REPUBLIC OF SOUTH AFRICA

THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

JUDGMENT

Reportable

Case No: JS443/12

In the matter between:

SACCAWU obo MAKHUBELA **Applicant**

and

THE DEVELOPMENT BANK OF SOUTH AFRICA **Respondent**

Case No: JS437/12

In the matter between:

SACCAWU obo RADEBE **Applicant**

and

THE DEVELOPMENT BANK OF SOUTH AFRICA **Respondent**

Heard: **12 June 2013**

Delivered: **15 August 2013**

Summary: Practice & Procedure**:** Time period applicable to contractual claims; Ambit of claims in terms of section 77(3) & (4) of the BCEA; Application of the Prescription Act 68 of 1969 to contractual claims

JUDGMENT

GAIBIE, AJ

Introduction

[1] This matter concerns certain preliminary points raised by the Development Bank of South Africa ("the DBSA") in respect of two contractual claims made by Lulama Patricia Makhubela in the first matter (under case number JS 443/12) and by Alice Libakiso Radebe and Margaret Nsibande in the second matter (under case number JS 437/12). In both matters, the contractual claims were brought by the union, SACCAWU, on behalf of their members.

[2] In both matters, the employees instituted their actions against the DBSA in terms of section 77(3) and (4) of the Basic Conditions of Employment Act 75 of 1997 ("the BCEA") in terms of which they claim payment of accrued remuneration and for specific performance of the employment contracts.[1]

Background facts in respect of the first matter

[3] In the first matter (JS443/12) –

3.1. Ms Makhubela was formerly employed by the DBSA in a managerial position. She was, pursuant to disciplinary proceedings, found guilty of certain allegations of misconduct,[2] and the disciplinary chairperson recommended her dismissal[3]. She was dismissed by the DBSA on 3 March 2010. On 30 March 2010,[4] she referred an unfair dismissal dispute to the Commission for Conciliation, Mediation and Arbitration ("the CCMA") in which she alleged that her dismissal was procedurally and substantively unfair.[5]

[1] Para 6 of the statement of claim in JS443/12, and para 7 of the statement of claim in JS437/12.
[2] See para 3 of the arbitration award which records that she was found guilty of fraud, negligence and failure to carry out instructions.
[3] Para 2 of the Response to Applicant's Statement of Claim
[4] Para 6 of the arbitration award.
[5] Para 13 of the response to Applicant's statement of claim. The referral to the CCMA did not form part of the documents that were placed before me in respect of this matter.

3.2. Thereafter, the dispute was referred to arbitration. The arbitration proceedings were held on 18 February and 11 April 2011. During the course of those proceedings, and pursuant to the commissioner's directions, the parties articulated the issues in dispute between them, the relevant part of which read as follows:

> 'That the Commissioner is required to decide whether the dismissal effected by the DBSA on 3 March 2010, is procedurally and substantively fair or unfair with reference to the sequence of events that included the letter sent and received on 19 November 2009 by the Group Executive Manager: Human Capital and Technology.'[6]

3.3. It is unclear on what basis the commissioner resolved that the dispute concerned the 'lawfulness' rather than the 'fairness' of the dismissal, but he proceeded nevertheless to issue the following ruling on 18 April 2011:

> '1 The arbitration is stayed pending the institution of legal proceedings by the Applicant in a civil court or the Labour Court for determination of the lawfulness of her dismissal by the Respondent.
>
> 2 The Applicant shall institute legal proceedings within 60 days hereof failing which the Respondent may apply for dismissal of the case. (My emphasis)
>
> 3 The Applicant may within 30 days of receipt of the outcome of the legal proceedings apply for the arbitration to be rescheduled for hearing.'

3.4. Ms Makhubela launched these proceedings on 24 May 2012, more than 13 months after the arbitration award and in excess of 24 months after the date of dismissal. Ms Makhubela did not therefore comply with the time period stipulated in paragraph 2 of the arbitration award.

3.5. The parties in this matter are in dispute, in particular, about the authority of a representative of the DBSA who allegedly offered Ms

[6] Para 7 of the arbitration award.

