REPUBLIC OF SOUTH AFRICA

IN THE LABOUR COURT OF SOUTH AFRICA, AT JOHANNESBURG

JUDGMENT

Reportable

Case no: JR1958/08

In the matter between:

CIRCUIT BREAKERS INDUSTRIES LTD **Applicant**

and

NUMSA obo HADEBE **First Respondent**

DLAMINI SSS N.O **Second Respondent**

THE METAL AND ENGINEERING INDUSTRIES

BARGAINING COUNCIL

(CENTRE FOR DISPUTE RESOLUTION) **Third Respondent**

Heard: **12 March 2013**

Delivered: **1 November 2013**

Summary: **Application of Prescription Act to failure by a party in whose favour an award has been granted to act on the award within three years – whether an award constitutes a 'debt' for the purposes of the Prescription Act. Whether reinstatement or specific performance is subject to prescription.**

JUDGMENT

CHETTY, AJ

[1] The applicant in this matter filed an application for the review and setting aside of the decision of the second respondent ('the arbitrator'), in terms of which the latter ordered the applicant to reinstate the first respondent without loss of earnings, retrospective to the date of his dismissal. The award of the arbitrator was handed down on 11 August 2008. The applicant then applied on 9 September 2008 to have the award reviewed and set aside. On 5 July 2012, the applicant filed an application in terms of Rule 11 in which it sought an order that the underlying *causa* of the review application, that is the award of the second respondent, had prescribed and accordingly the review application (and the first respondent's application for condonation for the late filing of its reply) had become academic.

[2] The first respondent opposed the Rule 11 application, contending that the prescriptive period had been interrupted when the applicant filed its review application; that the upholding of a successful plea of prescription would constitute a grave injustice; that the applicant was guilty of not having prosecuted the review application as a diligent litigant ought to, and that the applicant, by the filing of the review application, tacitly acknowledged liability for the payment of the 'debt' owed to the first respondent. Mr. Cartwright, who appeared for the first respondent, conceded that subsequent to the handing down of the award by the second respondent, the first respondent had not taken any measure to certify the award in terms of s 143 of the Labour Relations Act 66 of 1995 ("the Act") read with Rule 40 of the CCMA Rules, nor had the first respondent brought an application in terms of s 158(1) of the Act to make the arbitration award an order of Court.

[3] The essence of the argument from the applicant is that the first respondent had failed to take any steps to initiate any process as contemplated by the Prescription Act 68 of 1969 to enforce the award or to claim payment of a 'debt'. The first respondent submitted in the alternative that prescription only

commenced when the applicant filed the Rule 11 application on 6 July 2012, or that it was interrupted when the first respondent filed its notice of intention to oppose the review application on 23 September 2008, failing which on 12 July 2010, when it filed its answering affidavit in the review proceedings. As will appear from what is set out below, the first respondent hinges its defence on the judgment of Cook AJ in *Aon SA (Pty) Ltd v Commission for Conciliation, Mediation Arbitration and Others*[1] whereas the applicant relies on a number of decisions in this Court, which hold that prescription is not interrupted by the institution of review proceedings.

[4] The matter was set down on the opposed roll for a hearing on the issue of the first respondent's application for condonation as well as the review application. The parties were in agreement that I should hear the Rule 11 application, as a finding in favour of the applicant would bring the matter to an end. If the application is found to be unsuccessful, the matter would proceed to be heard on the condonation and review applications. Prior to hearing argument on the issue of prescription, I requested the parties to also address me on the issue of whether an award of reinstatement with back pay is a "debt" as envisaged in the Prescription Act, and if the Prescription Act did apply to labour disputes, whether the award in its entirety is covered by prescription, or whether the award is capable of being severed into two components, that is, reinstatement and the monetary award of back pay.

[5] As a starting point, the applicant contends that it is an established principle of our law that the rule of extinctive prescription as envisaged in the Prescription Act, applies to employment law. Section 10 of the Prescription Act provides that

> 'Extinction of debts by prescription
>
> (1) Subject to the provisions of this Chapter and of Chapter IV, a debt shall be extinguished by prescription after the lapse of the period which in terms of the relevant law applies in respect of the prescription of such debt.'

[1] (2012) 33 ILJ 1124 (LC).

