acquire the requisite knowledge was hampered by the fact that he remained in hospital until the end of August 2006, which restricted his sources of information to hospital personnel.<sup>22</sup> The respondent's failure to deny Mr Links's contention that he lacked knowledge of the cause of his condition before the end of August 2006 meant that the court was entitled to accept it.<sup>23</sup> Moreover, Mr Links could realistically only have acquired such knowledge when he was able to consult independent medical professionals – that is, after he was discharged at the end of August 2006.<sup>24</sup> His ignorance, prior to 5 August 2006, of the material facts required to institute legal proceedings meant that his claim was still alive when summons was served on 6 August 2009.<sup>25</sup>

*Links v MEC* was distinguished from the facts of the subsequent professional negligence case of *Loni v MEC, Department of Health, Eastern Cape Province*<sup>26</sup> on the grounds that in *Links* the claimant plainly required expert medical opinion in order to establish that the treatment he received was negligent; and in order to draw the causative link between the harm suffered and the negligent treatment.<sup>27</sup> While the allegations relied upon by the applicant in *Loni v MEC, EC* refer pertinently to alleged negligent acts, these allegations in essence amount to an allegation that the MEC's employees acted in breach of the contract by failing to afford the applicant appropriate treatment and care, this plainly being a term of the admitted contract.<sup>28</sup> In the judgment of the Constitutional Court, the debt claimed by the applicant arose from the breach of the contract by the employees of the MEC with regard to his care and treatment and upon his having suffered harm as a result. The focus by the applicant on his lack of knowledge of the development of osteitis was not the correct focus of the investigation in regard to this issue. The applicant, on his own evidence, had received substandard care and treatment, had suffered harm as a result and this case was, on an appropriate assessment of his evidence, plainly apparent to him long before the issue of osteitis arose and the link to such substandard care, treatment and harm being dealt with by expert medical opinion. It is not necessary for the extent of the harm to be known;

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<sup>19</sup> *Links v MEC supra* par 24.

<sup>20</sup> *Links v MEC supra* par 41.

<sup>21</sup> *Links v MEC supra* par 42 and 45.

<sup>22</sup> *Links v MEC supra* par 29.

<sup>23</sup> *Links v MEC supra* par 46.

<sup>24</sup> *Links v MEC supra* par 42, 47 and 49.

<sup>25</sup> *Links v MEC supra* par 49.

<sup>26</sup> [2018] ZACC 2 (*Loni v MEC, EC*).

<sup>27</sup> *Loni v MEC, EC supra* par 26.

<sup>28</sup> *Loni v MEC, EC supra* par 29.

the debt arises once harm has indeed been suffered.<sup>29</sup> The Constitutional Court further held:

“When the principle in *Links* is applied to the present facts, the applicant should have over time suspected fault on the part of the hospital staff. There were sufficient indicators that the medical staff had failed to provide him with proper care and treatment, as he still experienced pain and the wound was infected and oozing pus. With that experience, he could not have thought or believed that he had received adequate medical treatment. Furthermore, since he had been given his medical file, he could have sought advice at that stage. There was no basis for him to wait more than seven years to do so. His explanation that he could not take action as he did not have access to independent medical practitioners who could explain to him why he was limping or why he continued to experience pain in his leg, does not help him either. The applicant had all the necessary facts, being his personal knowledge of his maltreatment and a full record of his treatment in his hospital file, which gave rise to his claim. This knowledge was sufficient for him to act. This is the same information that caused him to ultimately seek further advice in 2011. It is clear, that long before the applicant’s discharge from hospital in 2001 and certainly thereafter, the applicant had knowledge of the facts upon which his claim was based. He had knowledge of his treatment and the quality (or lack thereof) from his first day in hospital and had suffered pain on a continuous basis subsequent thereto. The fact that he was not aware that he was disabled or had developed osteitis is not the relevant consideration.”<sup>30</sup>

## 2.2 Knowledge of the debt<sup>31</sup>

Section 11(d) of the Prescription Act provides that a debt prescribes after three years, while section 12(1) provides that prescription shall begin to run as soon as the debt is due.<sup>32</sup> In terms of section 12(3), a debt shall not be deemed to be due until the creditor has knowledge of the identity of the debtor and the facts from which the debt arises – provided that a creditor is deemed to have that knowledge if he could have acquired it by exercising due care. In *Mtokonya v Minister of Police*,<sup>33</sup> the plaintiff did not institute an action within three years as he was enjoined to do in terms of section 11(d). In July 2013, he was advised by his attorney that he had a cause of action against the defendant but summons was filed only on 23 April 2014 – whereas his arrest and detention (wherefor he filed the claim for damages) took place in September 2010. The plaintiff’s argument was that even though he did know the identity of the debtor and the material facts giving rise to the debt at the time he was released from detention in September 2010, he did not know that he had a legal remedy against the defendant. The question for determination turned on whether knowledge of a legal remedy was required for prescription to run.

<sup>29</sup> *Loni v MEC, EC supra* par 30. See also *Harker v Fussell* 2002 (1) SA 170 (T) 173E–174B.

<sup>30</sup> *Loni v MEC, EC supra* par 34–35.

<sup>31</sup> It was held in *Yarona Healthcare Network v Medshield* [2017] ZASCA 116 par 61–62 that actual or constructive knowledge is necessary for prescription to start running.

<sup>32</sup> In *Frieslaar NO v Ackerman* [2018] ZASCA 3 par 27, it was held that the obligation of the respondents to pay transfer costs and other related costs in the sale agreements, constitutes a debt as contemplated in s 10(1) of the Prescription Act, and as a general principle, prescription commences running once the creditor has acquired the right to claim the debt as contemplated in s 12(1) of the Act.

<sup>33</sup> [2015] ZAECMHC 67.

The courts have all along tried to distinguish between innocence and negligence as the test for a plaintiff's inaction and have focused on the reasonableness of the plaintiff's conduct having regard to the peculiar circumstances in which the plaintiff finds him or herself.<sup>34</sup> For instance, in *MEC for Education, KZN v Shange*,<sup>35</sup> although a rural learner who was injured by his teacher in school had knowledge of the material facts from which the cause of action arose, he did not know the identity of the debtor, nor was he reasonably expected to know the debtor, until sometime later. In *McCleod v Kweyiya*,<sup>36</sup> a minor injured in 1988 could not have obtained the knowledge that her claim against the Road Accident Fund (RAF) had been settled by her attorney for a significantly low amount of damages until 2009 when she was 25 years of age. It was held in both cases that a three-year period of prescription was delayed by the fact that the plaintiffs were ignorant of the identity of the debtor. In addition, the plaintiff in *McCleod* was also ignorant of the fact that the attorney who settled her claim was liable towards her to the extent of the damages not recovered from the RAF. In the case of *Mtokonya*, the plaintiff's case turned to be determined on whether knowledge of a legal remedy was required for prescription to run. The plaintiff did acquire knowledge that the defendant was the arrestor as well as that the arrest and detention were not justified but did nothing about it. The legal advice he later obtained to the effect that he had a right to institute a claim for damages against the defendant was a legal conclusion drawn in July 2014 based on the facts already in existence in September 2010. In these circumstances, held Nhlangulela ADJP, it was a negligent, rather than innocent, inaction on the part of the plaintiff to allow prescription of his claim to run. It follows, therefore, that the answer to the question posed is that knowledge of a legal remedy or conclusion does not affect prescription.<sup>37</sup>

The question presented before the Constitutional Court in *Mtokonya v Minister of Police*<sup>38</sup> was whether section 12(3) of the Prescription Act requires a creditor to have knowledge that the conduct of the debtor giving rise to the debt was wrongful and actionable before prescription may start running against the creditor.<sup>39</sup> In the majority judgment read by Zondo J (now CJ), it was clearly stated that section 12(3) does not require the creditor to have knowledge of any right to sue the debtor nor does it require him or her to have knowledge of legal conclusions that may be drawn from "the facts from which the debt arises". The established law is that the facts

<sup>34</sup> Cf the situation in *Makhele v Commander, Lesotho Defence Force* [2017] LSHC 10 par 29 where Mahase J held that the plaintiff's delay in instituting proceedings in 1999 was not due to any delay on his part but as a result of the non-availability of the proceedings of the court martial that was initiated in September 1997 and were kept by the defendant's officers. So, the plaintiff's action for unlawful dismissal or termination of his commission from the LDF had not prescribed.

<sup>35</sup> 2012 (5) SA 313 (SCA).

<sup>36</sup> 2013 (6) SA 1 (SCA).

<sup>37</sup> *Mtokonya v Minister of Police* *supra* par 14. See also *Claasen v Bester* 2012 (2) SA 404 (SCA); *Yellow Star Properties v MEC, Department of Planning and LG* [2009] 3 All SA 475 (SCA) par 37; *Van Staden v Fourie* 1989 (3) SA 200 (A) 216E; *Truter v Deysel* 2006 (4) SA 168 (SCA) par 20.

<sup>38</sup> 2017 (11) BCLR 1443 (CC) (*Mtokonya CC*).

<sup>39</sup> *Mtokonya CC* *supra* par 1.

from which the debt arises are the facts that a creditor would need to prove in order to establish the liability of the debtor.<sup>40</sup> Requiring “the facts from which the debt arises” is not a requirement for knowledge of a legal opinion, or of legal conclusions or that the creditor has a legal remedy.<sup>41</sup> By referring to knowledge of the facts, the subsection is distinguishing what is required from a question of law or a value judgement.<sup>42</sup> The majority declined the invitation by the applicant’s counsel to hold that the meaning of section 12(3) (a debt ... shall not be deemed to be due until the creditor has knowledge of ... the facts from which the debt arises) includes that the creditor must have knowledge of legal conclusions – that is, knowledge that the conduct of the debtor was wrongful and actionable. Section 12(3) does not support that proposition because, first, it refers to knowledge of the facts from which the debt arises, which is apart from knowledge of identity of the debtor. Secondly, to hold otherwise would render the law of prescription wholly ineffective.<sup>43</sup>

### 3 DOES THE PRESCRIPTION ACT APPLY TO LABOUR DISPUTES?

It was held in *Fredericks v Grobler NO*<sup>44</sup> that the extinctive prescription envisaged in the Prescription Act applies to employment issues<sup>45</sup> and that a debt would, in the context of an unfair dismissal claim, mean that the respondent had an obligation not to dismiss the applicant unfairly. The applicant in this case had referred a dispute to the bargaining council 10 years after he learnt that he had been recommended for promotion, but that nothing was done about it. The respondent contended that the applicant’s claim was due at the latest by September 2001 when the commissioner issued the certificate that it had not been able to settle the dispute. To that extent, it was argued, the debt that was due had become prescribed, as prescription began to run as soon as the applicant acquired the right to institute proceedings against the respondent in terms of section 191(1) of the LRA.<sup>46</sup> In deciding the question whether the claim of the

<sup>40</sup> *Mtokonya CC supra* par 36; *Links v MEC supra* par 39; *Truter v Deysel supra* par 16–19.