Makhubela a different post to the one that she occupied, that of Senior Researcher, apparently as an alternative to dismissal. In any event, this offer and Ms Makhubela's alleged acceptance of the offer occurred during the period 17 - 23 November 2009, several months before she was dismissed.

3.6. Ms Makhubela relies on the date of this event (23 November 2009), and not on the date of dismissal (3 March 2010), for the purposes of her contractual claim against the DBSA.

3.7. For the purposes of her contractual claim, she contends that on 17 November 2009, the DBSA, represented by Loyiso Ndlovu, its Group Executive Manager: Human Capital and Technology ("the GEM"), offered her a demoted post from Manager: Intellectual Capital to that of Senior Researcher within the Development, Planning and Implementation division, as an alternative to dismissal and that she accepted the offer on 23 November 2009. According to her, a binding contract was concluded on that day and it was expressly agreed that she would be paid a remuneration package of R912,788.78 per annum[7] ("the November 2009 contract"). She alleges that despite the tender of her services, the DBSA has failed to pay her any remuneration pursuant to the November 2009 contract and that it has therefore repudiated the contract or is in breach thereof.

3.8. The subsequent termination of her employment by the DBSA on 3 March 2010 which triggered the referral of the dispute to the CCMA (and which featured in the formulation of the dispute between the parties during the arbitration proceedings as indicated in paragraph 3.2 above) is apparently irrelevant in the formulation of her claim in this court.

3.9. In the circumstances, she seeks, *inter alia*, the following order:

'1 Declaring that [the November 2009 contract] is binding on the [DBSA];

[7] Paras 8–13 of the statement of claim.

2 Ordering the [DBSA] to pay [to her] accrued remuneration calculated at the rate of R912,788.78 per annum from 23 November 2009 until date of judgment;

3 ..... Ordering the [DBSA], with effect from the date of judgment, to make payment [to her], on or before the 25th day of each month the monthly remuneration due [to her]... until the date the [DBSA] lawfully terminates the employment contract;

4 Interest *a tempora more* at the prescribed rate per annum.'

Background facts in respect of the second matter

[4] In the second matter (JS437/12) –

4.1. Ms Radebe and Ms Nsibande (collectively referred to as 'employees') were formerly employed by the DBSA as general assistant and administrative assistant respectively.[8]

4.2. The employees were charged with misconduct and pursuant to disciplinary proceedings they were dismissed by the DBSA on 9 November 2009.[9] On 25 November 2009, they referred an unfair dismissal dispute to the CCMA in which they contested both the substantive and procedural fairness of the dismissals.[10] Prior to the dismissals, the employees pursued an internal appeal procedure at the DBSA. An external chairperson upheld the appeal. He set aside the sanction of dismissal and substituted it with a final written warning in respect of both employees. The GEM rejected the outcome of the appeal hearing, replaced it with the offer of a demotion which was open for acceptance by 9 November 2009, failing which the sanction of summary dismissal would be implemented. The offer was not accepted and the employees were consequently dismissed.[11]

[8] Paras 8 and 9 of the statement of claim.
[9] Para 2 of the arbitration award and para 2.2 of the respondent's response to the statement of case.
[10] Para 2.2 of the respondent's response to the statement of case.
[11] paras 2 – 4 of the arbitration award.

4.3. The arbitration proceedings commenced on 8 October 2010 and on 18 April 2011, the parties narrowed the issues in dispute between them. In essence, the dispute concerned the interpretation of certain clauses of the DBSA Disciplinary Code and Procedures ('the Disciplinary Code'). Like the first matter, the commissioner determined that the issue in dispute concerned the lawfulness rather than the fairness of the dismissal, and he made a similar ruling (like the one he issued in the first matter) on 28 April 2011 (approximately 10 days after the first ruling):

> '1 The arbitration is stayed pending the institution of legal proceedings by the Applicants in a civil court or the Labour Court for determination of the lawfulness of their dismissal by the Respondent.
>
> 2 The Applicants shall institute legal proceedings within 60 days hereof failing which the Respondent may apply for dismissal of the case. (My emphasis)
>
> 3 The Applicants may within 30 days of receipt of the outcome of the legal proceedings apply for the arbitration to be rescheduled for hearing.'