[6] Mr. Loyson who appeared for the applicant, relied on *Mpanzama v Fidelity Guards Holding (Pty) Ltd*[2] in support of the above submission, where Pillay J stated the following

> 'Given that the Labour Relations Act does not expressly exclude the operation of the Prescription Act, it will therefore not be inconsistent to apply the provisions of the Prescription Act to section 143 read with section 158(1)(c) of the Labour Relations Act.
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> Whatever the rationale may be for the doctrine of prescription or the limitation of actions, the Labour Relations Act compels the effective resolution of disputes (section 1(d)(iv) of the Labour Relations Act).
>
> This implies that labour disputes must be resolved or finalised expeditiously. For this reason too, it would not be inconsistent to apply the Prescription Act to sections 143 and 158 (1)(c) of the Labour Relations Act.
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> The Prescription Act has been applied to the Basic Conditions of Employment Act of 1983. *(Uitenhage Municipality v Malloy* 1998 (19) ILJ 757 (SCA)).'

In *Uitenhage Municipality v Molloy,*[3] the Supreme Court of Appeal stated the following:

> 'The remedy lies in the employee's own hands. Such an employee cannot profit by his or her own inaction. As was stated by Van den Heever J in *Benson and another v Walters and Others* 1981 (4) SA 42 (C) at 49G:
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> > "Our Courts have consistently held that a creditor is not able by his own conduct to postpone the commencement of prescription."'[4]

[7] The Constitutional Court in *Road Accident Fund and Another v Mdeyide*[5] left no doubt as to the applicability of prescription in litigation, albeit in the context of road accident claims. The Court held that

> 'Rules of prescription – providing that claims become extinct after a period of

[2] [2000] 12 BLLR 1459 (LC) at paras 8-11.
[3] 1998 (19) ILJ 757 (SCA).
[4] Ibid at 762F-G.
[5] 2011 (2) SA 26 (CC).

time – are common in our legal system and apply to all civil claims. The Prescription Act and other Acts of Parliament, including the RAF Act, provide for specific periods in respect of claims brought in terms of those Acts. The origin of rules of prescription in our legal system dates back to Roman times. (On the evolution of prescription in South African law, see Saner *Prescription in South African Law* (Butterworths, Durban 1996) 3-3 *et seq*. On prescription in general, see Loubser *Extinctive Prescription* (Juta, Kenwyn 1996) (*Extinctive Prescription)* as well as "Towards a Theory of Extinctive Prescription" (1988) 105 *SALJ* 34.) Under the common law the prescription period was generally 30 years. (See, for example, *Standard Bank of S.A. Ltd v Neethling, NO* 1958 (2) SA 25 (CPD) at 30A.) These rules were codified in the Prescription Act 18 of 1943, which was replaced by the current Prescription Act 68 of 1969 (Prescription Act).'

This Court has repeatedly emphasised the vital role time limits play in bringing certainty and stability to social and legal affairs, and maintaining the quality of adjudication. Without prescription periods, legal disputes would have the potential to be drawn out for indefinite periods of time bringing about prolonged uncertainty to the parties to the dispute. The quality of adjudication by courts is likely to suffer as time passes, because evidence may have become lost, witnesses may no longer be available to testify, or their recollection of events may have faded. (See *Mohlomi v Minister of Defence* 1997 (1) SA 124 (CC) (1996 (12) BCLR 1559; [1996] ZACC 20) at para 11. See also *Engelbrecht v Road Accident Fund and Another* 2007 (6) SA 96 (CC) (2007 (5) BCLR 457; [2007] ZACC 1) at para 29; and *Brümmer v Minister for Social Development and Others* 2009 (6) SA 323 (CC) (2009 (11) BCLR 1075; [2009] ZACC 21) at paras 64-67.)'[6]

In *Mpanzana*, it was held:

'It has also been applied in an application to make an award an order of Court in terms of section 31(1) of the Arbitration Act No 42 of 1965. *(Cape Town Municipality v Allie NO* 1981 (2) SA 1 (C) at 1).'[7]

[6] Ibid at paras 7-8.
[7] Above n2 at para 12.