<sup>41</sup> *Mtokonya CC supra* par 37.

<sup>42</sup> *Mtokonya CC supra* par 38.

<sup>43</sup> *Mtokonya CC supra* par 62–63. In *Mmangweni v Minister of Police* [2018] ZAECMHC 7 par 5, 9–11, 14–15, the Minister had argued that the plaintiff knew about the existence of the debt; the identity of the debtor; and the facts giving rise to the debt. The Minister argued further that ignorance of a right to claim compensation against the defendant does not stop the prescription period from running; and that s 11(d) of the Act was not unconstitutional as contested by the plaintiff. It was held that lack of a legal remedy, as in the present case, does not stop the prescription period from running. The court in *Mmangweni* distinguished *MEC for Education, KZN v Shange* 2012 (5) SA 313 (SCA) on the facts and, it was held that the facts proved on a preponderance of probabilities that the plaintiff’s delay in instituting his claim was unreasonable. The advice the plaintiff relied upon was the equivalent of what the Constitutional Court held did not fit into either the first or the second part of s 12(3) in *Mtokonya CC*.

<sup>44</sup> [2010] 6 BLLR 644 (LC) par 22.

<sup>45</sup> *Uitenhage Municipality v Molloy* 1998 (2) SA 735 (SCA); *Mpanzama v Fidelity Guards Holding (Pty) Ltd* [2000] 12 BLLR 1459 (LC); *Cape Town Municipality v Allie NO* 1981 (2) SA 1 (C).

<sup>46</sup> *Fredericks v Grobler NO supra* par 18.

applicant had already prescribed, Mohahlehi J referred to the judgment of Khampepe AJA in the Labour Appeal Court in *Solidarity v Eskom Holdings (Pty) Ltd*,<sup>47</sup> which replicated that of the SCA in *Truter v Deyse*<sup>48</sup> to the following effect:

“A debt is due in this sense, when the creditor acquires a complete cause of action for the recovery of debt, that is, when the entire set of facts which the creditor must prove in order to succeed with his or her claim against the debtor is in place or in other words when everything has happened which would entitle the creditor to institute action and to pursue his or her claim.”<sup>49</sup>

It was held that available evidence indicated that the applicant was aware that he had a claim all along or, at most, ought reasonably to have been aware of it, but he failed to institute a claim within the period prescribed by the Prescription Act.<sup>50</sup>

In another case, *FAWU v Country Bird*,<sup>51</sup> Steenkamp J had to consider whether the union’s claim had prescribed owing to the union’s excessive delay in prosecuting the claim as it brought the unfair dismissal claims consequent upon an unprotected strike that took place almost six years previously. The Labour Court judge endorsed the previous ruling of the court in *Mpanzama v Fidelity Guards*<sup>52</sup> where, applying the provisions of section 11(d) of the Prescription Act, Pillay J held that the Prescription Act applied to the disputes arising from the LRA. In that case, it was held that section 143, read with section 158(1)(c) of the LRA, and whatever the rationale for the doctrine of prescription or limitation of actions might be, the LRA compels the effective resolution of disputes in its section 1(d)(iv); and that this implies that labour disputes must be resolved or finalised expeditiously and that it would not be inconsistent to apply the Prescription Act to sections 143 and 158(1)(c) of the LRA.<sup>53</sup> Referring to the provisions of section 15 of the Prescription Act, Steenkamp J further held:

“The phrase ‘any document whereby legal proceedings are commenced’ must surely include the delivery of a statement of claim in terms of rule 6 (read with s 191 of the LRA). And a claim for reinstatement or compensation in terms of the LRA must also be envisaged under the meaning of ‘debt’ in the Prescription Act. As Prof Max Loubser<sup>54</sup> has pointed out, the term ‘debt’ has a wide and general meaning and the three-year prescription period in terms of section 11(d) of the Prescription Act applies to any liability of whatsoever kind, whether contractual, delictual or otherwise. Therefore, by referring the matter to the Labour Court and delivering a statement of claim in terms of rule 6, extinctive prescription of the union’s claim was clearly interrupted.”<sup>55</sup>

<sup>47</sup> (2008) 29 ILJ 1450 (LAC).

<sup>48</sup> 2006 (4) SA 168 (SCA) par 15.

<sup>49</sup> *Solidarity v Eskom Holdings (Pty) Ltd supra* par 26.

<sup>50</sup> *Fredericks v Grobler NO supra* par 36 and 38.

<sup>51</sup> (2012) 33 ILJ 865 (LC).

<sup>52</sup> [2010] 12 BLLR 1459 (LC) par 9–10.

<sup>53</sup> *FAWU v Country Bird supra* par 6–7.

<sup>54</sup> See Loubser *Extinctive Prescription* (1996) 43.

<sup>55</sup> *FAWU v Country Bird supra* par 9.

#### 4 IS A CLAIM FOR REINSTATEMENT SUBJECT TO THE PRESCRIPTION ACT?

Prior to the case of *Myathaza v JHB Metropolitan Bus Service Soc Ltd t/a Bus Metrobus*,<sup>56</sup> in which at least seven questions concerning the relationship between the law of prescription and the LRA were raised, the LAC had dealt with prescription claims under the LRA in at least three earlier instances: (a) *Solidarity v Eskom Holdings*;<sup>57</sup> (b) *SA Post Office Ltd v CWU*;<sup>58</sup> and (c) *Sondorp v Ekurhuleni Metropolitan Municipality*.<sup>59</sup> In both the *Solidarity* and *SA Post Office* cases, it was held that the employees' claims brought in terms of the LRA had prescribed in terms of the Prescription Act. These cases did not deal with arbitration awards or specifically with the situation where prescription was raised as a defence to defeat an employee's attempt to enforce an arbitration award after review had been brought to have it set aside.

However, in *Sondorp*, the question was whether the claim for reinstatement had prescribed in terms of the relevant provisions of the Prescription Act. Relying on the Labour Court judgment in *Gaoshubelwe v Pie Man's Pantry (Pty)*,<sup>60</sup> it was held that any claim of unfair dismissal is a debt contemplated by the Prescription Act. However, it was argued that the Labour Court was wrong to have held as it did in *Gaoshubelwe* that prescription was interrupted by the initiation of the process through the referral to the CCMA, in that the Labour Court had failed to take into consideration the provisions of section 15 of the Prescription Act, which dealt with the interruption of prescription under certain conditions.<sup>61</sup> Ndlovu JA (Zondi and Musi AJJA concurring) held that the issue before the court was about the application for an amendment of the original statement of claim, and not whether the claim for reinstatement had become prescribed, or whether the running of prescription would have been interrupted in terms of section 15 of the Prescription Act. Like the allegation of discrimination raised by the appellants in the proposed amendments, the defence of prescription raised by the municipality is a triable issue that also deserved a proper ventilation and consideration at trial; it was thus premature to deal with it at that stage.<sup>62</sup> Even so, the additional facts proposed to be introduced in terms of the amendments were part and parcel of the original cause of action and merely represent a fresh quantification of the original claim.<sup>63</sup> It followed that the amendments would not render the appellants' claim a new right of action and, thus, the defence of prescription would

<sup>56</sup> 2016 (3) SA 74 (LAC) (*Myathaza*).

<sup>57</sup> *Supra*.

<sup>58</sup> [2013] 12 BLLR 1203 (LAC).

<sup>59</sup> [2013] ZALAC 13.

<sup>60</sup> (2009) 30 ILJ 347 (LC) par 17.

<sup>61</sup> *Sondorp v Ekurhuleni Metropolitan Municipality supra* par 67–68.

<sup>62</sup> *Sondorp v Ekurhuleni Metropolitan Municipality supra* par 70–71.

<sup>63</sup> Per Corbett JA, *Evins v Shield Insurance Co Ltd* 1980 (2) SA 814 (A) 836D–E; *Dladla v President Insurance Co Ltd* 1982 (3) SA 198 (A) 199E–G. See also *Wigan v British Traders Insurance Co Ltd* 1963 (3) SA 151 (W); *Schnellen v Rondalia Assurance Corporation of SA Ltd* 1969 (1) SA 517 (W); *Lampert-Zakiewicz v Marine and Trade Insurance Co Ltd* 1975 (4) SA 597 (C).

probably not succeed.<sup>64</sup> In effect, the running of prescription would have been interrupted because the right of action sought to be enforced by the appellants in the proposed amended statement of case is recognisable as the same or substantially the same right of action as that disclosed in the original statement of case.<sup>65</sup> Since the amendments were mere elaboration of allegations in the original statement of case, the appellants had demonstrated that they had something deserving of consideration<sup>66</sup> such that the court *a quo* was in error not to have allowed their proposed amendments.<sup>67</sup>

#### 4 1 ***Myathaza v JHB Metrobus (LAC)***<sup>68</sup>

This case was a consolidation of three appeals from the Labour Court, all of which were arbitration awards<sup>69</sup> made before 1 January 2015 and were decided on the LRA as it was before section 145 was amended by the insertion of subsection (9) into that section and which only applies to arbitration awards made after that date. Three issues were common to all three cases, namely: (a) whether the Prescription Act applied to arbitration awards made in terms of the LRA; (b) what period of prescription was applicable to such arbitration awards; and (c) whether an application brought to review and set aside an arbitration award interrupts the running of prescription, or otherwise constitutes an impediment to the running of prescription as contemplated in section 13(1) of the Prescription Act. In respect of two of the matters, further issues arise – that is, whether the certification of an award as contemplated in section 143(3) of the LRA has an effect on the running of prescription; and whether the issue of a warrant of execution on the strength of a certified arbitration award has an effect on the running of prescription. The last issue to be determined by the court was whether, having regard to the respective facts of each matter, the appeals ought to be upheld.