4.4. The employees launched these proceedings on 29 May 2012, more than 13 months after the arbitration award and more than 30 months after the date of dismissal.

4.5. In the absence of their contracts of employment, the employees allege that it was an express/alternatively tacit term of their contracts of employment that they and the DBSA would be bound by the Disciplinary Code and that the DBSA's failure to implement the outcome of the internal appeal hearing constituted a repudiation or a breach of their contracts of employment.

4.6. In the circumstances, the employees seek, *inter alia*, the following order:

> '1 Declaring that the [DBSA] is bound by the [internal appeal] ruling;

2 Ordering the [DBSA] to pay [to Ms Radebe] accrued remuneration calculated at the rate of R7,166.93 per month from 9 November 2009 until date of judgment;

3 Ordering the [DBSA] to pay [to Ms Nsibande] accrued remuneration calculated at the rate of R14,981.72 per month from 9 November 2009 until date of judgment;

4 ..... Ordering the [DBSA], with effect from the date of judgment, to make payment [to her], on or before the 25th day of each month the monthly remuneration due [to her]... until the date the [DBSA] lawfully terminates the employment contract;

5 Interest *a tempora more* at the prescribed rate per annum.'

The *Points in Limine*

[5] The DBSA raised one *point in limine* in relation to the first matter and three points *in limine* in relation to the second matter. The point raised in relation to the first matter is common to the second matter, the only difference being the applicable dates and time periods. These points were set down for determination on the opposed motion roll as part of the effort by the Labour Court to expedite the determination of interlocutory matters.

[6] The points *in limine* were as follows.

Failure to comply with the CCMA's time period

6.1. The DBSA contends that, in light of the commissioner's ruling, the employees (in both matters) were obliged to institute legal proceedings in a civil court or the High Court within 60 days from the date of the ruling. The employees did not comply with that direction and legal proceedings were only launched in this court more than a year after the ruling. In the absence of a condonation application, the DBSA contends that the claims should be dismissed with costs. This constituted the first point *in limine*.

Failure to comply with the time periods set out in the BCEA read with the LRA

6.2. The DBSA contends that the employees' claims are brought in terms of section 77(3)[12] of the BCEA which is limited to conferring jurisdiction to the Labour Court in relation to contractual claims but is silent on the process and timeframes applicable to such claims. In the circumstances, the DBSA refers to the comparative approach adopted by this court in relation to claims brought in terms of the Employment Equity Act 55 of 1998 ('EEA') and argues that such an approach must be adopted in relation to claims brought in terms of section 77(3) of the BCEA, in the interests of the expeditious resolution of labour disputes.

6.3. In this regard, the DBSA submits that neither the Labour Relations Act 66 of 1995 ('LRA') nor the EEA specify a time period for the institution of claims in terms of the EEA. However, via a comparative approach of other time periods in the LRA, both the Labour Court and the Labour Appeal Court in *NEHAWU obo Mofokeng and Others v Charlotte Theron Children's Home* held that any referrals to the Labour Court in terms of the EEA must be effected within 90 days of the certificate of outcome being issued. In the circumstances, the DBSA contends that the period of 90 days should also be applied in relation to the claims in these matters. If such an approach is adopted, then the claims were brought well beyond the 90 day period and the claims must, accordingly, be dismissed. This constituted the second point *in limine*.

Failure to comply with a reasonable time period

6.4. As an alternative time period for the lodging of the claims, the DBSA contends that if the time periods articulated in the first two *points in limine* are not applicable, then the court must impose a general requirement of reasonableness in assessing the delay of the employees' claims. In this regard, the DBSA submits that the employees' claims are in substance and effect a claim for retrospective reinstatement - including a claim for back pay and future pay, which

[12] Section 77(3): The Labour Court has concurrent jurisdiction with the civil courts to hear and determine any matter concerning a contract of employment, irrespective of whether any basic condition of employment constitutes a term of that contract.

transcend the requirements of a discrete debt and in the context of the underlying philosophy of the LRA, that of the effective and expeditious resolution of labour disputes, the employees launched legal proceedings in this court more than a year after the ruling and without any explanation for the delay in doing so. In the circumstances, the DBSA contends that the claims should be dismissed. This constituted the third point *in limine*.

