REPUBLIC OF SOUTH AFRICA

IN THE LABOUR COURT OF SOUTH AFRICA, CAPE TOWN

JUDGMENT

Reportable

Case no: C751/2008

In the matter between:

PROF A R COETZEE & 48 OTHERS	Applicants
and	
THE MEMBER OF THE EXECUTIVE COUNCIL OF THE PROVINCIAL GOVERNMENT OF THE WESTERN CAPE	First Respondent
THE UNIVERSITY OF THE WESTERN CAPE	Second Respondent
THE UNIVERSITY OF STELLENBOSCH	Third Respondent
THE NATIONAL MINISTER OF HEALTH	Fourth Respondent

Heard: 10 August 2012

Delivered: 20 March 2013

Summary: Point *in limine* regarding prescription of a claim originally brought before the Bargaining council which found it had no jurisdiction; the design of the LRA makes it inconsistent with the Prescription Act 68 of 1969 contrary to a number of decisions of this court.

JUDGMENT

Rabkin Naicker J

[1] The applicants are principals and chief specialists in their various fields of medicine. They practice at the Groote Schuur, Tygerberg and Redcross War Memorial Children's Provincial hospitals. They are employed in terms of the joint conditions of staff of both the first and second respondents (in the case of UCT doctors) or of both the first and third respondents (in the case of the University of Stellenbosch doctors).

Background

[2] On 4 November 2010, this court per Cheadle AJ issued a declarator that the applicants were entitled to the scarce skills allowance paid by the first respondent to other medical practitioners at Groote Schuur and Tygeberg hospitals in terms of a collective agreement - PHSDSBC Resolution 1 of 2004.

[3] Having found on the merits for the applicants, the issue of quantum stood over for separate determination. First respondent was given leave to appeal to the LAC on the merits. The parties agreed that quantum be determined by this court before the appeal on the merits proceeds.

[4] In respect of the determination on quantum I note as follows:

4.1 The first respondent has raised a special plea of prescription in respect of the allowances, which I deal with below.

4.2 Since the hearing of this matter before me, on direction, a minute of agreement on quantum has been filed which records the capital value of each applicants total scarce skills allowance. The parties have undertaken to calculate interest on these capital values once I have made a determination regarding the special plea.

Special plea

[5] The first respondent's special plea on prescription reads as follows:

"2. **PRESCRIPTION**

2.1 The claim of the Applicants is based on facts of which the applicants had knowledge or, alternatively, facts of which they could have acquired knowledge by exercising reasonable care, prior to 10 October 2005.

2.2 The process whereby the Applicants claimed such relief was served on the Respondents after 10 October 2008.

2.3 By virtue of Section 12 of the Prescription Act, No 68 of 1969, read with Section 11 (d) thereof, the claim has prescribed."

[6] The submissions by Mr. Oosthuizen on behalf of the first respondent were in essence as follows:

6.1 Section 12 (1), read with Section 12 (3) of the Prescription Act, No 68 of 1969 , stipulates that prescription shall begin to run from the date on which the creditor has knowledge of the identity of the debtor and of the facts from which the debt arises.

6.2 Section 11 (d) of the Prescription Act stipulates that save where an act of Parliament otherwise provides, the period of prescription shall be three years in respect of any debt other than those specified in Section 11 (a) to 11 (c).

6.3 The provisions of the Prescription Act apply to claims under the LRA.

6.4 It was common cause that the Applicants were aware or alternatively could, by exercising reasonable care, have become aware of the collective agreement by the end of January 2004. The prescription began to run in January 2004 and the claim prescribed in January 2007.

Background of the referral to this court

[7] The dispute was referred to conciliation in accordance with the provisions of clause 3.5 of part C of schedule 2 of the constitution of the PH& WSBC (the bargaining council) on 13 June 2006. On 5 December 2006, the bargaining council ruled that it did not have jurisdiction to hear the matter as the applicants were contractually employed by the universities not by the Department of Health.

[8] On 25 August 2008, first respondent was given notice of proceedings to be brought in this court, and on the 10 October 2008 the statement of claim was filed in this court.

Interruption of Prescription

[9] It is submitted on behalf of first respondent that neither the referral to the bargaining council nor a notice in terms of Section 3 of the Institution of Legal Proceedings Against Certain Organs of State Act, No 40 of 2002 interrupted prescription.

[10] The material provisions of the Prescription Act dealing with the interruption of prescription are as follows:

" 15 Judicial interruption of prescription

(1) The running of prescription shall, subject to the provisions of subsection (2), be interrupted by the service on the debtor of any process whereby the creditor claims payment of the debt.

