REPUBLIC OF SOUTH AFRICA

IN THE LABOUR COURT OF SOUTH AFRICA; JOHANNESBURG

JUDGMENT

Reportable

Case no: JR 3147/2009

In the matter between:

CONCOR HOLDINGS (PTY LIMITED **Applicant**

and

DANIEL MAZIBUKO **First Respondent**

COMMISSIONER FOR CONCILIATION,

MEDIATION AND ARBITRATION **Second Respondent**

THULANI AKIM NO **Third Respondent**

Heard: **10 and 25 January 2013**

Delivered: **18 July 2013**

Summary: Application to dismiss review application. Whether employee's right to enforce an arbitration award has prescribed after three years and whether any considerations of equity and justice are applicable in applying the Prescription Act 68 of 1969.

JUDGMENT

BANK, AJ

Introduction

[1] The first respondent in this matter, Daniel Mazibuko, was formerly employed by the Applicant, Concor Plant (which has apparently now changed its name to Murray and Roberts Construction (Pty) Ltd t/a Murray and Roberts Plant). For the sake of convenience and clarity, and by virtue of the fact that fairly voluminous papers have been filed in this long and drawn-out matter, I will refer to the parties as "Concor" and "Mazibuko" respectively.

[2] Mazibuko states that he commenced his employment with Concor as a driver in 1988, although Concor maintains that he only commenced his employment in August 2007. Be that as it may, it appears to be common cause that Mazibuko was sent to one of Concor's clients, Eskom, and deployed at the latter's Ingula project. In July 2008, after a series of minor accidents, it was found that Mazibuko was unable to see through his right eye and needed new spectacles for his left eye. Because of Eskom's strict occupational health and safety regulations, Mazibuko was disqualified for employment as a driver on this particular project. Concor, to its credit, did what it could to find an alternative position for Mazibuko as a driver and created a temporary position for him at its Amalgam offices as a store assistant. Concor states that it

continued paying Mazibuko the same salary he would have earned as a driver rather than the (presumably lower) salary of a store assistant.

[3] After undergoing a re-test of his vision in order to assess his suitability as a light vehicle driver, on 26 November 2008, Mazibuko was found to be "right eye blind". This meant that he would be unable to return to Eskom for the duration of the Ingula project. Concor states that it was unable to secure another permanent position for Mazibuko as a driver despite making all possible enquiries.

[4] Concor subsequently found that it could no longer retain Mazibuko in the temporary store assistant's position and decided to commence with a retrenchment consultation process which started on 1 April 2009. Concor states that it attempted to reach a settlement with Mazibuko by offering him a separation package which he refused. Despite three consultation meetings at which Mazibuko was represented by a union shop steward, no alternatives to retrenchment were found and Mazibuko was retrenched with effect from 24 April 2009, on which date he was paid his outstanding monies, including severance pay.

[5] Mazibuko then referred an unfair dismissal dispute to the CCMA which was attended by both parties and heard before the third respondent ("the Commissioner") for an arbitration hearing in Johannesburg on 5 and 8 September 2009. The Commissioner handed down an arbitration award on 24 September 2009 in which he found that Mazibuko's dismissal was substantively unfair and ordered Concor to pay him an amount of R21,000.00, equivalent to seven months' salary.

[6] Concor subsequently filed a review application on 19 November 2009 and, as has unfortunately become the norm in such proceedings, the record was filed almost 10 months later on 7 September 2010. Mazibuko filed his answering affidavit on 5 October 2010. Thereafter, the matter appears to

have lain dormant for a further unexplained period of some 15 months until, on 25 January 2012, when Concor filed an application for condonation of the late filing of its notice in terms of Rule 7A(8)(b).

[7] I pause to point out that Mazibuko has at all material times been represented by various attorneys appointed by the Legal Aid Board. In the proceedings before me, he was ably represented by Mr Makinta, also appointed by the Legal Aid Board, for whose assistance I am grateful. Concor was represented by Ms Charoux.