<sup>64</sup> *Sondorp v Ekurhuleni Metropolitan Municipality supra* par 73.

<sup>65</sup> *Sondorp v Ekurhuleni Metropolitan Municipality supra* par 74. See also *FirstRand Bank Ltd v Nedbank (Swaziland) Ltd* 2004 (6) SA 317 (SCA) par 4; *Churchill v Standard General Insurance Co Ltd* 1977 (1) SA 506 (A) 517B–C; *CGU Insurance Ltd v Rumdel Construction (Pty) Ltd* 2004 (2) SA 622 (SCA) 26H–27B; *Mntambo v RAF* 2008 (1) SA 313 (W).

<sup>66</sup> *Ciba-Geigy (Pty) Ltd v Lushof Farms (Pty) Ltd* 2002 (2) SA 447 (A) 462J–463B, 464E–F/G.

<sup>67</sup> *Sondorp v Ekurhuleni Metropolitan Municipality supra* par 75–76.

<sup>68</sup> *Supra*.

<sup>69</sup> *Myathaza v JHB Metropolitan Bus Service (SOC) Ltd t/a Bus Metrobus supra*; *Mazibuko v Concor Holdings (Pty) Ltd supra*; *Cellucity (Pty) Ltd v Communication Workers Union obo Peters* 2016 (3) SA 74 (LAC). In other words, the LAC considered the appeal together with two matters that concerned the same issue, but which had reached different conclusions. For instance, in *Concor Holdings (Pty) Ltd v Mazibuko* (2014) 35 ILJ 477 (LC) par 29, it was held that the Prescription Act was applicable and that the award in favour of the employee had prescribed after three years. In *Cellucity (Pty) Ltd v Communication Workers Union obo Peters* [2014] 2 BLLR 172 (LC) par 21, the Labour Court held that the Prescription Act was inconsistent with the LRA and that its application thereof would create inequalities between litigants using different routes for their disputes and furthermore would be unworkable where disputes moved between tribunal and court and *vice versa*.

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In a judgment delivered by Coppin JA, the LAC extensively deliberated upon the issues and questions raised and responded as follows:

- (i) In terms of section 16(1) of the Prescription Act, its provisions applied to “any debt” unless they were inconsistent with the provisions of another Act. Generally, arbitration awards pertaining to unfair dismissals, in which compensation and/or reinstatement with or without back pay are awarded, should constitute “debts” as contemplated in the Prescription Act. Since the LRA made no provisions regarding the imposition of a prescriptive period in respect of the execution or enforcement of arbitration awards, there were no inconsistencies between the LRA and the Prescription Act in this regard. It follows that on a proper construction of section 16(1) of the Prescription Act, the provisions of that Act applied to the LRA arbitration awards.<sup>70</sup>
- (ii) The prescription period applicable to the LRA arbitration awards was dependent on whether an arbitration award constituted “a judgment debt” (in which case a 30-year prescription period would be applicable) or a simple “debt” (in which case a three-year prescriptive period would be applicable). To give the term “judgment debt” in the Prescription Act a meaning that included “arbitration awards” made under the LRA would unduly strain the language of the Prescription Act. Arbitration awards made under the LRA differ in significant respects from orders or judgments of the Labour Court. The latter clearly fell within the meaning “judgment debt”, while generally an arbitration award under the LRA did not, but satisfied the definitional criteria of a mere “debt” under that Act. The other categories of “debt” in the Prescription Act were clearly not applicable. Accordingly, a three-year prescriptive period was generally applicable to such arbitration awards (that is, the debts embodied in them).<sup>71</sup>
- (iii) The lack of certification of an award in terms of section 143(3) of the LRA did not mean that the award, or more specifically the “debt” embodied in the award, was not due. Certification had nothing to do with whether the award was due or not but was part of the process of executing an award as if it were an order of the Labour Court. Compliance with the award was not delayed pending certification. Performance by the debtor of the obligation(s) embodied in the award was not dependent upon or subject to the certification contemplated in section 143 of the LRA.<sup>72</sup>
- (iv) Although obtaining a warrant of execution may be a necessary step to obtain satisfaction of the award, it did not interrupt the running of the prescription in respect of the award because it was not a “process” as envisaged in section 15 of the Prescription Act (which dealt with the judicial interruption of prescription).<sup>73</sup>

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<sup>70</sup> *Myathaza supra* par 22, 42–44.

<sup>71</sup> *Myathaza supra* par 46, 53–54.

<sup>72</sup> *Myathaza supra* par 61–63.

<sup>73</sup> *Myathaza supra* par 64.

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- (v) The reliance on section 13(f) of the Prescription Act – that there would be a delay in the case where “the debt is the object of a dispute subjected to arbitration” – was misplaced. This is because an arbitration award itself was a debt but was not the object of the dispute subjected to arbitration.<sup>74</sup>
- (vi) A review to set aside an award was not a “process whereby the creditor claims payment of the debt”, which in terms of section 15 of the Prescription Act would interrupt the running of prescription. On the contrary, it was a process whereby the debtor sought to set aside the debt. Such a review, therefore, would not interrupt prescription but for the amendment of section 145 of the LRA (effective from 1 January 2015), which inserted a subsection providing that “an application to set aside an arbitration award in terms of this section interrupts the running of prescription ... in respect of that award”. This, however, only applied to arbitration awards made after the commencement date of the amendment.<sup>75</sup>
- (vii) An application to make an arbitration award an order of court could be construed as a “process whereby the creditor claims payment of the debt” as contemplated by section 15(1) of the Prescription Act. By bringing such an application, the creditor was in effect asking the court to order the debtor to pay the debt (represented by the award). An application to make an award an order of court would therefore interrupt prescription by its service on the debtor. But, for it to actually and effectively interrupt prescription, the creditor would have to prosecute the claim under that process to final judgment.<sup>76</sup>

Soon after the Labour Appeal Court judgment in *Myathaza* but before the Constitutional Court judgment on appeal from that same case (discussed below), the Labour Appeal Court was urged in *FAWU obo Gaoshubelwe v Pieman's Pantry (Pty) Ltd*<sup>77</sup> to decide whether *Myathaza* was correctly decided and to overrule that judgment, an invitation which it declined. After an exhaustive analysis of the arguments presented before it by both parties to the case, Sutherland JA (Ndlovu JA and Murphy AJA concurring), held that the Prescription Act does indeed apply to all litigation under the LRA, not least of all, litigation prosecuted in terms of section 191. So, where a dismissed employee refers an unfair dismissal dispute to the Labour Court more than three years after dismissal, that claim is prescribed since the periods set for prescription of debts by the Prescription Act are not in conflict with the LRA and the three-year time limit for claiming debt applies to all claims under the LRA.

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<sup>74</sup> *Myathaza supra* par 65.

<sup>75</sup> *Myathaza supra* par 73–74.

<sup>76</sup> *Myathaza supra* par 76–77.

<sup>77</sup> (2017) 38 ILJ 132 (LAC).

## 4 2 *Myathaza v Metrobus (CC)*<sup>78</sup>

In the subsequent appeal to the Constitutional Court in *Myathaza v JHB Metropolitan Bus Service (SOC) Ltd t/a Metrobus*, the court had to determine two issues of fundamental importance – namely, whether the applicant could enforce an arbitration award issued in his favour in terms of the LRA and whether the application of the LRA to enforce the award was excluded by the intervention of the Prescription Act. Arising from the latter question are two subsidiary issues: (i) whether the arbitration award constitutes a “debt” as envisaged by section 10 of the Prescription Act; and (ii) whether the running of prescription was interrupted.<sup>79</sup> The employer was made to reinstate the employee, Sizwe Myathaza, who had been fired more than six years before, after it had failed to review an arbitration award that was in the employee’s favour. The arbitration award issued on 17 September 2009 also ordered that the employee be reinstated with back pay. This was now made an order of the Labour Court. It was held that the Prescription Act did not apply to Myathaza’s matter. While all three judgments came to the conclusion that the appeal should succeed and that the judgments of the LC and LAC should be set aside, each judgment gave a different reason for reaching that conclusion.

### 4 2 1 *The first judgment in Myathaza (CC)*

In the lead judgment of Jafta J (with which Nkabinde ADCJ, Khampepe and Zondo JJ concurred), it was held that an award issued at the conclusion of arbitration represents the resolution of the dispute.<sup>80</sup> Jafta J found the Prescription Act to be inconsistent with the provisions of the LRA having regard to section 16(1), which delineates the reach of the prescription regime established by the Act. Bearing in mind the judicial obligation in section 39(2) of the Constitution, the word “inconsistent” must be ascribed a meaning that avoids limiting the right of access to dispute resolution forums established by the LRA to give effect to the fair-labour-practice rights guaranteed in section 23 of the Constitution.<sup>81</sup> Jafta J stated:

<sup>78</sup> 2018 (1) SA 38 (CC); (2017) 38 ILJ 527 (CC) (*Myathaza v Metrobus*).

<sup>79</sup> *Myathaza v Metrobus supra* par 21.

<sup>80</sup> *Myathaza v Metrobus supra* par 24.

<sup>81</sup> See *NUMSA v Hendor Mining Supplies (A Division of Marschalk Beleggings) (Pty) Ltd* (2017) 38 ILJ 1560 (CC) par 8 where the court was considering whether it had jurisdiction to grant leave to appeal in circumstances not totally dissimilar to the present. Madlanga J held that holding that a claim has prescribed implicates the right of access to court in terms of s 34 and that, quintessentially, is a constitutional issue – *RAF v Mdeyide* 2011 (2) SA 26 (CC) par 6; *Links v MEC, Department of Health, Northern Cape Province* 2016 (4) SA 414 (CC) par 22; *Makate v Vodacom (Pty) Ltd* 2016 (4) SA 121 (CC) par 90–91; *Mtokonya v Minister of Police* [2017] ZACC 33 par 9; *Myathaza v Metrobus supra* par 18. Further, an application such as the present that requires the court to determine the effect of retrospective reinstatement in terms of s 193(1)(a) of the LRA and the resultant need to pay arrear remuneration is also a constitutional issue – *TAWU of SA v PUTCO Ltd* 2016 (4) SA 39 (CC) par 28; *City Power (Pty) Ltd v Grinpal Energy Management Services (Pty) Ltd* (2015) 36 ILJ 1423 (CC) par 14 – because the LRA was promulgated to give effect to the constitutional right to fair labour practices.