[8] Counsel for the applicant conceded that the upholding of a plea of prescription might, in some cases, deprive an unsuspecting and in many cases, unrepresented employee, of the benefits of an award made by the CCMA or bargaining council, simply because they were not informed of the need to have the award made an order of Court in terms of s 158 of the Act. In this context, an employer who is dissatisfied with the outcome of an award from the CCMA or bargaining council may decide to institute review proceedings where there is no prospect of success whatsoever. If, for whatever reason, more than three years elapses from the date when the award is issued and the employee during the intervening period has taken no steps to enforce the award, the award is prescribed in terms of the Prescription Act. In this matter, the applicant in its affidavit in support of the dismissal of the arbitration award due to prescription merely states

> 'For reasons which are not material, nor relevant to this application, the review application has not been finalized at the time of the signing of this affidavit, even though the same was opposed by the First Respondent.'[8]

In response, the first respondent contends that the reasons for the delay in prosecuting the review are "extremely material" as a grave injustice would result if the award were to prescribe, particularly where the party seeking to plead prescription has been responsible for the delay. The first respondent points out that almost four years have elapsed since the date when the review was launched. It submitted that instead of seeking to set the matter down for adjudication, the applicant has deemed it fit to bring an application for the award to be dismissed due to prescription.

[9] In dealing with the first respondent grounds of opposition, it firstly contends that the applicant's review application amounted to a "tacit acknowledgment of a debt", alternatively that the period was interrupted when the first respondent filed a notice of intention to oppose the review or when it later filed its answering affidavit. These contentions are raised in the context of s 14 of the

[8] Record at 562, para 6

Prescription Act, under the heading "Interruption of prescription by acknowledgement of liability", which provides:

> '(1) The running of prescription shall be interrupted by an express or tacit acknowledgement of liability by the debtor.
>
> (2) If the running of prescription is interrupted as contemplated in subsection (1), prescription shall commence to run afresh from the day on which the interruption takes place or, if at the time of the interruption or at any time thereafter the parties postpone the due date of the debt from the date upon which the debt again becomes due.'

The only authority I can find in support of the first respondent's contention is in *Aon* where Cook AJ held that

> 'The Applicant, by launching the review application, acknowledged the debt created by the award, but seeks to have the debt reviewed, corrected or set aside by the Court. I am of the view that the filing of the review application by the applicant, the debtor, amounts to express acknowledgement of liability by the applicant to the employee, the creditor. Accordingly, the running of prescription was interrupted by an express acknowledgement of liability by the debtor on 11th of November 2004.'[9]

I respectfully disagree with the conclusion reached by Cook AJ in *Aon*, as a review application to challenge an award of a commissioner, in my view, cannot be construed as an "acknowledgement of liability" to a creditor, as envisaged in s 14(1) of the Prescription Act. The more logical conclusion is that a review application arises from the fact that an applicant disputes liability for any payment or performance in terms of an award.[10]

[10] The next ground on which the first respondent relies is that the launching of the review application by the applicant, alternatively, the filing of an intention to oppose the review together with an answering affidavit by the respondent,

[9] Above 1 at para 9.
[10] See *Sampla Belting SA (Pty) Ltd v Commission for Conciliation, Mediation and Arbitration and Others* (2012) 33 ILJ 2465 (LC).

serves to interrupt prescription for the purposes of the Prescription Act. Section 15 of the Act, under the heading "judicial interruption of prescription" provides

> '(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.
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> ...
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> (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.'

[11] A number of decisions of this Court confirm that the filing of a review application does not interrupt prescription.[11] I am in agreement with the views expressed in *Police and Prisons Civil Rights Union on behalf of Sifuba v Commissioner of the SA Police Service and Others,*[12] where Musi AJ held that

> 'The applicant however contends that a review application practically suspends the legal force of an arbitration award. This is a practice of convenience. The court will in most cases for reasons of convenience and expedience postpone an application to make an arbitration award an order of court if there is a pending review application. This practice should not however be exalted to a rule or a legal impediment to prescription. In recognizing this practice, Grogan AJ said the following in *Professional Security Enforcement v Namusi* (1999) 20ILJ 1279 (LC); [1999] 6 BLLR 610 (LC) at para 10:
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> "Neither the Act not the common law lays down a hard-and-fast rule that an application to have an award (or any judicial order) made an order of court must be dismissed or conditionally postponed if the person against whom it is to be made has applied for its rescission or review. This Court has, however, adopted the practice of postponing applications

[11] See *Sampla Belting,* above 9 and the cases cited therein. *Technikon Pretoria (now Tshwane University of Technology) v Nel NO and Others* (2012) 33 ILJ 293 (LC); *SA Transport and Allied Workers Union on behalf of Phakathi v Ghekko Services SA (Pty) Ltd and Others* (2011) 32 ILJ 1728 (LC) and *Magengenene v PPC Cement (Pty) Ltd and Others* (2011) 32 ILJ 2518 (LC) and *SA Transport and Allied Workers union on behalf of Hani v Fidelity Cash Management Services (Pty) Ltd* (2012) 33 ILJ 2452 (LC).