(2) Unless the debtor acknowledges liability, the interruption of prescription in terms of subsection (1) shall lapse, and the running of prescription shall not be deemed to have been interrupted, if the creditor does not successfully prosecute his claim under the process in question to final judgment or if he does so prosecute his claim but abandons the judgment or the judgment is set aside.

(3) ……

(4) ……..

(5) ……..

(6) For the purposes of this section, 'process' includes a petition, a notice of motion, a rule nisi, a pleading in reconvention, a third party notice referred to in any rule of court, and any document whereby legal proceedings are commenced."

Evaluation

[11] First respondent's submission that claims under the LRA are subject to the provisions of the Prescription Act relies on the case of **Mpanzama v Fidelity Guard Holdings (Pty) Ltd**.[1] The court in that matter held that given neither section 143 nor section 158(1)(c) of the LRA proscribe any time limits for instituting proceedings to make an award an order of court, and the LRA does not explicitly exclude the Prescription Act, it would not be inconsistent to apply that statute to the provisions of the LRA. The court per Pillay J bolstered its approach by reliance on the principle of effective and expeditious resolution of disputes. [2]

[12] This approach to the certification process of awards, and applications to make an award an order of court, has been followed in a number of subsequent Labour Court decisions.[3] In **SA Transport and Allied Workers Union v Phakathi v Ghekko Services SA (Pty) & Others**[4] the court, per Basson J held that an application in terms of section 143(4) of the LRA to enforce an arbitration award is a process envisaged by section 15(6) of the Prescription Act which interrupts prescription.[5] The Labour Court has therefore, on the basis that an award constitutes a debt in terms of the Prescription Act, held that such award prescribes three (3) years before it has been certified and/or

[1] [2000] 12 BLLR 1459 (LC)
[2] At paragraphs 9 and 10
[3] See for example Magengenene v PPC Cement & Others (2011) 32 ILJ 2518 (LC); Technicon Pretoria (now Tswane University of Technology) v Nel NO and Others (2012) 33 ILJ (LC); Sampla Belting SA (Pty) Ltd v CCMA & Others (2012) 33 ILJ 2465 (LC)
[4] (2011) 32 ILJ 1728 (LC)
[5] At paragraph 24

made an order of court. The implication of this is that the referral of a claim to the CCMA or bargaining council is not a debt for the purposes of the Prescription Act and prescription only begins to run once an award is made an order of court or is certified.

[13] In my judgment this proposition thus far accepted as established or even trite in decisions of this court, deserves further consideration. Is the Prescription Act consistent with the LRA? The LAC has found that the Prescription Act does apply to contractual claims.[6] It has not dealt with the issue in as far as unfair dismissal claims under the LRA are concerned.

[14] In **Road Accident Fund and Another v Mdeyide**[7] the Constitutional Court considered the important question of consistency between the Prescription Act and other statutes – in that matter, the Road Accident Fund Act. The court found that the Prescription Act 68 of 1969 regulates the prescription of claims in general, and the Road Accident Fund Act 56 of 1996 (RAF Act) is tailored for the specific area it deals with, namely claims for compensation in terms of s 17 against the Road Accident Fund for those injured in road accidents. It found that the legislature enacted the RAF Act — and included provisions dealing with prescription in it — for the very reason that the Prescription Act was not regarded as appropriate for this area.[8] Dealing with the constitutional and legal framework applicable to that matter, the court had this to say:

> "Section 34 of the Constitution enshrines the right of access to courts and states that '(e)veryone has the right to have any dispute that can be resolved by the application of law decided in a fair public hearing before a court or, where appropriate, another independent and impartial tribunal or forum'. The Constitution also recognises the values of human dignity and the advancement of human rights, and requires the State to respect, protect, promote and fulfil the rights recognised in it……

[6] Solidarity & Others v Eskom Holdings Ltd (2008)29 ILJ 1450 (LAC) and National Union of Public Service & Allied Workers v Public Servants Union (2010) 31 ILJ 2347 (LAC)
[7] 2011(2)SA 26 (CC)
[8] At paragraphs 50-53

> The Prescription Act deals with prescription in general. In terms of s 10 a debt is extinguished by prescription after the lapse of the period which applies in respect of the prescription of the debt. A claim is thus after a certain period of time no longer actionable and justiciable. It is a deadline which, if not met, could deny a plaintiff access to a court in respect of the specific claim.
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> Generally under the Prescription Act, prescription applies to a debt. For the purposes of this Act, the term 'debt' has been given a broad meaning to refer to an obligation to do something, be it payment or delivery of goods or to abstain from doing something. Although it may on occasion be doubtful whether an obligation is indeed a debt in terms of the Act, there is no doubt that a claim under the RAF Act constitutes a debt. However, the RAF Act regulates the prescription of claims under it and some of the differences between the two statutes have been placed at the core of this matter……
>
> When does prescription begin to run? This question is central to the present enquiry. Section 12(1) of the Prescription Act stipulates that it begins as soon as the debt is due. A debt is due when it is 'immediately claimable or recoverable'. In practice this will often coincide with the date upon which the debt arose, although this is not necessarily always so. In terms of s 12(3) of the same Act, a debt is deemed to be due when a creditor has knowledge of the identity of the debtor and of the facts from which the debt arises. A creditor is deemed to have the required knowledge if she or he could have acquired it by exercising reasonable care…."[9]