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“But if ‘inconsistent’ is reasonably capable of an interpretation which over and above that promotes those guarantees, we are duty bound to choose the latter construction. In the context of the Constitution, inconsistency is given a wider meaning which goes beyond contradiction or conflict. Legislation or conduct is taken to be inconsistent with a provision in the Constitution if it differs with a constitutional provision. Sometimes this arises from the overbroad language of a statute.”<sup>82</sup>

Relying on *RAF v Mdeyide*,<sup>83</sup> where the court had held that the differences between the Prescription Act and the Road Accident Fund Act 56 of 1996 established the inconsistency that excluded the application of the Prescription Act to claims under the RAF Act, the court in *Myathaza* held that it is enough if there were material differences between the two pieces of legislation. It held further that the meaning of inconsistency adopted in *Mdeyide* imposes less restriction on the guarantee to have access to cheaper and expeditious dispute resolution forums established specifically for settling labour disputes in a manner that promotes the object of the Bill of Rights.<sup>84</sup> The Prescription Act does not cater for a situation where a claim or dispute has been adjudicated and an outcome binding on parties has been reached but before that outcome is made an order of the court. Since an award was a final and binding remedy, it was difficult to determine a prescription period applicable to it under the Prescription Act. The three-year period is meant for claims or disputes that are yet to be determined and in respect of which evidence and witnesses may be lost if there is a long delay.<sup>85</sup> Even if the Prescription Act were to apply, the main award granted in favour of the applicant could not prescribe because it is not an obligation to pay money or deliver goods or render services by Metrobus to the applicant.<sup>86</sup> Metrobus was obliged to apply for a date for the review of the arbitration within six months of lodging the review. Metrobus’s delay was unduly long and undermined the LRA’s object of speedy resolutions of disputes. This affected Myathaza as he had been without income since his unfair dismissal in 2009.<sup>87</sup>

#### 4 2 2 *The second judgment in Myathaza (CC)*

In his judgment, Froneman J (Madlanga, Mhlantla JJ and Mbha AJ concurring),<sup>88</sup> agreed with the orders made by Jafta J that the Prescription Act must be reinterpreted in order to give proper constitutional effect to,

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<sup>82</sup> *Myathaza v Metrobus supra* par 39.

<sup>83</sup> 2011 (2) SA 26 (CC).

<sup>84</sup> *Myathaza v Metrobus supra* par 42.

<sup>85</sup> *Myathaza v Metrobus supra* par 44.

<sup>86</sup> *Myathaza v Metrobus supra* par 59. It was also noted that *Desai NO v Desai NO* 1996 (1) SA 141 (SCA), on which the LAC relied for holding that “debt” means an obligation to do something or refrain from doing something, was overruled by the Constitutional Court in *Makate v Vodacom (Pty) Ltd* 2016 (4) SA 121 (CC) par 93, where it was held that there was nothing in the *Electricity Supply Commission v Stewarts and Lloyds of SA (Pty) Ltd* 1981 (3) SA 340 (A) that remotely suggests that “debt” includes every obligation to do something or refrain from doing something, other than payment or delivery. The trial court had therefore attached an incorrect meaning to the word “debt” which, as contemplated in s 10 of the Prescription Act, did not cover the present claim.

<sup>87</sup> *Myathaza v Metrobus supra* par 62.

<sup>88</sup> *Myathaza v Metrobus supra* par 66.

among others, the right of access to justice. He, however, disagreed with the proposition that this necessitates a finding that its provisions are inconsistent with the provisions of the LRA since the relevant provisions of the two Acts are capable of complementing each other in a way that best protects the fundamental right of access to justice while at the same time preserving the speedy resolution of disputes under the LRA. After finding the two statutes consistent with each other, Froneman J examined the meaning of “process” and “debt” in section 15 of the Prescription Act and held that commencing proceedings before the CCMA interrupted prescription in accordance with section 15(1) of the Prescription Act.<sup>89</sup> In determining whether a claim for unfair dismissal under the LRA constituted a “debt”, Froneman J held that only a claim for the enforcement of legal obligations should qualify as a “debt” under the Prescription Act.<sup>90</sup> An unfair dismissal claim is designed to enforce three possible kinds of legal obligation – namely, reinstatement, re-employment and compensation. Each one of them enjoins the employer “to do something positive”. In the case of reinstatement, which was ordered in the present case,

“it means the resuscitation of the employment agreement with all the attendant reciprocal rights and obligations. The employer must provide employment and pay remuneration. Both fall within the meaning of a ‘debt’ under the Prescription Act, however narrowly interpreted.”<sup>91</sup>

Since the service of the process initiating the CCMA dispute resolution process interrupted prescription, prescription remained interrupted until any review proceedings seeking to nullify the CCMA outcome were finalised. In effect, the restriction to review only provides a cogent and compelling reason for reinterpreting the Prescription Act to include statutory reviews under section 145 of the LRA as included in the judicial process that interrupts prescription until finality is reached under section 15 of the Prescription Act. The restriction infringes the right of access to courts more severely than where a right is allowed. An interpretation that best protects the right of access should be preferred. This can be achieved by allowing the right of review to play the same role of finality as the right of appeal does in ordinary matters.<sup>92</sup> Since the referral of the dispute to the CCMA interrupted prescription until finalisation of the review process, the arbitration award in question had not prescribed and therefore the appeal succeeded.<sup>93</sup> The appeal was upheld on the basis that until the review was finalised, Myathaza’s claim would not prescribe.<sup>94</sup>

### 4 2 3 *The third judgment in Myathaza (CC)*

While concurring with Jafta J’s lead judgment that the Prescription Act was not applicable, Zondo J added that, even assuming that it was applicable to the matter dealt with under the LRA, the provisions of the Prescription Act

<sup>89</sup> *Myathaza v Metrobus supra* par 75 and 82.

<sup>90</sup> *Myathaza v Metrobus supra* par 78.

<sup>91</sup> *Myathaza v Metrobus supra* par 79.

<sup>92</sup> *Myathaza v Metrobus supra* par 86.

<sup>93</sup> *Myathaza v Metrobus supra* par 88.

<sup>94</sup> *Myathaza v Metrobus supra* par 90.

relied upon for the conclusion that the arbitration award had prescribed had no application to the arbitration award.<sup>95</sup> Zondo J disagreed that the referral of a dismissal dispute to the CCMA interrupted prescription since that could occur only by service on the debtor of the process contemplated in section 15(1) read with subsection (6) of the Prescription Act.<sup>96</sup> The Justice of the Constitutional Court then proceeded to deal with the question whether an arbitration award such as the one involved in his present case constituted a “debt” for the purposes of the Prescription Act and concluded that it did not.<sup>97</sup> Zondo J concluded that section 145(9) of the LRA enacted in January 2015 did not apply to the present case and as Jafta J had correctly observed, this provision was Parliament’s response to various judgments of the Labour Court and Labour Appeal Court, which were to the effect that the Prescription Act applied to the LRA dispute resolution system concerning dismissal disputes.<sup>98</sup>

### 4 3 The *Mogaila* judgment

In a direct access application in *Mogaila v Coca-Cola Fortune (Pty) Ltd*,<sup>99</sup> the Constitutional Court was called upon to determine issues not dissimilar to those in *Myathaza v Metropolitan Bus* – namely, whether: (a) the Prescription Act was inconsistent with the LRA; and (b) whether an order of reinstatement granted in the applicant’s favour constituted a “debt” for the purposes of the Prescription Act 1969. In addition, the applicant sought an order of the court directing the employer to reinstate her to her previous employment position.<sup>100</sup> The court had the *Myathaza v Metrobus* judgment (decided some two and a half months earlier) as a point of reference but, as already shown, there was no majority in terms of the reasoning despite a unanimous outcome. Fortunately for the applicant in *Mogaila*, the three approaches in *Myathaza v Metrobus* would all lead to an outcome similar to that in *Myathaza v Metrobus* – that is, that Ms Mogaila would be entitled to an order declaring that the arbitration award ordering her reinstatement had not prescribed. She was entitled to secure its certification under section 143(3) of the LRA, and its enforcement under section 143(1).<sup>101</sup> Ms Mogaila must succeed either because the arbitration award in her favour had not prescribed because the Prescription Act did not apply at all to LRA matters, or, as the Jafta and Zondo JJ judgments held, even if that statute were applicable, the order of reinstatement was not an obligation to pay money, deliver goods or services,<sup>102</sup> or because, as Froneman J held, the CCMA referral interrupted prescription, and the interruption persisted until the finalisation of the review proceedings in October 2013.<sup>103</sup> Finally, on the basis of Froneman J’s approach, the arbitration award would have

<sup>95</sup> *Myathaza v Metrobus supra* par 104, 131–139.

<sup>96</sup> *Myathaza v Metrobus supra* par 140–141.

<sup>97</sup> *Myathaza v Metrobus supra* par 119.

<sup>98</sup> *Myathaza v Metrobus supra* par 145.

<sup>99</sup> 2018 (1) SA 82 (CC) (*Mogaila*).

<sup>100</sup> *Mogaila supra* par 1.

<sup>101</sup> *Mogaila supra* par 27.

<sup>102</sup> *Myathaza v Metropolitan Bus supra* par 59.