[12] (2009) 30 ILJ 1309 (LC).

brought under s 158(1)(c) if the respondent has filed an application for review."[13]

[12] Following the views expressed in *Sifuba*, Bhoola J in *Magengenene* concluded that

> 'If these principles are to be applied to the present matter it would make it clear that a review is not a legal impediment that interrupts the running of prescription, and the applicant should have taken timeous steps to enforce the award.'[14]

Gush J in *Sampla Belting SA (Pty) Ltd v CCMA and Others*[15] was obliged to come to the same conclusion, recognising the possibility for unfairness in the present legislation when he commented that:

> 'Despite the seemingly unfair consequence of a review application not interrupting prescription, the court has no option but to give effect to the Prescription Act.
>
> It is worth noting though, that the provisions of s 24 of the Labour Relations Act Amendment Bill 2012 propose that the Labour Relations Act be amended to provide that the filing of a review application will suspend the running of prescription. The proposed amendment to s 145 of the Labour Relations Act reads as follows:
>
> "(9) [A]n application to set aside an arbitration award in terms of this section interrupts the running of prescription in terms of the Prescription Act (Act No. 68 of 1969) in respect of the award."
>
> Whilst this amendment will remedy the unfairness, it also serves to confirm that the filing of a review application does not at present interrupt prescription. In the circumstances and particularly as the applicant has properly raised the question of prescription in its pleadings, I am obliged to uphold the applicant's plea of prescription.'[16]

[13] Id at para 35.
[14] *Magengenene v PPC Cement (Pty) Ltd and Others* (2011) 32 ILJ 2518 (LC) at para 7.
[15] (2012) 33 ILJ 2465 (LC).
[16] Id at para 23-25.

[13] The next ground of defence advanced by the first respondent was that the upholding of a plea of prescription would result in a grave injustice, particularly to employees. It is inconceivable that a plea of prescription would be raised by an employee – invariably it would be an employer who seeks to nullify the effect of an adverse award issued by a commissioner. As to the 'injustice' that would befall a party where a plea of prescription is upheld, Musi AJ in *Sifuba* held that

> 'It was also argued that it would be inequitable to punish the applicant by upholding a plea of prescription. It is not only an issue of punishment but also an issue of substantive law, finality, certainty, protection of the debtor and the expeditious prosecution and resolution of disputes. The Prescription Act does not give the court a discretion. If the requirements for a plea of prescription have been established by the party taking the point then that party is entitled as a matter of right to have that plea upheld. Although this court is a court of equity, in my view considerations of equity do not come into play when all the requirements for a successful plea of prescription are established. Extinctive prescription renders unenforceable a right by the lapse of time. See s 10(1) of the Prescription Act.'[17]

[14] The views expressed in *Sifuba* are similar to those expressed by Pillay J in *Mpanzama* where the learned judge commented that

> 'It was submitted that as a Court of equity, the Prescription Act should not be applied to oust the jurisdiction of the court and thereby deny the applicant's claim.
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> Equity must be applied even-handedly to both employer and employees. The employee had three years in which to prosecute his claim. The Respondent had persistently denied liability for the debt. The respondent did not obstruct the applicant in instituting proceedings.
>
> In the circumstances, the Court cannot come to the assistance of a sloppy litigant. It would be inequitable to the respondent if the applicant is allowed to profit from his own inaction.'[18]

[17] Above n12 at para 44.
[18] *Mpanzama* n2 at paras 13-15.

In the present matter, I would not categorise the first respondent as a sloppy litigant.[19] The unfortunate consequence of prescription, in the context of the Act, is that a sloppy litigant who draws out the proceedings, aware that an employee has not made an award of the CCMA an order of Court, may at the end benefit from its dilatory conduct in the review proceedings. It is presumably this unfair consequence which has driven the legislature to institute the pending amendments to the Act to provide for the interruption of prescription when a review is filed. It is a trite principle of our law of prescription that a party cannot profit from his own inaction. On a point of law, however, I am unable to disagree with the views expressed in the various judgments to which I have referred to above. Despite its harsh consequences and the injustice, that results from a plea of prescription being upheld, it operates as a matter of law.