The first point in *limine*

[7] In relation to this point in limine, the DBSA in essence contended that the employees (in both matters) were obliged, in so far as they wished to pursue a contractual claim in relation to the terminations, to comply with the time period determined by the CCMA for the purposes of instituting such action either in the Labour Court or the High Court. In other words, the employees were obliged to institute such action within 60 days of the ruling, and their failure to do so effectively rendered their claims moot. In this regard, counsel for the DBSA (in JS437/12) referred to the Supreme Court of Appeal's judgment in *Oudekraal Estates (Pty) Ltd v City of Cape Town and Others*[13] and the principl e established therein that administrative acts are valid and enforceable until and unless they are set aside. The principle is articulated by the SCA in the following terms in paragraph [26] of Oudekraal 1 judgment:

> 'Until the Administrator's approval (and thus also the consequences of the approval) is set aside by a court in proceedings for judicial review it exists in fact and it has legal consequences that simply cannot be overlooked. The proper functioning of a modern State would be considerably compromised if all administrative acts could be given effect to or ignored depending upon the view the subject takes of the validity of the act in question. No doubt it is for this reason that our law has always recognised that even an unlawful administrative act is capable of producing legally valid consequences for so long as the unlawful act is not set aside.'

[13] 2010 (1) SA 333 SCA

[8] It was accordingly argued that the CCMA ruling constituted an administrative act and that it was not an option for the employees to simply ignore the CCMA ruling, until and unless the ruling was set aside.

[9] The issue as to whether arbitration proceedings (that are conducted in terms of the LRA) and any rulings or awards that emanate from that process, constitute administrative action was considered by the Constitutional Court in *Sidumo and Another v Rustenburg Platinum Mines Ltd and Others*[14]. In that case, Navsa AJ concluded that a commissioner conducting a CCMA arbitration performs an administrative act but that the LRA (and not PAJA) constituted the national legislation in respect of which such 'administrative action' occurs. The fact that such administrative acts are governed by the LRA and not by PAJA is significant and has a bearing on whether the Labour Court is bound by certain rulings and jurisdictional determinations that are made by the CCMA. The real issue in respect of this *point in limine* is whether the employees were bound to comply with the time period indicated in the CCMA rulings for the purposes of instituting these claims. Put another way, is the Labour Court bound to enforce truncated time periods for contractual claims which have been determined by the CCMA?

[10] The nature and effect of the CCMA's rulings in relation to jurisdictional matters was considered by the Labour Appeal Court in *SA Rugby Players Association and Others v SA Rugby (Pty) Ltd and Others*[15] *(SARPA)* in the context of whether a dismissal has occurred. Tlaletsi AJA held, on behalf of the Labour Appeal Court, that:

> 'The CCMA is a creature of statute and is not a court of law. As a general rule, it cannot decide its own jurisdiction. It can only make a ruling for convenience. Whether it has jurisdiction or not in a particular matter is a matter to be decided by the Labour Court.'

[11] In light of that judgment, the Labour Court is not bound by any rulings made by the CCMA in relation to its jurisdiction, and by implication any rulings made by it in relation to the jurisdiction of the Labour Court or indeed the High Court.

[14] 2008(2) SA 24 (CC)
[15] (2008) 29 ILJ 2218 (LAC) at para 40.

Perhaps more importantly, and for the same reason advanced in *SARPA*, the Labour Court is simply not bound by a CCMA ruling that truncates or reduces the relevant time periods for the processing of claims that may be governed by the LRA or indeed by any other legislation.