<sup>103</sup> *Mogaila supra* par 28.

prescribed only in October 2016. Ms Mogaila however filed her application timeously, in April 2016. Prescription was therefore interrupted, again, pending the finalisation of these proceedings. On the basis of whichever approach adopted in *Myathaza v Metrobus*, she was entitled to proceed with the certification of the award under section 143 of the LRA.<sup>104</sup> In the end, the court declared that the order of reinstatement made in favour of Ms Mogaila by the arbitrator had not prescribed in terms of the Prescription Act.<sup>105</sup>

#### 4 4 The *FAWU v Pieman's Pantry* decision

The issues canvassed in the Constitutional Court in the recent case of *FAWU obo Gaoshubelwe v Pieman's Pantry (Pty) Ltd*<sup>106</sup> clearly show that the *Mogaila* case was far from being the last the Constitutional Court would pronounce on issues involving unfair dismissal claims under section 191 of the LRA and the application of the Prescription Act. The first of the two questions for determination in this case was whether the Prescription Act applied to such claims, and the second was whether the unfair dismissal dispute referred by the applicant to the Labour Court on behalf of its members employed by the respondent had prescribed.<sup>107</sup> FAWU argued that the Prescription Act does not apply to unfair dismissals in terms of section 191 of the LRA, which is designed to ensure effective resolution of labour disputes and, in any event, if the Prescription Act applies, prescription was interrupted by the initial referral of the dispute to the CCMA for conciliation.<sup>108</sup> Pieman's Pantry contended that the Prescription Act applies to the LRA because an unfair dismissal claim under the LRA is a "debt" for the purposes of the Prescription Act. It rejected the contention that there is an inconsistency between the two Acts, and argued they were complementary. The time-bar imposed by section 191 is not an alternative to the prescription regime. It further argued that FAWU's unfair dismissal claims had prescribed as the statement of claim had been filed in the Labour Court more than three years after the certificate of non-resolution of the dispute was issued. Pieman's final submission was that the service of a referral for conciliation by the CCMA does not amount to "any process" capable of disrupting prescription in terms of section 15(1) of the Prescription Act. In line with the foregoing argument, it follows that prescription started running after a certificate of non-resolution was issued.<sup>109</sup> The Constitutional Court was unanimous in upholding the appeal

<sup>104</sup> *Mogaila supra* par 29.

<sup>105</sup> *Mogaila supra* par 31. In *Compass Group SA (Pty) Ltd v Van Tonder* (2016) 37 ILJ 1413 (LC), the LC held that it was bound by the LAC judgment in *Myathaza* and had no option but to find that the arbitration award in this matter had prescribed, thereby depriving the employee of a compensation award. By the time the matter was heard by the LAC in *Van Tonder v Compass Group SA (Pty) Ltd* (2017) 38 ILJ 2329 (LAC), the CC had overruled that decision in *Myathaza v Metrobus* and the court found that, whichever of the approaches set out by the CC was adopted, the compensation order contained in the arbitration award had not prescribed.

<sup>106</sup> [2018] ZACC 7; (2018) 39 ILJ 1213 (CC).

<sup>107</sup> *FAWU v Pieman's Pantry supra* par 1, 30, 77 and 138.

<sup>108</sup> *FAWU v Pieman's Pantry supra* par 22 and 24.

<sup>109</sup> *FAWU v Pieman's Pantry supra* par 25.

and setting aside the orders of the Labour Appeal Court and the Labour Court, but in what is becoming a pattern in these cases, the court was split into three, with each judgment delivering a different reason for upholding the appeal.

#### 4 4 1 *The minority judgment of Zondi AJ*

In answering the question whether the Prescription Act applies to litigation under the LRA, Zondi AJ, who delivered the minority opinion, held that the answer must be informed by a critical analysis of the provisions of section 210 of the LRA as well as of section 16 of the Prescription Act so as to ascertain whether there was any inconsistency between those provisions.<sup>110</sup> Zondi AJ referred to the court's judgment in *Mdeyide* where it held that the Road Accident Fund Act (which included provisions dealing with prescription) was ostensibly enacted to cover that field since the Prescription Act was not appropriate in that area, meaning that there was no consistency in that context;<sup>111</sup> and to *Myathaza v Metrobus* where none of the three judgments was conclusive in its individual answer, although each led to the same result.<sup>112</sup> It was the learned judge's conclusion that the provisions of the Prescription Act are inconsistent with those of section 191 of the LRA to the extent that there are material differences between the two Acts.

According to the acting judge, the inconsistency arises as a result of the different time periods that are stipulated in the Acts; thus the Prescription Act would not apply to litigation conducted in terms of section 191 of the LRA.<sup>113</sup> Under the prescription regime, a creditor must claim the debt within the specified time period as he or she cannot seek condonation of non-compliance with the statutory prescription.<sup>114</sup> On the other hand, section 191(11) prescribes time limits within which the dispute should be referred to the Labour Court, and it also provides for condonation for late referral upon good cause shown. In other words, although the LRA requires expedition in litigation, "it is not intolerant of the delay. It condones delays for which there is a satisfactory explanation".<sup>115</sup> Under the LRA regime, an employee dismissed for operational requirements could discover three years later that the employer, contrary to section 189 of the LRA, did not observe the rules of consultation and could apply simultaneously for condonation in his claim for unfair dismissal because he acquired the knowledge of the unfairness three years later. Under the prescription regime, unless an employee places him or herself within the provisions of sections 13, 14 or 15 of the Act, his or her claim for unfair dismissal would have prescribed and become unenforceable because prescription begins to run as soon as the debt is due – that is, when the creditor acquires knowledge of the identity of the debtor.<sup>116</sup> In the final analysis, Zondi AJ

<sup>110</sup> *FAWU v Pieman's Pantry supra* par 38–42.

<sup>111</sup> *RAF v Mdeyide* 2011 (2) SA 26 (CC) par 50.

<sup>112</sup> *FAWU v Pieman's Pantry supra* par 45–48.

<sup>113</sup> *FAWU v Pieman's Pantry supra* par 49.

<sup>114</sup> *FAWU v Pieman's Pantry supra* par 59.

<sup>115</sup> *FAWU v Pieman's Pantry supra* par 62.

<sup>116</sup> *FAWU v Pieman's Pantry supra* par 72–73.

held that the provisions of the Prescription Act are incapable of importation into the LRA, and that they do not apply to litigation under that regime. In effect:

“To try to apply the Prescription Act to the litigation under the LRA is just like trying to fit square pegs into round holes, ignoring clear structural differences between the two Acts. Legal consequences flowing from failure to comply with the time periods which each legislation respectively stipulates, are not the same. Failure to comply with the time periods stipulated by the LRA is not fatal as such failure may be condoned on good cause shown. Under the Prescription Act a creditor loses a right to enforce its claim once the claim has prescribed. It does not provide a mechanism through which the lost right may be reclaimed. These differences between the two statutes are, in my view, sufficiently material to constitute inconsistency as contemplated in section 16(1) of the Prescription Act.”<sup>117</sup>

#### 4 4 2 *The concurring judgment of Zondo DCJ*

The Deputy Chief Justice (as he then was) agreed with the judgment of Zondi AJ (the first judgment) that leave to appeal be granted and that the appeal be upheld, but he proceeded to proffer additional reasons for the conclusion that the Prescription Act does not apply to unfair dismissal claims.<sup>118</sup> First, there is no indication whatsoever in section 191(11)(b) that the power conferred upon the Labour Court is limited in any way or that it is subject to the Prescription Act.<sup>119</sup> Second, the provisions of the LRA sought to do things differently and were aware of the existence of the Prescription Act in the statute books. If, indeed, the drafters of the LRA had intended it to incorporate the Prescription Act, they would have done so expressly. Not having done so means that they did not intend the prescription statute to play any role vis-à-vis the LRA.<sup>120</sup> Thirdly, the provisions of section 191(2) allow the employee to show good cause “at any time”, so, it does not limit the employee to showing good cause within a three-year period in accordance with the Prescription Act. That means that the employee could show good cause outside the three-year prescription period.<sup>121</sup> Lastly, even after three years, the CCMA, a bargaining council or the Labour Court does have jurisdiction to condone late unfair dismissal referrals where good cause is shown for such lateness.<sup>122</sup>

One of the cases cited<sup>123</sup> to illustrate where employees had waited over three years to refer their unfair dismissal disputes to conciliation and showed *bona fide* error of law or other good cause includes the recent Constitutional Court judgment in *September v CMI Business Enterprises*

<sup>117</sup> *FAWU v Pieman's Pantry supra* par 74.

<sup>118</sup> *FAWU v Pieman's Pantry supra* par 78.

<sup>119</sup> *FAWU v Pieman's Pantry supra* par 91.

<sup>120</sup> *FAWU v Pieman's Pantry supra* par 92–93.

<sup>121</sup> *FAWU v Pieman's Pantry supra* par 94.

<sup>122</sup> *FAWU v Pieman's Pantry supra* par 96.

<sup>123</sup> See also *Steenkamp v Edcon Ltd* 2016 (3) SA 251 (CC) par 193; *Chirwa v Transnet Ltd* 2008 (4) SA 367 (CC) par 77; *Fredricks v MEC for Education & Training, EC* 2002 (2) SA 693 (CC); *Gcaba v Minister of Safety and Security* 2010 (1) SA 238 (CC); *NUMSA v Intervale (Pty) Ltd* (2015) 36 ILJ 363 (CC) par 71–72.

