REPUBLIC OF SOUTH AFRICA

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THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

JUDGMENT

Case no: JR 260/13

In the matter between:

COMPASS GROUP SA (PTY) LTD	**Applicant**
and	
Chris VAN TONDER	**First Respondent**
Commissioner T D LYNCH	**Second Respondent**
CCMA	**Third Respondent**

Heard: 10 February 2016

Delivered: 2 March 2016

Summary: Prescription – prior to s 145(9) of LRA coming into effect – Court bound by LAC ruling in *Metrobus* [2015] ZALAC 45 – review of arbitration award not interrupting prescription – award prescribed.

JUDGMENT

STEENKAMP J

Introduction

[1] The employee in this case (the first respondent, Mr Van Tonder) has an arbitration award in his favour worth some R 228 000. The applicant, Compass Group SA (Pty) Ltd – his erstwhile employer – seeks to have the award reviewed and set aside. But this Court need not pronounce on the merits of that application, as the arbitration award has prescribed. The outcome, in my view, is not fair; but it is the law, at least as it stood until the legislature addressed the iniquity of the law as it stood by amending the LRA[1] and adding the new section 145(9). But that change came too late for Mr Van Tonder.

Background facts

[2] Given my finding on the law, the background facts leading to the employee's dismissal are not important. He was dismissed. He referred an unfair dismissal dispute to the CCMA.[2] The arbitrator[3] found the dismissal to have been unfair. He ordered Compass to pay the employee compensation amounting to R 228 000.

The review

[3] The award was issued on 14 September 2012. Compass became aware of it on 7 November 2012. It delivered its review application in terms of s 145 of the LRA on 5 December 2012. In terms of the award, its debt to the employee became due on 21 November 2012.

[4] The employee delivered an answering affidavit on 11 April 2013. After responding to the applicant's grounds of review, he said[4]:

> "Wherefore I respectfully pray that the above Honourable Court dismiss the application with costs and confirm the arbitration award as an order of the above Honourable Court."

[1] Labour Relations Act, Act 66 of 1995.

[2] The Commission for Conciliation, Mediation and Arbitration (the third respondent).

[3] Commissioner T D Lynch (the second respondent), who did not live up to his surname.

[4] Language as in the original affidavit.

Prescription

[5] The applicant, Compass, argues that the debt prescribed on 20 November 2015, i.e., three years after it arose.

[6] The argument is based on s 11(d) of the Prescription Act:[5]

> "The prescription of debts shall be the following:
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> …
>
> (d) save where an Act of Parliament provides otherwise, three years in respect of any other debt."

[7] Such an Act is the LRA. Section 145 of that Act was amended with effect from 1 January 2015 to add s 145(9):

> "An application to set aside an arbitration award in terms of this section interrupts the running of prescription in terms of the Prescription Act, 1969 (Act No 68 of 1969) in respect of that award."

[8] The purpose of the new subsection is clear: it implies that, before the amendment, an application for review of an arbitration award in terms of s 145 did not interrupt the running of prescription. And, unfortunately for Mr van Tonder, the new s 145(10) specifies that the new s 145(9) only "applies to an arbitration award issued after such commencement date", i.e. 1 January 2015.

[9] Before the amendment, there were conflicting judgments emanating from this Court on the question whether the institution of review proceedings interrupted prescription.[6] That led to the LAC hearing appeals against three matters in one sitting.

[10] In *Myathaza v Metrobus*[7] the LAC pronounced on the law as it stood before 1 January 2015. It held that an arbitration award issued under the LRA is a "debt" as contemplated by the LRA and that the Prescription Act applies.

[5] Act 68 of 1969.

[6] The Court in *Cellucity* [per Rabkin-Naicker J] said yes; the Court in *Myathaza* [Van Niekerk J] and *Mazibuko* [Bank AJ) held the contrary view.

[7] *Myathaza v Johannesburg Metropolitan Bus Service (SOC) Ltd t/a Metrobus* [2015] ZALAC 45 (6 November 2015) [per Coppin JA, Musi JA and Makgoka AJA concurring].

[11] The LAC considered the argument that, where a review is pending, the Labour Court is not likely to make the award and order of court; but, held the Court, "there is nothing preventing a debtor to, at any time after the issue of the arbitration award, and before its prescription, bring an application to make such an award an order of court."[8]

The answering affidavit

[12] In this case, the employee did not apply to have the award made an order of court. Did the paragraph in the answering affidavit containing the prayer that the Court dismiss the review application "and confirm the arbitration award as an order" of court interrupt prescription, as Mr *Nel* argued?

[13] As morally and emotionally persuasive as that argument is, I think not, given the judgment of the LAC in *Metrobus*. The LAC unequivocally required an application to make the award an order of court; and the prayer in the answering affidavit is not an application. Nor is it a counterclaim.