[15] In *Solidarity and Others v Eskom Holdings Limited,*[20] the LAC gave consideration to the issue of prescription but in the context of a suit filed by the union against the employer for failing to comply with an agreement to honour certain undertakings concerning benefits payable to its members on reaching the date for their early retirement. The dispute before the Court was whether the claim of those aggrieved by the employer's decision not to abide by the agreement had prescribed three years from the date of the breach or whether such claim would only prescribe three years after a member had reached the date for early retirement. In his judgement, Zondo, JP noted that Khampepe, JA had come to the conclusion that in terms of the Prescription Act, the "debt" owed to the appellants by the respondent would be "due" when each one of the second and further appellants reached their date for early retirement age. On that basis, the claims had not become prescribed. Both the Labour Court as well as Khampepe, JA in the LAC agreed that the Prescription Act was applicable to the appellant's claim in relation to the benefits that would flow from the early retirement agreement. The Court, however, did not delve into the issue of what constituted a "debt" or whether reinstatement falls within the meaning of a "debt".

[19] See *Van Vuuren v Boshoff* 1964 1 SA 395 (T), at 403G where the Court held that 'The Prescription Act is designed to penalise inaction, not legal ineptitude.'
[20] CA 9/05 [2007} ZALAC 19 (21 December 2007).

[16] The first respondent submitted further that in light of *Sidumo and Another v Rustenburg Platinum Mines Ltd and Others,*[21] a decision of the CCMA was the result of administrative action and therefore not extinguished by prescription. Referring to *Oudekraal Estates (Pty) Ltd v City of Cape Town and Others,*[22] Mr. Cartwright contended that a CCMA award remains valid until set aside by a competent court. I am of the view that the reliance on *Ouderkraal* is misplaced. However, it was further submitted that as an award is the result of administrative action, it does not constitute a 'debt' as envisaged in the Prescription Act. I find there to be merit in the contention of the first respondent, but for very different reasons.

> 'Section 23(1) [of the Constitution] provides that everyone has the right to fair labour practices. Although the right to fair labour practices extends to employees and employers alike, for employees it affords security of employment.'[23]

[17] As I have pointed out earlier, the upholding of a plea of prescription may have the unintended consequence of depriving an employee of the benefit of a lawfully obtained award in his or her favour, only because he or she failed to simply institute proceedings in this Court to stay prescription. More importantly, in my view, is whether an award of the CCMA of reinstatement may be construed as a 'debt' for the purposes of the Prescription Act. A perusal of the cases in which prescription has been raised and which I have referred to above, reflect, in my respectful view, as an assumption that an award of the CCMA is a 'debt'. In *Magengenene*, the Court held that

> 'It is trite that extinctive prescription as envisaged in the Prescription Act is applicable to LRA disputes. In this regard, an arbitration award is a debt as contemplated in the Prescription Act: *Chemical Energy Paper Printing Wood and Allied Workers Union and Another v Le-Sel Research* (*Pty*) *Ltd* (2009) 30

[21] (2007) 28 ILJ 2405 (CC) at para 88.
[22] 2004 (6) SA 222 (SCA) at para 26.
[23] *Mpanzama* n19 at para 55.

> ILJ 1818 (LC); *Public Servants Association obo Khaya v CCMA and Others* (2008) 29 ILJ 1546 (LC).'[24]

In *Chemical Energy Paper Printing Wood and Allied Workers Union and Another v Le-Sel Research* (*Pty*) *Ltd*[25] it appears that the Court accepted the submission of counsel that the arbitration award constituted a "debt". In his judgment the Learned Judge records the following

> 'In court, Adv *Boda* conceded that an arbitration award is a debt as contemplated in the Prescription Act.'[26]

[18] In the decisions of *Sampla Belting* and *Aon*, the Court dealt with awards of compensation which was been handed down by the CCMA and held that prescription did run against those awards, which constituted 'debts'. In *Aon*, Cook AJ concludes that "The debt in this matter is created by the arbitration award."[27] In *Sifuba*, the Court dealt with an award issued in favour of the employee where the employer, the SA Police Services, had sought to deduct certain monies from his salary. The employee had been found to have been overpaid by error. In the result, the bargaining council ordered that the employee be paid his arrear salary. In *Mpanzama* v *Fidelity Management Services (Pty) Ltd*, the awards in respect of which a review was sought pertained to reinstatement. In the latter decision, Pillay J noted that