CC.<sup>124</sup> After discussing these cases, Zondo DCJ expressed the following view:

“Bringing the Prescription Act into the unfair dismissal claims under the LRA gives employers two ‘sledgehammers’ capable of ‘killing’ an employee’s unfair dismissal claim in circumstances where the ‘deal’ reached at NEDLAC among all the stakeholders was that the employer would have only one ‘sledgehammer’, namely the LRA ‘sledgehammers’. In other words, that an employer could ‘kill’ an employee’s unfair dismissal claim for delay in referring it by showing that the employee had no good cause. If an employee referred a dismissal dispute to the relevant forum outside the stipulated period but before the expiry of three years, the employer would use an LRA ‘sledgehammer’ to try to ‘kill’ the claim by taking the point that there was no good cause for the delay. If the claim was referred after the expiry of the three-year period provided for in the Prescription Act, the employer could invoke the Prescription Act ‘sledgehammer’ and take the point that the claim has prescribed and, with or without good cause, the claim is ‘dead’.”<sup>125</sup>

In considering whether the Prescription Act applies to unfair dismissal claims under section 191 of the LRA, Zondo DCJ stated that the court should adopt a similar approach to the one adopted in deciding whether the Promotion of Administrative Justice Act<sup>126</sup> (PAJA) would apply to the review of CCMA arbitration awards, which was to say that the LRA is specialised national legislation designed to give effect to the right to fair labour practices whose dispute resolution mechanism contains specialised provisions while the Prescription Act contains general provisions. Thus, as the court said in *Sidumo v Rustenburg Platinum Mines Ltd*<sup>127</sup> in relation to PAJA, the specialised provisions of the LRA “trump general provisions”.<sup>128</sup> Furthermore, the judge expressed the view that applying the Prescription Act to unfair dismissal claims imposes on employees a burden or disadvantage without giving them any benefit such as those the Act gives to creditors and debtors under the prescription regime.<sup>129</sup> Finally, it was because the Prescription Act is not meant to be applied to unfair dismissal claims or disputes under the LRA that one experiences difficulties in any attempt to find consistency in the two different statutory regimes.<sup>130</sup>

#### 4 4 3 *Kollapen AJ’s majority judgment*

Although Kollapen AJ, delivering the judgment of the majority, agreed that the appeal should succeed, he disagreed that the provisions of the Prescription Act were inconsistent with those of the LRA such that the former is not applicable to litigation under the latter Act.<sup>131</sup> Kollapen AJ entertained no doubt as to whether there was compatibility and consistency between the two Acts even though they deal with different aspects of time

<sup>124</sup> [2018] ZACC 4 (27 February 2018).

<sup>125</sup> *FAWU v Pieman’s Pantry supra* par 119.

<sup>126</sup> 3 of 2000.

<sup>127</sup> 2008 (2) SA 24 (CC).

<sup>128</sup> *FAWU v Pieman’s Pantry supra* par 127.

<sup>129</sup> *FAWU v Pieman’s Pantry supra* par 136.

<sup>130</sup> *FAWU v Pieman’s Pantry supra* par 137.

<sup>131</sup> *FAWU v Pieman’s Pantry supra* par 139.

periods in the process of litigation. The LRA is concerned with time periods that do not necessarily result in the extinction of the claim in the event of non-compliance, whereas the object of the Prescription Act is to achieve extinction in the event of non-compliance. Even in the face of their differences (between a time-bar and a true prescription time period),<sup>132</sup> they are consistent with each other.<sup>133</sup> The judgment of Kollapen AJ (with Cameron, Froneman, Madlanga, Mhlantla and Theron JJ and Kathree-Setiloane AJ, concurring) could be summarised in line with the subheading under which they were considered in the judgment, as follows:

(i) The different character of time periods

The provisions of section 16(1) of the Prescription Act and section 210 of the LRA, which set the respective time frames, each seek to enhance the quality of justice and adjudication, which must be the hallmark of a system of constitutional justice in a democratic state such as South Africa; they are equally consistent with the imperatives of the Constitution and in particular its section 34. To the extent that the Prescription Act would apply to actions for the recovery of debts, the question arises as to whether, given the admittedly unique and context-sensitive nature of the LRA, there is an in-principle incompatibility in seeking to interpret the Prescription Act in a manner that renders it applicable to the LRA dispute-resolution process. However, that is not the case with the inclusion of labour rights in the Bill of Rights, which signalled a significant and seismic development in the recognition of the rights of workers.<sup>134</sup>

(ii) Is the claim a “debt” under the Prescription Act?<sup>135</sup>

If regard is had to the jurisprudence embedded in such cases as *Makate*<sup>136</sup> and *Escom*<sup>137</sup> and the literal meaning of “debt”, then, it must follow that a claim for unfair dismissal seeks to enforce three kinds of employer obligations, namely: reinstatement, re-employment and compensation.<sup>138</sup> In other words, an unfair dismissal claim activates proceedings for the recovering of a debt as contemplated in section 16(1) of the Prescription Act, hence the first part of the enquiry is answered in the affirmative.<sup>139</sup>

(iii) Inconsistency versus difference<sup>140</sup>

The judgment referred to the approach of the court in *Mdeyide*, which considered whether the Prescription Act was consistent with the Road Accident Fund Act and held that it was “a quest bound to fail”. This was a

<sup>132</sup> *Myathaza v Metropolitan Bus supra* par 94.

<sup>133</sup> *FAWU v Pieman’s Pantry supra* par 140.

<sup>134</sup> *FAWU v Pieman’s Pantry supra* par 149–150.

<sup>135</sup> *FAWU v Pieman’s Pantry supra* par 152–157.

<sup>136</sup> *Makate supra* par 90.

<sup>137</sup> *Electricity Supply Commission v Stewarts and Lloyds of SA (Pty) Ltd* 1981 (3) SA 340 (A) 344F.

<sup>138</sup> *Myathaza v Metropolitan Bus supra* par 79.

<sup>139</sup> *FAWU v Pieman’s Pantry supra* par 156–157.

<sup>140</sup> *FAWU v Pieman’s Pantry supra* par 158–167.

case where a difference resulted in clear inconsistency. If one had regard, in the present case, to the wording of section 210 of the LRA (which provides that the provisions of the LRA will apply in the event of conflict between it and the provisions of any other law), the meaning of the word “conflict” must also assume the meaning ordinarily assigned to it and difference in itself will not constitute conflict unless such difference leads to conflict.<sup>141</sup>

(iv) The consistency evaluation<sup>142</sup>

On the question whether the time periods provided for in section 210 of the LRA were inconsistent with the provisions of the Prescription Act, it was emphasised that while both Acts deal with time periods, they do so for different reasons and to achieve different objectives. There is no doubt that the time periods in each Act regulate different features of the litigation process, but that they are not only reconcilable but can exist in harmony side by side. So, having regard to section 210 of the LRA, the provisions of the LRA are not in conflict the provisions of the Prescription Act. Accordingly, the existence of any conflict between the two statutes has not been shown in these proceedings.<sup>143</sup>

(v) The good cause “at any time” argument<sup>144</sup>

The language of section 191(2) and the context of the phrase “at any time” clearly show that it was used in the context of good cause, which is supported by section 191(11)(b). It follows that the phrase “at any time” does not have the effect of extending the mandatory time frame of 30 and 90 days set out in section 191(2) of the LRA and, therefore, does not provide the basis for an inconsistency argument in relation to the Prescription Act.<sup>145</sup>

(vi) Was the running of prescription interrupted by the referral of the matter to conciliation?<sup>146</sup>

Given the mandatory nature of conciliation as a requirement for arbitration or referral to the Labour Court, it follows that the proceedings for the recovery of a debt arising from an unfair dismissal claim commences when the dispute is referred to conciliation. However, a process that initiates proceedings for enforcement of payment of debt interrupts prescription.<sup>147</sup> Although prescription began to run when the debt became due (in this case, on 1 August 2001), it was interrupted by the referral of the dispute to the CCMA on 7 August 2001 and continued to be interrupted until the

<sup>141</sup> *FAWU v Pieman's Pantry supra* par 166–167.

<sup>142</sup> *FAWU v Pieman's Pantry supra* par 168–181.

<sup>143</sup> *FAWU v Pieman's Pantry supra* par 177, 179, and 180–181.

<sup>144</sup> *FAWU v Pieman's Pantry supra* par 182–193.

<sup>145</sup> *FAWU v Pieman's Pantry supra* par 192–193.

<sup>146</sup> *FAWU v Pieman's Pantry supra* par 194–204.

<sup>147</sup> *FAWU v Pieman's Pantry supra* par 202. See also *Cape Town Municipality v Allianz Insurance Co Ltd* 1990 (1) SA 311 (C) 334H–J.

dismissal of the review proceedings by the Labour Court on 9 December 2003. So, when the dispute was referred to the Labour Court for adjudication on 16 March 2005, it clearly had not prescribed.<sup>148</sup>

(vii) Fairness and flexibility<sup>149</sup>

While prescription has been broadly identified as limiting the right of access to courts,<sup>150</sup> the operation of the provisions of section 12 has been described as striking the necessary balance between certainty and fairness by introducing the necessary flexibility when a debt becomes due and when such debt has prescribed.<sup>151</sup> But, it must be borne in mind that flexibility in the LRA is not of the open-ended kind. Failure by a party to comply with time frames requires an application of condonation that would be granted if good cause is shown for the lateness. The principle of fairness to both sides encapsulated in the “good cause” exercise is similar to the approach taken by the court in *Links v MEC*<sup>152</sup> in the interpretation of the Prescription Act: “I would say no more than that the consciousness that is brought to bear on these two different but reconcilable pieces of legislation evidences the same golden thread – fairness to both sides and certainty in the process”.<sup>153</sup>

(viii) Conclusion

Finally, Kollapen AJ held that both the Prescription Act and the LRA seek to achieve objectives that are compatible with each other, which is, the efficient and timely resolution of disputes within a specific time frame within their respective spheres. They do not advance different and inconsistent litigation imperatives – rather, they can, and have coexisted with each other in an integrated fashion.<sup>154</sup>

#### **4 5 The recent LAC case of NUMSA obo E Masana**

In *NUMSA obo E Masana v Gili Pipe Irrigation (Pty) Ltd*,<sup>155</sup> Sutherland JA recognised the period during which the litigation was being conducted as “an era of great uncertainty about the application in Labour Relations litigation of the principles of prescription as encapsulated in the Prescription Act 68 of 1969”.<sup>156</sup> The court *a quo* had adopted the approach of the Labour Court in *PSA obo Khaya v CCMA*<sup>157</sup> to the effect that the Prescription Act applied to the LRA and that section 13(1)(f) of the

<sup>148</sup> *FAWU v Pieman's Pantry supra* par 204.

<sup>149</sup> *FAWU v Pieman's Pantry supra* par 205–213.

<sup>150</sup> *Makate supra* par 90.

<sup>151</sup> *FAWU v Pieman's Pantry supra* par 206; *Links v MEC supra* par 26.

<sup>152</sup> *Supra*.

<sup>153</sup> *FAWU v Pieman's Pantry supra* par 212–213.

<sup>154</sup> *FAWU v Pieman's Pantry supra* par 214.

<sup>155</sup> (2019) 40 ILJ 813 (LAC).

<sup>156</sup> *NUMSA obo E Masana supra* par 5.

<sup>157</sup> (2008) 29 ILJ 1546 (LC).