[14] Rule 7(1) specifies that "an application" must be brought on notice to all persons who have an interest in the application; and rule 7(2) refers to a "notice of application" that complies with Form 4 and that is supported by an affidavit in terms of rule 7(4). The prayer in the employee's answering affidavit does not comply with those prerequisites of "an application" as contemplated by rule 7.

[15] In *Sifuba*[9] the Labour Court held that, in that case, the answering affidavit was not a process whereby an action was instituted (and that would have interrupted prescription):

> "In this matter a counter-application would have sufficed as a process whereby action is instituted. An answering affidavit is not a counter-application. If the applicant [trade union] wanted to apply, simultaneously with its opposition to the review application, to make the arbitration award an order of court it should have launched a review application. Sifuba's request in the answering affidavit is not a counter-application."

[8] *Metrobus* para [78] (presumably "debtor" should reach "creditor").

[9] *POPCRU obo Sifuba v Commissioner of SAPS* (2009) 30 *ILJ* 1309 (LC) para [40] [per Musi AJ, as he then was].

[16] The judgment of the LAC in *Metrobus* does not appear to me to have disturbed that finding. Nor has it overturned *Sampla Belting*[10] where Gush J held:[11]

> "[18] The third respondent's second ground is that the third respondent's answering affidavit and application to have the review application dismissed, despite the provisions of section 15 of the prescription Act, constituted a 'process whereby the creditor claims payment of the debt'. It is abundantly clear from both the answering affidavit and the dismissal application that that neither of them constitute 'process whereby the creditor claims payment of the debt'. (my emphasis).
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> [19] In this regard, the third respondent relied on an unreported decision of this Court where the Honourable Judge Cook AJ held not only that an application to review an arbitration award interrupted prescription but that even if that view was incorrect an application to dismiss a review application did. Having dealt with the averment that a review application interrupts prescription it remains to consider, in the light of this judgment, whether either the third respondent's answering affidavit or the application to dismiss interrupted prescription.
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> [20] The provisions of section 15 of the Prescription Act set out quite clearly what would constitute judicial interruption of prescription viz: "service on the debtor of any process whereby the creditor claims payment of the debt". In order therefore for either the answering affidavit or application to dismiss the review application the "process" must claim payment of the debt. It is patently clear from both the third respondent's answering affidavit and application to dismiss that neither "process" claimed payment of the debt. The position in the AON case was markedly different. In that matter it appears from the judgment that the application to dismiss the review did comply with section 15 of the Prescription Act in that not only did the applicant seek the dismissal of the review application but in addition sought an order "reinforcing the existing CCMA award" (sic).
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> [21] Insofar as the third ground is concerned, the applicant's review application does not constitute an impediment to the running of prescription

[10] *Sampla Belting SA (Pty) Ltd v CCMA* (2012) 33 *ILJ* 2465 (LC).

[11] Paras [18] – [23].

> nor is it an impediment to the third respondent [the creditor] interrupting prescription.
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> [22] At all times the third respondent could have interrupted prescription either by applying for the award to be certified by the CCMA in accordance with section 143 of the Labour Relations Act or applying to have the award made an order of court in accordance with section 158(1)(c) of the Labour Relations Act. The third respondent did not do so.
>
> [23] 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."

[17] Ms *Govender* also referred the Court to *Giflo Engineering (Bop) (Pty) Ltd v MEIBC.*[12] In that judgment, Lagrange J[13] confirmed the principle in *Sifuba* that the filing of an answering affidavit by the award creditor in a review application does not amount to taking a legal step to recover the debt owing in terms of the award that would interrupt the running of extinctive prescription in terms of s 15(1) of the Prescription Act.

Conclusion

[18] I am bound by the decision of the LAC in *Metrobus* on the facts of this case. When the applicant instituted review proceedings – and when the employee delivered his answering affidavit – s 145(9) of the LRA had not commenced. I have no option but to find that the arbitration award has prescribed.

[19] The upshot is that the employee has been deprived of an award of R 228 000. I am not persuaded that justice has been served. The law is, in this case, an ass; but I am reluctantly forced to hand down an asinine judgment.

[20] As to costs, I take into account the elements of both law and fairness, as I am enjoined to do by s 162 of the LRA. In this case, those two elements do not coincide. A costs award would not be fair.

[12] (2012) 33 *ILJ* 388 (LC).

[13] Para [7].

Order

The arbitration award of 14 September 2012 has prescribed.

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Steenkamp J

APPEARANCES

APPLICANT:	Ms P Govender of MacGregor Erasmus.
FIRST RESPONDENT:	A J Nel Instructed by Lee & McAdam.