[12] In any event, the first point of limine cannot be upheld for a more fundamental reason, and that is that contractual claims that are envisaged in terms of the LRA, the BCEA or the common law, are claims that are processed independently of the conciliatory or arbitral provisions of the LRA. That being so, the employees were not dependent on any such processes or on any rulings from the CCMA for the purposes of launching these claims. The fact that the employees first referred their disputes to the CCMA before they launched these proceedings is of no relevance to the validity or otherwise of their claims in terms of section 77(3) of the BCEA. Accordingly the arbitration awards or rulings in this matter are of complete insignificance as to whether the claims were lodged timeously or not. For these reasons the first point in limine is dismissed.

The second and third *points in limine*

[13] In relation to these *points in limine*, the DBSA in essence contends that the time period for the lodging of such claims should be governed by the 90 day period determined by the Labour Court and the Labour Appeal Court in relation to claims brought in terms of the EEA, or alternatively by a reasonable time period[16].

[14] Both these points in limine effectively require this court to establish a time frame for proceedings in terms of section 77(3) of the BCEA in circumstances where the process is regulated by the Prescription Act 68 of 1969 ("the Prescription Act").

[15] In *Solidarity and Others v Eskom Holdings Ltd*[17], Zondo JP in a majority judgment of the Labour Appeal Court held that if a claim is subject to a specific statutory time frame within which it is required to be instituted, that is

[16] See fn 15
[17] (2008) 29 ILJ 1450 (LAC)

the time frame that governs the claim and the unreasonable delay rule has no application. The LAC also held that the unreasonable delay rule only applies to reviews that are not subject to a statutory requirement that they be instituted within a fixed period. In that regard, Zondo JP said the following[18]:

> 'To apply the 'unreasonable delay' rule where the Prescription Act applies would, it seems to me, amount to the court legislating another prescription period in addition to the one prescribed by the Prescription Act. In my view there is no reason or justification in law for that additional prescription period and it can only serve to sow confusion as to when the one period applies and when the other does not apply'.

[16] The same principle (established in *Solidarity*) must apply to the comparative argument raised by the DBSA in relation to the time period that is applicable to claims in terms of the EEA.

[17] The question is whether the Prescription Act governs the time periods for the processing or institution of claims made by the employees in this matter. More specifically, do the employees claims constitute a 'debt' for the purposes of the Prescription Act. The DBSA accepts that the Labour Court has applied the Prescription Act in relation to claims in terms of section 77 of the BCEA but contends that all these matters involved claims for discrete amounts of money. In contrast, the DBSA argues that the employees' claims in these matters are claims for retrospective reinstatement, back pay and future pay, and that these claims go beyond the claim for a discrete debt, and by implication the Prescription Act is not applicable.

[18] The DBSA adopts a rather constrained definition of a 'debt' for the purposes of determining whether the Prescription Act is applicable, and it is one which is not supported by the jurisprudence of the superior courts and this court. In *Food and Allied Workers Union and Others v Country Bird*[19]*,* Steenkamp J cited with approval the writings of an academic in respect of the definition of a debt for the purposes for the Prescription Act. The relevant passage in that judgment reads as follows:

[18] At 1456 E-F
[19] (2012) 33 ILJ 865 (LC).

> 'As Prof Max Loubser has pointed out, the term 'debt' has a wide and general meaning and the three year prescription period in terms of s11(d) of the Prescription Act applies to any liability of whatsoever kind, whether contractual, delictual or otherwise.'[20]

[19] The notion of a wider rather than a narrower definition of a 'debt' was also endorsed by the Appellate Division (as it was then known) in *Desai NO v Desai and others*[21], in the following terms:

> 'Section 10(1) of the Prescription Act 68 of 1969 ('the Act') lays down that a 'debt' shall be extinguished after the lapse of the relevant prescriptive period, which in the instant case was three years (see 11(d)). The term 'debt' is not defined in the Act, but in the context of section 10(1) it has a wide and general meaning, and includes an obligation to do something or refrain from doing something.'

[20] Relying on the *dicta* of the Appellate Division in *Desai*, the High Court in *Director-General, Department of Public Works v Kovac Investments*[22] held that a claim for specific performance constitutes a debt for the purposes of the Prescription Act.