Prescription Act envisaged a three-year period of prescription to apply to an award. Accordingly, Cele J dismissed the rescission application at the court *a quo*.<sup>158</sup> Meanwhile, the Constitutional Court handed down its judgment in *Myathaza v Metrobus*, which unfortunately provided a deadlock rather than a clear road ahead; the court was evenly split on both sides of the divide, one half holding that the Prescription Act applied to the LRA while the other half held that it did not. It was not until the subsequent case of *FAWU v Pieman's Pantry* that a clear majority emerged, deciding that the Prescription Act applied to LRA litigation.<sup>159</sup> Without necessarily repeating the discussion of the decisions of Froneman J in *Myathaza v Metrobus* and that of the majority in *FAWU v Pieman's Pantry*, which the LAC counselled must be read together,<sup>160</sup> it suffices to say that Sutherland JA relied on certain passages in the two cases,<sup>161</sup> and held that once it was accepted that the Prescription Act applies to all litigation under the aegis of the LRA, there is no rational basis to conclude that any aspect or stage of such litigation, including an award, is not subject to prescription. Sutherland JA added:

“In *Metrobus*, Froneman J held that prescription applies specifically to awards. In the light of *Pieman's Pantry*, the view of one half of the Constitutional Court in *Metrobus* to that effect, must now be accepted as a definitive statement of the law. This Court endorses that view.”<sup>162</sup>

Having found that as at the date that Cele J heard the matter, a total of 19 months could be counted as periods during which prescription was running in relation to Masana's right(s); the matter was thus sent back to the Labour Court to deal with the merits of the rescission application.<sup>163</sup>

## 5 CAN ARREAR WAGES BE RECOVERED AS A JUDGMENT DEBT?

The issue of prescription in a claim for arrear wages also arises when an employer fails to reinstate employees in terms of a court order. Since an obligation to pay emanating from a court order is a judgment debt and prescribes only after 30 years, the question then arises whether arrear wages are included in the judgment debt. These issues were considered in a series of hearings concerning a matter between NUMSA and Hendor Mining Supplies.<sup>164</sup>

<sup>158</sup> *NUMSA obo E Masana supra* par 6.

<sup>159</sup> *NUMSA obo E Masana supra* par 7 and 8.

<sup>160</sup> *NUMSA obo E Masana supra* par 10.

<sup>161</sup> *Myathaza v Metrobus supra* par 85–88; *FAWU v Pieman's Pantry supra* par 202–204.

<sup>162</sup> *NUMSA obo E Masana supra* par 11.

<sup>163</sup> *NUMSA obo E Masana supra* par 13 and 15–16.

<sup>164</sup> See *NUMSA obo Fohlisa v Hendor Mining Supplies (A Division of Marschalk Beleggings) (Pty) Ltd* [2017] ZACC 9.

## 5 1 *Hendor Mining Supplies (LC and LAC)*

The employer had failed to reinstate its employees and pay their remuneration in the intervening period before eventually reinstating them. The reinstatement was meant to take place in terms of an order made on 16 April 2007 by Cele AJ of the Labour Court. By that order, the employees were to be reinstated with effect from 1 January 2007, whereas they were to report for duty on 23 April 2007. However, when the employees reported for duty on the day in question, the employer did not take them back. Rather, the employer engaged in attempts to have the order of the Labour Court overturned through the appeal processes. It was only after these attempts had failed that the employees were allowed to return to work on 29 September 2009. Having failed to pay the employees their remuneration for the period 1 January 2007 to 28 September 2009, the employees instituted the present litigation. The employer set up the defence of prescription. Thus, the issue for determination turned on whether the prescription period in respect of unpaid wages was, in this case, three or 30 years. In other words, was the employees' claim a "judgment debt" in terms of section 11(d) of the Prescription Act? The employees sought a declarator from the Labour Court that the employer was liable to pay their remuneration from 1 January 2007 to 28 September 2009. Before the Labour Appeal Court in *Hendor Mining Supplies (A Division of Marschalk Beleggings) (Pty) Ltd v NUMSA*,<sup>165</sup> the employer argued that the claims for arrear wages from 23 April 2007 until 28 September 2009 did not relate to a judgment debt but were claims in contract that accrued weekly under the contract of employment; and that such claims were a "debt due" within the meaning of section 11(d) of the Prescription Act and, therefore, subject to a three-year prescription period. The employer conceded that the claims for arrear wages from 23 April 2007 until 28 September 2009 were new claims in contract and not a continuation of the unfair dismissal dispute that had existed between the parties.<sup>166</sup>

The Labour Court rejected the appellant's reliance on prescription as "incongruous, if not illogical" and held that the appellant bore

"the risk of additional financial obligations which become fully executable at the date of the order of the highest court that pronounces on it, as a judgment debt rather than a contractual claim."<sup>167</sup>

With regard to the Constitutional Court's judgment in *Billiton Aluminium SA Ltd t/a Hillside Aluminium v Khanyile*<sup>168</sup> and *Equity Aviation Services (Pty) Ltd v CCMA*,<sup>169</sup> the Labour Court rejected as "not only odd but perverse" the appellant's contention that the claim for unpaid wages from 23 April 2007 was one in contract in that the employees were entitled to back pay until 28 September 2009. Consequently, the respondents' claims were

<sup>165</sup> [2016] 2 BLLR 115 (LAC) (*Hendor Mining Supplies*).

<sup>166</sup> *Hendor Mining Supplies supra* par 5–6.

<sup>167</sup> *Hendor Mining Supplies supra* par 7.

<sup>168</sup> (2010) 31 ILJ 273 (CC).

<sup>169</sup> 2009 (1) SA 390 (CC).

found not to have prescribed and the appellant was ordered to pay back pay for the period 1 January 2007 to 28 September 2009, with interest at the prescribed rate with costs.<sup>170</sup> On the other hand, the Labour Appeal Court held that where an employee, after the reinstatement order and during the time that the employer exercises its review and appeal remedies to exhaustion, tenders his or her labour, he or she does so in terms of the employment contract. The employee is therefore entitled to payment in terms of the contract of employment. The claim is therefore a contractual one wherein the employee would have to set out sufficient facts to justify the right or entitlement to judicial process. The employee would *inter alia* have to prove that the contract of employment was extant; that he or she tendered his or her labour in terms thereof and that the employer refused or was unwilling to pay him or her in terms of that contract. The employer on the other hand would have all the contractual defences at his or her disposal. The Labour Appeal Court reasoned that the claim for back pay for 1 January 2007 to 22 April 2007 was a judgment debt.<sup>171</sup> Yet, in its order, it dismissed the declaratory order sought by NUMSA and the employees in its entirety. That dismissal must be inclusive of back pay due in respect of the period 1 January to 22 April 2007. However, according to the Labour Appeal Court, the prescription period in respect of the claims for arrear wages for the period 23 April 2007 to 28 September 2009 was three years. In other words, as from 15 September 2012 (three years after the appellant's petition for leave to appeal was refused), that period had elapsed, such that these claims had prescribed. These claims, the Labour Appeal Court reasoned, did not arise from Cele's order, but from the employment contract that had been reinstated. Having thus held, it did not find it necessary to decide the question of substitution.

## 5 2 NUMSA v Hendor Mining Supplies (CC)

The workers took the matter of the employer's refusal to pay them their arrear wages from 1 January 2007 to 29 September 2009 to the Constitutional Court in *NUMSA obo Fohlisa v Hendor Mining Supplies (A Division of Marschalk Beleggings) (Pty) Ltd*,<sup>172</sup> the employer contending that the claim had prescribed. For the workers, NUMSA argued in support of the Labour Court's holding that the back pay arising from reinstatement constitutes a judgment debt and will only prescribe after 30 years in terms of section 11(a)(ii) of the Prescription Act. In the alternative, the workers argued that the earliest they could reasonably have come to know that Hendor would not pay the back-dated remuneration was 29 September 2009 when they reported for duty.<sup>173</sup> The main issue for determination was whether the prescription period in respect of the unpaid remuneration was three or 30 years and the answer turned on whether the employee's claim was a judgment debt.<sup>174</sup> In other words, did the obligation to pay arrear remuneration for the period 1 January 2007 to 28 September 2009

<sup>170</sup> *Hendor Mining Supplies supra* par 7.

<sup>171</sup> *Hendor Mining Supplies supra* par 11.

<sup>172</sup> [2017] ZACC 9 (*NUMSA v Hendor Mining Supplies*).

<sup>173</sup> *NUMSA v Hendor Mining Supplies supra* par 6.

<sup>174</sup> *NUMSA v Hendor Mining Supplies supra* par 1.

constitute a judgment debt; and if not, did prescription only start running from 29 September 2009?<sup>175</sup> Incidentally, the judgments of Madlanga J for the majority and Zondo J for the minority differed as to whether there was only one period (the majority view), or as the minority believed, there were two separate periods, one being for back pay under the first period (which is the judgment debt that prescribed after thirty years), and the other for back pay for the other period (which prescribes after three years). For the majority, there was no differentiation in such periods; there was only the period of 1 January 2007 to 28 September 2009 during which Hendor did not reinstate the employees in compliance with the order of Cele AJ. In effect, the injunction to reinstate contained in that order continued to exist for the entire period until complied with.<sup>176</sup>

### 5.2.1 First judgment

The most acceptable definition of “reinstatement”, the primary statutory remedy in unfair dismissal disputes,<sup>177</sup> was provided by the Constitutional Court in *Equity Aviation*.<sup>178</sup> It means “to put the employee back into the same job or position he or she occupied before the dismissal, on the same terms and conditions”. In other words, it is aimed at “placing an employee in the position he or she would have been but for the unfair dismissal”. It has the effect of safeguarding

“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.”<sup>179</sup>

<sup>175</sup> *NUMSA v Hendor Mining Supplies supra* par 7.

<sup>176</sup> *NUMSA v Hendor Mining Supplies supra* par 31.