[8] The matter then came before Bhoola J on 2 February 2012 on which occasion Mazibuko took the point that he had not been afforded sufficient time in which to respond to Concor's condonation application. Bhoola J then ordered both the condonation and review application to be postponed *sine die* in order to enable Mazibuko to file answering papers in the condonation application or an application to dismiss the review. Concor was ordered to pay the wasted costs of that day's hearing.

[9] Mazibuko subsequently filed his answering affidavit in the condonation application on 8 February 2012 and Concor filed its reply on 15 February 2012. A request to enrol the matter for hearing was made on 23 April 2012 and the matter was enrolled for hearing on 10 January 2013.

[10] Shortly prior to the hearing of the matter, two further applications were launched by both Concor and Mazibuko respectively:

10.1. On 22 December 2012, Mazibuko launched an application to dismiss Concor's review application on the grounds that both the review and condonation applications had been instituted by Concor "simply to delay its compliance with the award, and to frustrate me".[1] He further submitted that Concor had no *bona fide* intention to review the award and that Concor had no prospects of success in either application;

10.2. On 10 December 2012, Concor then launched its own application to have Mazibuko's claim dismissed on the grounds that it had prescribed. An affidavit was deposed to by one Shannyn Karshagan, Concor's human resources manager, who stated that it had come to the attention of the company's legal representatives in preparing for the main application that the arbitration award had itself prescribed on 8 October 2012, on the grounds that Concor had been ordered by the Commissioner to pay Mazibuko within 14 days of receipt of the award and that the award had thus prescribed three years and 14 days after the date of the award, which was 8 October 2012. It was also argued that Mazibuko could have interrupted prescription by either applying for the award to be certified by the CCMA in accordance with section 143 of the Labour Relations Act No 66 of 1995 ("the LRA") or by applying to have the award made an order of this court in accordance with section 158(1)(c) of the LRA and Mazibuko had failed to do either.

[11] It is not necessary for me to deal with the opposing affidavits filed by both parties in respect of these two interlocutory applications and accordingly I do not do so.

[12] For the reasons set out further in this judgment, the issue to be determined, while seemingly crisp, has proven far more taxing than I ever envisaged and has occupied much of my thoughts over the past few months in an attempt to balance the dictates of law and equity, as I am enjoined to do, and in arriving at my final decision. To the extent that this has occasioned further delays for both parties I can only offer my sincere apologies.

[13] It goes without saying that it is necessary to first dispose of the point on prescription because, if Concor's argument is upheld, that will certainly be the end of the matter and there will be no necessity to deal with the main case at all. I pointed this out to the parties when they first appeared before me and

[1] Supporting affidavit in the application to dismiss at para 27.

both parties were in agreement with me. I also pointed out that the question of the prescription of arbitration awards has been dealt with by this Court in a good number of reported (and some unreported) decisions but I nevertheless required the parties to prepare further heads of argument on this particular issue and to address me fully on all relevant aspects. It is for this reason that the proceedings were adjourned to 25 January 2013 on which occasion the matter was fully argued. I am indebted to both legal representatives for their comprehensive and helpful submissions in this regard.

Submissions

[14] Ms Charoux provided ample authority for the submission that it is well-established that an arbitration award is regarded as a debt as defined by section 1 of the Prescription Act No 68 of 1969 and that such debt will be extinguished by prescription after a lapse of three years from the date of issuing of the award.

[15] Faced with the weight of the authorities against him, Mr Makinta valiantly argued that I should somehow find that the definition of "judgment" in section 11 of the Prescription Act refers to a judgment in the wider context and ought to include within this definition an arbitration award of the CCMA that has not yet been made an order of court. He also argued that this court, as a court of equity, should, in applying the Prescription Act as it is bound to do, apply it in the most equitable manner possible.