[21] In the context of these authorities, the claims articulated by the employees in both matters clearly constitute a debt for the purposes of the Prescription Act and are governed by a prescriptive period of three years. In terms of section 16(1) of the Prescription Act, the three year time period applies to any debt arising after the commencement of the Prescription Act except to the extent that it is inconsistent with the provisions of any other Act which prescribes a specific period within which a claim is to be made. Neither the LRA nor the BCEA specifies a time period that is inconsistent with the period set out in the Prescription Act in respect of a claim for a debt arising out of a contract of employment in section 77(3) of the BCEA.

[22] In the circumstances, the claims in relation to both matters were timeously instituted in this court.

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[20] At para [9].
[21] 1996 (1) SA 141 (AD) at H-I
[22] 2010 (6) SA 646 (GNP) at 648D

[23] Before I conclude this judgment, there is one further issue that must be dealt with and which emanates from the judgment of this court in *Mohlaka v Minister of Finance and Others*[23]. It is apparent from this judgement that Pillay J took the view that an employee's rights in terms of section 185 of the LRA, taken together with the remedies for breach of that right contained in section 194, as well as the procedures for adjudicating disputes over unfair dismissals in section 191, constitutes a complete statement of the extent of the rights in respect of a termination of employment or an unfair dismissal. They are entirely statutory in origin and content and give rise to no contractual obligation whether in terms of the common law or in terms of section 77 of the BCEA. To the extent that section 77(3) provides an employee with a contractual claim, it is according to Pillay J, limited to the enforcement and regulation of basic conditions of employment, such as leave and hours of work, and that any other claims, such as a claim for contractual damages (emanating from a termination of employment) is necessarily excluded because the LRA is essentially the only basis upon which an employee may challenge any dismissal or termination of employment. The essence of her judgment is captured in paragraph [20] thereof which reads:

> 'Section 77(3) of the BCEA provides that the Labour Court has concurrent jurisdiction with the civil courts to determine any matter concerning a contract of employment, irrespective of whether any basic condition of employment constitutes a term of that contract; this section cannot be interpreted so widely as to include any matter concerning the contract of employment which is already regulated in the LRA. To allow concurrent jurisdiction between the Labour Court and the CCMA would resuscitate the problems identified above under old labour laws. The Legislature could never have intended that.'[24]

[24] Whatever the merits are of such a view, that decision is clearly incorrect in light of the decision of the Supreme Court of Appeal in *Makhanya v University of Zululand*[25]. In that decision, Nugent JA confirmed that employees have

[23] [2009] 4 BLLR 348 (LC).
[24] Ibid at para 20..
[25] 2010 (1) SA 62.

rights in terms of the LRA, and other rights arising from the general law. In that regard he said the following:

> 'The LRA creates certain rights for employees that include 'the right not to be unfairly dismissed and [not to be] subjected to unfair labour practices..... Yet employees also have other rights, in common with other people generally, arising from the general law. One is the right that everyone has (a right emanating from the common law) to insist upon performance of a contract. Another is the right that everyone has (a right emanating from the Constitution and elaborated upon in the Promotion of Administrative Justice Act) to just administrative action.'[26]

[25] Nugent JA also indicated where such rights are enforceable, in the following terms[27]:

> 'An LRA right is enforceable only in the CCMA or in the Labour Court. The common law right is enforceable in the High Courts and the Labour Court[28]. And the constitutional right is enforceable in the High Courts and in the Labour Court'.[29].

[26] The SCA accordingly interpreted the provisions of section 77(3) widely and not narrowly as the court in *Mohlaka*, and unequivocally retained an employee's right to challenge his termination both in terms of the LRA and in terms of the common law.

Order

[27] For the reasons set out above, I accordingly make the following order:

27.1. The *points in limine* raised by the DBSA in both matters (instituted under case numbers JS 443/12 and JS437/12) are dismissed with costs.

[26] At 67 para [11]
[27] At para 13 .
[28] Nugent JA indicated that this right was contained in section 77(3) of the BCEA
[29] Nugent JA referred to section 157(2) of the LRA

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Gaibie, AJ

Acting Judge of the Labour Court of South Africa

Appearances: Case No.: JS443/12

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Appearances: Case No.: JS437/12

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