<sup>177</sup> The situation under the UK Employment Rights Act 1996 is similar to that of South Africa where, if the dismissed employee so wishes, reinstatement is the primary remedy for unfair dismissal, or, at least, a presumption in their favour, followed by re-engagement, rather than compensation. In terms of s 116 of the Act, it is provided that reinstatement or re-engagement should be considered first by the tribunal having taken into consideration some other listed factors – *Oasis Community Learning v Wolff* [2013] UKEAT 0364 (17 May 2013) par 10. But it was said in *British Airways Plc. v Valencia* [2014] UKEAT 0056 (26 June 2014) par 8 that the statute requires consideration of reinstatement first and it is only if a decision is made not to order reinstatement will the question of re-engagement arise. Quite recently, the UK Supreme Court offered further clarification of the issue when, in *McBride v Scottish Police Authority* [2016] ICR 788 (UKSC) par 32, Lord Hodge said: “If the complainant wishes such an order, the tribunal is required first to consider whether to make an order of reinstatement, and if it decided not to make such an order, then, secondly, to consider whether to make an order for re-engagement (s 112(2), (3) and 116(1), (3)). If neither order is made, the tribunal may make an award of compensation for unfair dismissal (s 112(4)).” This may be compared with the situation in Namibia where reinstatement is lumped together with other “appropriate awards” the arbitrator could make under s 86(15) of the Labour Act 11 of 2007. Thus, in the exercise of the discretion whether or not to award reinstatement or compensation the arbitrator must also bear in mind that reinstatement is not a primary remedy of unfair dismissal in Namibia. An award of compensation is equally just as important. This point was made in *Paulo v Shoprite Namibia (Pty) Ltd* 2013 (1) NR 78 (LC) par 18–19 by Damaseb JP; and quite recently by Geier J, *Negonga v Secretary to Cabinet* 2016 (3) NR 670 (LC) par 66.

<sup>178</sup> *Supra*.

<sup>179</sup> *Equity Aviation supra* par 36. Cf per McNally JA of the Zimbabwe Supreme Court who, in *Chegutu Municipality v Manyora* 1997 (1) SA 662 (ZS) 665H, defined reinstatement thus: “I conclude therefore that ‘reinstatement’ in the employment context means no more than

According to Madlanga J in *NUMSA v Hendor Mining Supplies*, if that meaning were to become a reality, outstanding remuneration could not but accumulate for as long as the order was not complied with. The reason is that for the entire intervening period before reinstatement, the obligation to reinstate and the effect of concomitant payment could only have been a judgment debt; it is not the order that reinstates, but Hendor that was supposed to have done so.<sup>180</sup> “On principle”, held the Justice of the Constitutional Court,

[w]hen reinstatement eventually took place with effect from 1 January 2007 as directed in Cele AJ’s order, the accumulated remuneration was also reinstated. The practical, and indeed, legal reality dictated that it had to be paid as back pay. On a proper reading, that is the import of the *Equity Aviation* principle.<sup>181</sup> In the context of this type of order, I do not see why 16 April 2007 should alter this position. The relevance of this date is merely that it is the date of the order. Nowhere does the order say that the employees must be remunerated retrospectively from 1 January 2007 to 15 April 2007.<sup>182</sup>

Madlanga J could not conceive of a situation where an employee would be entitled to payment of remuneration in terms of an employment contract that was still in review or appeal processes and was yet to be resuscitated. Until there has been reinstatement, there is no contract of employment and until reinstatement, one cannot talk of an “extant” contract of employment. The point must however be made that remuneration is only payable after reinstatement. In conclusion, it was held that the obligation to settle the outstanding debt for back pay for the entire period 1 January 2007 to 28 September 2009 is a judgment debt that prescribes after 30 years in terms of section 11(a)(ii) of the Prescription Act; thus, the applicants were entitled to relief.<sup>183</sup> Finally, the conclusion that the employees’ claims constitute a judgment debt made it unnecessary to consider the applicants’ alternative argument that prescription started running on 29 September 2009.<sup>184</sup>

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putting a person again into his previous job. You cannot put him back into his job yesterday or last year. You can only do it with immediate effect or from some future date. You can, however, remedy the effect of previous injustice by awarding back pay and/or compensation. But mere reinstatement does not necessarily imply that back pay and/or compensation automatically follows.” This interpretation accords with the definition adopted by the Supreme Court of Namibia interpreting ‘reinstatement’ in the context of the Labour Act 1992 in *Transnamib Holdings Ltd v Engelbrecht* 2005 NR 372 (SC) 381E–G to the effect that the mere use of the words “in the position which he or she would have been had he or she not been so dismissed” does not necessarily mean that reinstatement in that “position” runs from the date of dismissal. So, too, Damaseb JP reiterated in *Paulo v Shoprite Namibia (Pty) Ltd* 2013 (1) NR 78 (LC) par 10 that, save for the difference that reinstatement is a primary remedy in South Africa while it is not in Namibia and Zimbabwe, nothing in the interpretation of the word “reinstatement” by the highest courts in the three jurisdictions recognises the right of an employee who has been found to have been unfairly dismissed to be automatically entitled to back pay and/or compensation.

<sup>180</sup> *NUMSA v Hendor Mining Supplies supra* par 32.

<sup>181</sup> *Equity Aviation supra* par 36.

<sup>182</sup> *NUMSA v Hendor Mining Supplies supra* par 33.

<sup>183</sup> *NUMSA v Hendor Mining Supplies supra* par 51–52.

<sup>184</sup> *NUMSA v Hendor Mining Supplies supra* par 53.

### 5 2 2 *The second judgment*

Zondo J disagreed with Madlanga J's judgment that the whole claim is a judgment debt. Per Zondo J, one part of the claim from 1 January 2007 to 15 April 2007 is a judgment debt whereas the other part – that is, the claim for wages from 16 April 2007 to 28 September 2009 – is a contractual debt and not a judgment debt. However, the claim in either case had not prescribed. Since the first part of the claim was a judgment debt, the prescription period applicable to it was 30 years. Although the second part of the claim was a contractual claim, it had also not prescribed. The reasons given for so holding are quite different from those in the first judgment.<sup>185</sup> Insofar as the second period was concerned, the applicants' claims were debts under the Prescription Act but could only become due when the contracts of employment on which they were based were restored. Reinstatement is about restoration of the employment contract.<sup>186</sup> Since the applicants involved were reinstated on 29 September 2009, that was the day their contracts were restored. Their remuneration could not have been due before that date. Therefore, prescription could not have started running before the date of the restoration of their contracts. Accordingly, they could not have instituted legal proceedings for the payment of their remuneration before the date their contracts were restored. In other words, they could not have instituted legal proceedings to enforce contracts that were not in place while the order reinstating them was suspended as the employer was pursuing appeals.<sup>187</sup> The Labour Court, therefore erred in dealing with the matter on the basis that the debts in relation to 23 April 2007 to 15 September 2009 became due on 15 September 2009 and had therefore prescribed by 19 September 2012 when the applicants instituted the relevant proceedings.<sup>188</sup>

## 6 CONCLUSION

As this article has shown, the two main questions that the Constitutional Court was called upon to determine in *Myathaza v Metrobus*<sup>189</sup> were: (a) whether the Prescription Act was consistent with the LRA; and (b) whether an arbitration award under the LRA constituted a "debt" for the purposes of the Prescription Act. This produced a three-pronged answer. While the first and third judgments answered both questions in the negative, the second judgment answered the questions in the affirmative. Notwithstanding the split in this case, the Constitutional Court upheld Mr Myathaza's appeal and set aside the order of the Labour Appeal Court. Fortunately, the full bench of the Constitutional Court resolved the matter in *Mogaila*<sup>190</sup> by holding that whichever of the approaches was adopted – whether the arbitration award in the employee's favour could not have prescribed because the Prescription Act did not apply; or the referral of her

<sup>185</sup> *NUMSA v Hendor Mining Supplies supra* par 62 and 81–82.

<sup>186</sup> *Equity Aviation supra* par 36.

<sup>187</sup> *NUMSA v Hendor Mining Supplies supra* par 177–178.

<sup>188</sup> *NUMSA v Hendor Mining Supplies supra* par 179–180.

<sup>189</sup> *Supra*.

<sup>190</sup> *Supra*.

claim for reinstatement to the CCMA had interrupted prescription until the finalisation of the review proceedings – Ms Mogaila was entitled to an order declaring that the arbitration award ordering her reinstatement had not prescribed.<sup>191</sup>

What appears to be a replay of the Constitutional Court's tape in *Myathaza v Metrobus* was on show in *FAWU v Pieman's Pantry*<sup>192</sup> in the sense that all three judgments – the minority, concurring minority and majority judgments delivered in that order – produced the same result of upholding the appeal and agreeing with the order made in the minority (first) judgment<sup>193</sup> but differing on the reasons advanced in support of each line of reasoning. This unity of purpose, if one could so describe it, is notwithstanding that the first minority judgment likened applying the Prescription Act to the litigation under the LRA as equivalent to trying to fit square pegs into round holes, while ignoring the structural differences between the two Acts. For the concurring minority judgment, to bring the Prescription Act into the unfair dismissal claims under the LRA was like giving the employers two "sledgehammers" capable of "killing" an employee's unfair dismissal claim in circumstances where the "deal" reached at NEDLAC among all the stakeholders was that the employer would have only one "sledgehammer", namely the LRA "sledgehammers".<sup>194</sup> However, the majority was not prepared to accept that the provisions of the Prescription Act were inconsistent with those of the LRA such that the former is not applicable to litigation under the latter Act. Rather, the majority held that the LRA and the Prescription Act both seek to achieve objectives that are compatible with each other and that can function alongside each other.<sup>195</sup> It is clear from the *NUMSA v Hendor Mining Supplies* case that an employer cannot, through the appeal process, wriggle out of the obligation to reinstate unfairly dismissed employee by pleading technical prescription; nor could a process of appeal accompanied by the employer's refusal to comply with the arbitrator or court's order of reinstatement alleviate the employer's burden of paying the unfairly dismissed employees their back pay or remuneration upon reinstatement.

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<sup>191</sup> *Mogaila supra* par 27–29.

<sup>192</sup> *Supra*.

<sup>193</sup> *FAWU v Pieman's Pantry supra* par 75–76, 137 and 214–215.

<sup>194</sup> *FAWU v Pieman's Pantry supra* par 119.

<sup>195</sup> *FAWU v Pieman's Pantry supra* par 139 and 214.