[15] First respondent's case in respect of prescription relies on the submission that 'all claims under the LRA fall under the Prescription Act'. In my judgment the LRA, in its design, is inconsistent with such a submission. Instead of any reference to prescription or the inclusion of a prescription clause, the LRA includes specific time periods for the referral of claims and underscores the use of the tool of condonation by this court when such periods are exceeded in the text of the statute, rather than in the court's rules.

[9] At paragraphs 6,10, 11 and 13

[16] Further, if the Prescription Act did apply, there should be no distinction as regards its application between the different routes required by the LRA i.e. those that go to conciliation and then to arbitration, and/or those which are adjudicated in the Labour Court after conciliation. This lack of distinction would accord with our constitutional values, particularly the right to equality and of access to justice. The LRA does not proscribe a hierarchy of dismissal claims litigants may bring.

[17] The question of the interruption of prescription is also problematic if one accepts that the Prescription Act applies to all LRA claims and that claims which are arbitrated are only hit by prescription three years after an award is certified or made an order of court. There are various outcomes possible when a referral is made to a bargaining council or the CCMA. One of these occurs when the debtor raises the issue of jurisdiction at conciliation, as happened in this matter, and a ruling ensues in the debtors favour. Should such a finding negate the interruption of prescription by the original referral? First respondent argues that it must even though a referral does provide the creditor with knowledge of the debt and of the facts from which the debt arises.

[18] Under the design of the LRA the same problem may arise for a litigant in the following circumstances: a referral is made to conciliation by the creditor and subsequently is referred to arbitration. At the arbitration, a jurisdictional point is raised by the debtor and it is found that the CCMA had no jurisdiction to conciliate or arbitrate the dispute and the matter must go to the Labour Court. Is the statement of claim subsequently filed in this court the only process that can interrupt prescription of the claim despite the fact that the parties have already appeared at two tribunals together.

[19] Another obstacle to the proposition that the Prescription Act applies to all claims under the LRA is the following: a litigant who has to go the arbitration route and gets an award in her favour will not be able to enforce that award after three years. Another litigant who must go the adjudication route in terms

of the LRA will obtain a "judgment debt" in this court which in terms of the Prescription Act prescribes only 30 years after it is handed down.[10]

[20] Further, the LRA, in its design, does not establish an impenetrable wall between proceedings in the CCMA and / or Bargaining Councils and the Labour Court. Indeed proceedings can move across the divide between court and tribunal in both directions. An example is provided by Section 158 (2) and (3) of the LRA which reads as follows:

> "(2) If at any stage after a dispute has been referred to the Labour Court, it becomes apparent that the dispute ought to have been referred to arbitration, the Court may-
>
> (a) stay the proceedings and refer the dispute to arbitration; or
>
> (b) with the consent of the parties and if it is expedient to do so, continue with the proceedings with the Court sitting as an arbitrator, in which case the Court may only make any order that a commissioner or arbitrator would have been entitled to make.
>
> (3) The reference to 'arbitration' in subsection (2) must be interpreted to include arbitration-
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> (a) under the auspices of the Commission;
>
> (b) under the auspices of an accredited council;
>
> (c) under the auspices of an accredited agency;
>
> (d) in accordance with a private dispute resolution procedure; or
>
> (e) if the dispute is about the interpretation or application of a collective agreement."

[21] In my judgment, for at least the above reasons, I find that the Prescription Act is inconsistent with the LRA. Its application to LRA claims would create inequalities between litigants using different routes for their disputes and furthermore will be unworkable where disputes move between tribunal and

[10] Section 11(a) iii of the Prescription Act 68 of 1969

court and vice versa. It will be beneficial if these issues are considered by the LAC and I give leave to the parties to appeal and cross appeal the following order together with the main order on the merits:

1. The point *in limine* is dismissed.
2. The First respondent is to pay the costs of this application.

Rabkin- Naicker J

Judge of the Labour Court

APPEARANCES

For the Applicants Adv. R.G.L Stelzner SC instructed by MacRobert Inc

For the First Respondents Adv A.Oosthuizen SC instructed by State Attorney