> 'It was not disputed in these proceedings that the award was a debt within the meaning of the Prescription Act. The debt arose when the award was published and not before (*Cape Town Municipality v Ally NO (supra)*.'[28] (sic)

[19] I am of the view that where an award of compensation has been issued by the CCMA in favour of an employee and the award is subsequently reviewed by the employer; the award would constitute a debt for the purposes of the Prescription Act and would be subject to the three years prescriptive period. An award of compensation is, however, not the case before me. The question

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[24] *Magengenene* (supra) 2520B-D.
[25] (2009) 30 ILJ 1818 (LC).
[26] Ibid at para 22.
[27] *Aon*, above n1 at para 9.
[28] *Mpanzama* above n2 at para 18.

which I posed to both parties at the outset of the hearing was whether an order of reinstatement, as in the present case, constitutes a debt for the purposes of prescription. Any notion that an award of reinstatement, accompanied by an order of back pay, is capable of being severed into two portions was strongly resisted by Mr Loyson. He submitted than an award must be viewed as a single, indivisible entity. This submission would appear to find support in *Republican Press (Pty) Ltd v CEPPWAWU and Gumede and Others*[29] where Nugent JA said the following:-

> 'I do not think that the back pay to which a worker ordinarily becomes entitled when an order for reinstatement is made is to be equated with compensation (thus allowing for limitation contained in section 194 to be applied in relation to the back pay). As pointed out by Davies AJA in *Kroukram* (and I respectfully agree) an order of reinstatement restores the former contract and any amount that was payable to the worker under that contract necessarily becomes due to the worker on that ground alone'.[30]

[20] In analysing the different remedies available to a commissioner at arbitration, Murphy AJA in *Tshongweni v Ekurhuleni Metropolitan Municipality*[31] effectively sketched out the scheme of relief permissible by the LRA, in comparison to the relief available under earlier forms of the Act. The learned judge's exposition is relevant to the conclusion I reach as to whether prescription is applicable to orders for specific performance.

> 'Counsel's submission is founded upon a fundamental misconception regarding the nature of the statutory remedies available for unfair dismissal in terms of the LRA. Reinstatement, re-employment and compensation, as the exclusive remedies for unfair dismissal, (now provided for in section 193(1) of the LRA), were introduced into labour legislation to remedy the absence of satisfactory relief for the unfair termination of the contract of employment by employers. At common law the only remedy available to a dismissed employee was an action for wrongful breach of contract. As in all cases of breach of contract, the injured party could elect to sue for specific performance or for will succeed only where

[29] [2007] 11 BLLR 1001 (SCA).
[30] Ibid at para 19.
[31] (2012) 33 ILJ 2847 (LAC).

the party claiming performance has performed or at least tenders performance. In the context of an employment contract, a claim for specific performance is a claim for reinstatement on the same terms and conditions of employment that existed at the date of dismissal and must be accompanied by a tender by the employee to resume services or at least to fulfil the principal obligation under the contract to make his or her services available. The employee's entitlements under a contract of employment are dependent on the availability of his or her services to the employer and not the actual rendering of services. (footnote omitted)

Prior to the 1980's our courts rarely awarded specific performance of a contract of employment on the ground that it was inadvisable to compel one person to employ another whom he does not trust in a position which imports a close relationship. (footnote omitted) This meant that an employee in the event of a wrongful termination of employment was restricted to a claim for damages to remedy the breach. Where damages are sought as a surrogate for performance they relate to the monetary value of the performance agreed upon but not received. Such damages in the employment context were normally of a limited amount because of the application of the general principle that an injured party is only entitled to his or her positive interest. The basic principle in the assessment of damages is that the plaintiff should be placed in the position he or she would have been in had the contract been fully performed. All that is required for the lawful termination of a contract of employment, for there to be full performance, is notice of termination in an indefinite term contract and the expiry of the period in a fixed-term contract. Damages for breach in the employment context accordingly will be either the amount payable as notice pay in an indefinite term contract or the salary payable for the unexpired period of a fixed term contract, less any sum the dismissed employee earned or could reasonably have earned during the notice period or the unexpired period of the contract, such being the actual loss suffered by him. (footnote omitted) Hence a plaintiff's damages could never be more than the notice pay due under the contract or the salary owing in respect of the unexpired fixed term.