The law

[16] In *Sampla Belting SA (Pty) Ltd v CCMA,*[2] Gush J analysed sections 14 and 15 of the Prescription Act dealing with the interruption of prescription and concluded[3] that the provisions of section 15 of the Prescription Act "set out quite clearly what would constitute judicial interruption of prescription",

[2] (2012) 33 ILJ 2465 (LC).
[3] Ibid at para 20.

namely, service on the debtor of any process whereby the creditor claims payment of the debt. Gush J had earlier considered the meaning of the word "process" in section 15(1) and referred to section 15(6) in which it is stated that "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.

[17] It goes without saying that a Court cannot be faulted for doing whatever it can to assist an individual litigant when such litigant, armed with what he or she believes (correctly or otherwise) to be an unassailable case supported by an arbitration award, is faced with a review application that puts a spanner in the works and effectively ensures that the litigant is denied payment of compensation for several years while the achingly-slow review process takes its course.

[18] A good example of this is the decision of Molahlehi J in *Technikon Pretoria (now Tshwane University of Technology) v Nel NO and Others,*[4] in which prescription was raised, in which it was held that a point of prescription ought to properly be raised in a special plea or opposing affidavit although the court retains a discretion to allow such point to be raised at a later stage. In this case the Court held that the employer party, in filing a "notice to argue point of law" raising the point of prescription for the very first time on the day before the hearing and also in heads and supplementary heads of argument, meant that the point of prescription was not properly before the court as it had not been properly pleaded and that the employer party had denied the employee the opportunity to give a full account of the delay in relation to prosecuting his application in terms of section 158(1)(c) of the LRA to finality. Molahlehi J, noting that Section 17 of the Prescription Act enjoins a party to raise prescription in pleadings but nevertheless affords a Court a discretion to allow such to be raised at any stage of the proceedings, was prepared to exercise his discretion against the employer party raising prescription at a

[4] (2012) 33 ILJ 293 (LC) at para 18.

late point in the proceedings and held that the employee's claim had not indeed prescribed.

[19] In dealing with the prescription of arbitration awards, the position of this Court was succinctly articulated by Musi AJ in *POPCRU obo Sifuba v Commissioner of the SAPS and Others*[5] in which the court held that:

> 'A valid arbitration award, like a court judgment in certain circumstances, is regarded as a novation of the former debt on which the award was granted and the arbitration award itself constitutes the new debt. The former debt is converted in a debt that is due by virtue of the valid arbitration award. New rights, duties and obligations are created by a valid arbitration award. If an arbitrator's award is not made an order of Court it will prescribe after four years. See s13(1)(f) and (i) read with s11(d) of the Prescription Act. On the other hand, a party's right to enforce the award by way of application to have it made an order of court prescribes within three years of the publication of the award. *Cape Town Municipality v Allie NO* 1981 (2) SA 1 (C) at 4 F-H; *Trust Bank of Africa Ltd v Dhooma* 1970 (3) SA 304 (N) at 308; *Swadif (Pty) Ltd v Dyke NO* 1978 (1) SA 928 at 944 E-F; *Primavera Construction SA v Government; North West Province* 2003 (3) SA 579 (B) at paras 13 and 14. If the arbitration agreement provides between the parties that the arbitrator's award shall have the status of a judgment of a court the prescription period applicable to a judgment debt shall apply in such a case. See *Blaas v Athanassiou* 1991 (1) SA 723 (W) at 725 H-J.'[6]

[20] Importantly, it was also held in *Sifuba*'s case that the mere filing of an answering affidavit by the award creditor in a review application will not amount to taking the necessary legal steps to recover the debt owing in terms of the award that would have the effect of interrupting the running of extinctive prescription.[7]

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[5] (2009) 30 ILJ 1309 (LC).
[6] Ibid at para 32.
[7] See also the remarks of Lagrange J in *Giflo Engineering (Bop) (Pty) Ltd v MEIBC and Others* 2012 (33) *ILJ* 388 (LC) at paras 7 and 8 in this regard.