The unfair dismissal regime was introduced in the 1980s, following the recommendations of the Wiehahn Commission of Enquiry into Labour Legislation, precisely in recognition of the fact that contractual principles and remedies offered employees paltry protection. Since then employees can sue

on a wider cause of action (unfairness rather than wrongful breach) and the statutory remedies of reinstatement, re-employment and compensation are available. In *Equity Aviation Services (Pty) Ltd v CCMA and Others*, (footnote omitted*)* the Constitutional Court explained the meaning of the word reinstate as follows:

> "The ordinary meaning of the word 'reinstate' is to put the employee back into the job or position he or she occupied before the dismissal, on the same terms and conditions. Reinstatement is the primary statutory remedy in unfair dismissal disputes. It is aimed at placing an employee in the position he or she would have been but for the unfair dismissal. It safeguards worker's 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. (Emphasis supplied.)'[32]

[21] What is clear from the decision of the Labour Appeal Court is that, apart from clarifying the instances where reinstatement may not be competent, it is evident that reinstatement is an order for specific performance. The question posed by the first respondent still remains – is it a debt for the purposes of the Prescription Act. The Prescription Act does not define a 'debt'. Our courts have held that it must be given a wide and general meaning.[33] Mr Loyson referred me to the decision of Molahlehi J in *Fredericks v Grobler N.O and Others*[34] where the learned Judge accepted with approval the finding in *Electricity Supply Comm v Stewarts and Lloyds of SA (Pty) Ltd*[35] that a debt is

> 'that which is owed or due; anything (as money, goods, services) which one person is under an obligation to pay or render to another.'[36]

[22] On that basis, Molahlehi J regarded an award of the CCMA as a debt for the purposes of prescription. For reasons which I have set out above and particularly in light of the remedy of reinstatement (or re-employment)

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[32] Ibid at para 35-37.
[33] See *African Products (Pty) Ltd v Venter* [2007] 3 All SA 605 (C) at para 22.
[34] [2010] 6 BLLR 644 (LC) at para 21.
[35] 1981 (3) SA 340 (A).
[36] Ibid at 344F-G.

constituting an order for specific performance, I am constrained to respectfully disagree with the conclusion reached by Molahlehi J above. In *Leviton and Son v De Klerk's Trustee,*[37] a debt was held to mean "whatever is due – *debitum* – from an obligation." On the other hand, the Constitution Court in *Njongi v MEC, Department. of Welfare, Eastern Cape*[38] had to consider whether arrears owing to the applicant arising from a social grant constituted a debt for the purposes of the Prescription Act. It was argued before the Constitutional Court that disability grant arrears could not be a debt in circumstances where the Provincial government had failed to perform functions assigned to it under the Constitution. Justice Yacoob writing for the Court held that

> 'Therefore, however broadly the term might be defined, it is not a debt for purposes of the Prescription Act. The argument was that an obligation of this kind can never prescribe. Debts arising from fundamental rights are of a genre different to that envisaged by prescription legislation which was in any event pre-constitutional.'[39]

[23] The right to reinstatement, in my view, falls into a similar category of fundamental rights contemplated by the constitution under the rubric of the right to fair labour practice. This must be distinguished from those cases where an award of compensation has been determined as the appropriate remedy for an unfair dismissal. In such instance, I accept that where a party has taken no steps to make such award an order of court within three years, such claim would prescribe similarly to any other debt. An award for reinstatement (with or without backpay) must be seen in a different light. Our courts have accepted that reinstatement is the primary remedy in the case of an unfair dismissal. It could have never been the intention of the legislature to make the remedy of reinstatement open to being up-ended by a plea of prescription. For this reason too, I am inclined to take the view that a right of reinstatement as a remedy granted by the CCMA does not constitute a "debt" for the purpose of prescription and that the application should be dismissed.

[37] 1914 CPD 685 at 691.
[38] 2008 (6) BCLR 571 (CC).
[39] ibid at para 41.

[24] In the result, I make the following order:

1. The applicant's application in terms of Rule 11 is dismissed;

2. There is no order as to costs;

3. The matter is be set down for a hearing on the merits and on the second respondent's application for condonation.

Chetty, AJ

Acting Judge of the Labour Court

Appearances:

For the Applicant:	Advocate E Loyson.
Instructed by:	Henk Wissing INC
For the First Respondent:	Mr. D Cartwright of David Cartwright Attorneys