Analysis

[21] In this case, it was argued on behalf of Mazibuko that the answering affidavit in the review application and the application to dismiss the review application constituted such "a process" as defined and that this would therefore amount to the requisite "service on the debtor of a process whereby the creditor claims payment of the debt". Even if there was some merit in this argument, it cannot avail Mazibuko as his application to dismiss the review application was launched on or about 22 December 2012, after the date on which Concor argues the arbitration award in his favour would have prescribed, namely 8 October 2012.

[22] Similarly, the *Technikon Pretoria* case referred to above cannot avail Mazibuko as it can never be said that the point of prescription was not raised on the pleadings: it is clearly raised in both Concor's substantive application in terms of Rule 11 to dismiss Mazibuko's claim which was filed on 10 December 2012 as well as its answering affidavit filed in response to Mazibuko's application to dismiss filed on 10 January 2013.

[23] I was then referred to the judgment of Bhoola J in the matter of *SATAWU obo Hani v Fidelity Cash Management Services (Pty) Ltd*[8] in which counsel for the employee had argued that it was inherently unfair and inequitable that an employee with an award in his favour should find himself in a position where he is unable to enforce the award as a result of the employer's reliance on prescription.[9] In advancing this argument on behalf of the employee in question, it had been submitted that where a debt is the subject of a dispute which is "subjected to arbitration" within the meaning of section 13(1)(f) of the Prescription Act, there is a period of one year after the arbitration is concluded before prescription starts to run. Where there is a dispute that is "subject to arbitration", thus went the argument, this dispute ended only when the Labour Appeal Court finally disposes of the matter. As the initiating of a

[8] (2012) 33 ILJ 2452 (LC).

review by an employer is an acknowledgment that the dispute was still "subjected to arbitration" this serves to interrupt prescription, especially in that the very purpose of a review is to set aside the arbitration award and to seek remittal of the dispute to another arbitrator for another arbitration, thus keeping the dispute alive.

[24] It was then argued that arbitration proceedings can therefore be said to only have "ended" (and no longer "subject to arbitration") for purposes of the Prescription Act when the Labour Appeal Court refuses a petition. Until such time the dispute is still "subject to arbitration" within the terms of section 13(1)(f) and there is a period of one year after the arbitration is concluded before prescription begins to run.[10] Such an interpretation, it was submitted, would be both fair and equitable to both parties in that it allows the employee party to seek to enforce an arbitration award in his favour and the employer party to delay making payment of the amount of the arbitration award pending the outcome of a review which may or may not succeed.[11]

[25] Interestingly, the counter-argument against this seemingly-persuasive and original argument was simply that the dictates of equity and fairness are trumped by the provisions of the Prescription Act, the rules of which have been found to be constitutionally valid and that strict enforcement of the Prescription Act is nevertheless viewed as a reasonable and justifiable limitation on the right of access to courts under section 36 of the Constitution.[12]

Bhoola J then considered several judgments, including one of her own earlier judgments in *Magengenene v PPC Cement (Pty) Ltd and Others*[13] in which she had held,[14] confirming the principle expressed by Musi AJ in *Sifuba's* case, that the expeditious resolution of labour disputes is consistent with the timeous enforcement

[9] Ibid at para 11.
[10] Ibid at para 11.
[11] Ibid at para 15.
[12] Ibid at para 16.
[13] (2011) 32 ILJ 2518 (LC).

of debts as set out in the Prescription Act and that a party's right to enforce an arbitration award by having it made an order of court prescribes three years after the issue of the award. She stated that the notion that this Court somehow exercises a jurisdictional discretion in regard to whether the Prescription Act is applicable or not had been "debunked" in Sifuba's case[15] and confirmed that the launching of a review application is not a legal impediment that interrupts the running of prescription and that the employee in that matter ought to have taken timeous steps to enforce the award.[16]

Conclusion

[26] Whilst I am mindful of the fact that this is a court of both law and equity as defined in section 151 of the LRA, it is more than abundantly clear that there is no scope within my discretion to exercise any "judicial imagination" in making an appropriate order in this case. I am mindful of the admonition expressed by Van den Heever JA in *Preller and Others v Jordaan*[17] which was also very recently quoted in an unreported judgment of Willis J in the South Gauteng High Court in *Roseveare v Katmer*,[18] in which it was stated "'n regter wat volgens sy gesonde verstand, na goeddunk en sonder regsreëls kan oordeel te vrese is as honde en slange" which, loosely translated means that a judge who decides matters according to his or her own sense of what is right and fair, and not according to the law, ought to be more feared than snakes and dogs.

[27] Although one's sympathies are undeniably with the employee party in this matter, it must be remembered that he has always been availed of legal advice through qualified attorneys appointed by the Legal Aid Board. These attorneys ought to have advised Mazibuko of one of the basic rights afforded to an employee holding a valid arbitration award and that is, that in order to

[14] Ibid at para 6.
[15] Ibid at para 7.
[16] Ibid at para 7.
[17] 1956 (1) SA 483 (A) at 500G-H.
[18] [2013] ZAGPJHC 18 (28 February 2013) at para 19.

avoid prescription, all one has to do is file a notice of motion in this court in terms of section 143 of the LRA or, even more simply, to apply to have the arbitration award made an order of court, at no cost and a minimal inconvenience to the employee.

[28] Mazibuko's application to dismiss the review application, launched as it was on 24 December 2012, therefore came exactly three months too late: had such application been launched before 8 October 2012, two and a half months earlier, I might well have been able to come to his assistance and, on the strength of his application to dismiss the review application (which includes an explicit prayer that the arbitration award be made an order of court), ruled that this would most certainly have interrupted the running of extinctive prescription.

[29] I, therefore, find that Concor has properly raised and pleaded the issue of prescription and that Mazibuko's right to enforce the arbitration award awarded in his favour has accordingly prescribed. That being the case, I accordingly uphold Concor's application in terms of Rule 11 dated 10 December 2012 and find that Mazibuko's claim falls to be dismissed on the grounds that it has prescribed. Having disposed of that application, it automatically follows that Mazibuko's application to dismiss Concor's review application also falls to be dismissed. For the above reasons, I need not deal with the main review application.

Costs

[30] All that remains is the issue of costs. Ms Charoux argued Concor has sought costs and is entitled to such costs but later submitted that she was not going to persist in seeking costs of the hearing of 25 January but only sought the costs of the postponed hearing on 10 January 2013, in light of the fact that Bhoola J had made a costs order in favour of Mazibuko in respect of the postponed hearing on 2 February 2012. Her suggestion was that these costs

orders ought to be offset one against the other. I tend to agree that this is an appropriate solution but that still leaves the question of the costs of 10 January to be determined. Although costs were wasted as a result of an indulgence being granted to Mazibuko to file an answering affidavit, I am of the view that, in light of the rulings which I have just given, it is appropriate that no order be made as to costs. I say this because these rulings will undoubtedly fall harshly upon Mazibuko and because one cannot but bear in mind the proposed amendments to section 145 of the Labour Relations Act, which will now finally provide the statutory relief to many hapless employees faced with review applications that drag on for many years in the form of a provision to the effect that the launching of such a review application will interrupt the running of prescription in respect of an arbitration award.[19]

[31] Accordingly, I make the following order:

1. The Applicant's application in terms of Rule 11 to dismiss the First Respondent's claim is upheld.

2. The First Respondent's application to dismiss the Applicant's review application is dismissed.

3. There is no order as to costs.

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BANK AJ

Acting Judge of the Labour Court

19 See Clause 22(9) of the Labour Relations Amendment Bill B16B-2012.

Appearances

For the Applicant:	Ms L Charoux
Instructed by:	Stanley Moldt Attorneys
For the First Respondent:	Mr Makinta of ES Makinta Attorneys