REPUBLIC OF SOUTH AFRICA

THE LABOUR COURT OF SOUTH AFRICA, CAPE TOWN

JUDGMENT

REPORTABLE

Case no: C 39/2013

In the matter between:

CELLUCITY (PTY) LTD **Applicant**

And

CWU OBO PETERS **Respondent**

Heard: 24 May 2013

Delivered: 14 November 2013

Summary: Application for a declarator that an award has prescribed and for the final setting aside of a writ of execution

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JUDGMENT

RABKIN-NAICKER J

Introduction

[1] The applicant company approached the court on an unopposed basis for the following relief:

"1. That it be declared that the Respondent is not entitled to any further relief in the form of any payment in terms of the arbitration

award handed down by Arbitrator S Bhana of the CCMA dated 4 September 2009 under case number WECT9584-09, on the basis that it has become prescribed;

2. That it be declared that the warrant of execution issued by the Court on 12 July 2010 under case number WECT9584-09 be finally set aside."

[2] Elizabeth Peters (the employee) was dismissed by the company on 3 June 2009. On the 19 June 2009 she referred an unfair dismissal dispute to the CCMA. Pursuant to the referral, an arbitration award in favour of the employee was issued on the 21 August 2009 under case number WECT 9584-09. The employee was awarded a sum of R42,000.00 as compensation for a substantively unfair dismissal.

[3] The employer then brought a review application to the labour court under case number C733/09 on 21 October 2009. My brother Van Niekerk J dismissed the review application in a judgment delivered on the 6 November 2012.

[4] A writ of execution was issued in respect of the award on 12 July 2010. The Company submits on the papers that "this application has now become necessary and this application must be determined based upon the above facts."

[5] The company contends in its founding affidavit that:

"6.1 There can be no doubt that the Individual Respondent was entitled to the sum of R42 000, 00 in terms of the arbitration award in her favour. However, the Applicant submits that the Respondent is no longer in 2013 entitled to the same, on the basis that the arbitration award and her claim pursuant thereto has become prescribed. The contention of the Applicants are based on a number of grounds, set out hereunder.

6.2 Firstly, the arbitration award giving rise to this matter was handed down on 9 September 2009. The cause of action giving rise to this

matter thus arose on such date, and this date is the date of arising of the debt owed by the Applicant to the Individual Respondent in terms of the arbitration award.

6.3 The Individual Respondent therefore had to institute process, as prescribed by law, to claim and recover the debt owed by the Applicant to her in terms of the arbitration award, which debt / cause of action arose as a result of the publication of this arbitration award on 9 September 2009.

6.4 In terms of the provisions of the Prescription Acct, any claim prescribes within 3 (three) years of the date when the cause of action arose as a result of the publication of this arbitration award on 9 September 2009.

6.5 In the absence of any such process in this matter, the Individual Respondent's claim in terms of the arbitration award handed down on 9 September 2009 prescribed on 9 September 2012".

[6] The further submissions included in the affidavit are to the effect that s143 proceedings to certify an award (which the applicant had duly completed) do not constitute an interruption in terms of the Prescription Act. Mr Snyman appeared for the Company and represented it in the review application. In the proceedings before me, he handed up a 48 page judgment which he had written (*qua* acting judge), dealing with the prescription of an arbitration award and the consequences of a section 143 certification process. In that judgment the defence of prescription of an arbitration award was upheld. He also found that because a certified arbitration award is not a court order, its prescription period remains three years.[1]

[7] In the matter of **Professor A.R.Coetzee & 48 others and The member of the Executive Council of the Provincial Government & Others,** a

[1] Numsa OBO Johannes Maemola and Thembelihle Equipment (Pty Ltd) JR 3039/2007 handed down on 26 February 2013.

judgment handed down on the 20 March 2013 under case number C751/2008, I found the Prescription Act to be incompatible with the architecture of the LRA. I reasoned inter alia as follows:

"[14] In **Road Accident Fund and Another v Mdeyide**[2] the Constitutional Court considered the important question of consistency between the Prescription Act and other statutes – in that matter, the Road Accident Fund Act. The court found that the Prescription Act 68 of 1969 regulates the prescription of claims in general, and the Road Accident Fund Act 56 of 1996 (RAF Act) is tailored for the specific area it deals with, namely claims for compensation in terms of s 17 against the Road Accident Fund for those injured in road accidents. It found that the legislature enacted the RAF Act — and included provisions dealing with prescription in it — for the very reason that the Prescription Act was not regarded as appropriate for this area.[3] Dealing with the constitutional and legal framework applicable to that matter, the court had this to say:

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

The Prescription Act deals with prescription in general. In terms of s 10 a debt is extinguished by prescription after the lapse of the period which applies in respect of the prescription of the debt. A claim is thus after a certain period of time no longer actionable and justiciable. It is a deadline which, if not met, could deny a plaintiff access to a court in respect of the specific claim.

Generally under the Prescription Act, prescription applies to a debt. For the purposes of this Act, the term 'debt' has been given a broad meaning to refer to an obligation to do something, be it payment or delivery of

[2] 2011(2)SA 26 (CC)

[3] At paragraphs 50-53

goods or to abstain from doing something. Although it may on occasion be doubtful whether an obligation is indeed a debt in terms of the Act, there is no doubt that a claim under the RAF Act constitutes a debt. However, the RAF Act regulates the prescription of claims under it and some of the differences between the two statutes have been placed at the core of this matter……When does prescription begin to run? This question is central to the present enquiry. Section 12(1) of the Prescription Act stipulates that it begins as soon as the debt is due. A debt is due when it is 'immediately claimable or recoverable'. In practice this will often coincide with the date upon which the debt arose, although this is not necessarily always so. In terms of s 12(3) of the same Act, a debt is deemed to be due when a creditor has knowledge of the identity of the debtor and of the facts from which the debt arises. A creditor is deemed to have the required knowledge if she or he could have acquired it by exercising reasonable care…."[4]

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

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

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

[17] …….There are various outcomes possible when a referral is made to a bargaining council or the CCMA. One of these occurs when the debtor raises the issue of jurisdiction at conciliation, as happened in this matter, and a ruling ensues in the debtors favour. Should such a finding negate the interruption of prescription by the original referral? First respondent argues that it must even though a referral does provide the creditor with knowledge of the debt and of the facts from which the debt arises.

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

[19] Another obstacle to the proposition that the Prescription Act applies to all claims under the LRA is the following: a litigant who has to go the arbitration route and gets an award in her favour will not be able to enforce that award after three years. Another litigant who must go the adjudication route in terms of the LRA will obtain a "judgment debt" in this court which in terms of the Prescription Act prescribes only 30 years after it is handed down.[5]

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

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

"(2) If at any stage after a dispute has been referred to the Labour Court, it becomes apparent that the dispute ought to have been referred to arbitration, the Court may-

(a) stay the proceedings and refer the dispute to arbitration; or

(b) with the consent of the parties and if it is expedient to do so, continue with the proceedings with the Court sitting as an arbitrator, in which case the Court may only make any order that a commissioner or arbitrator would have been entitled to make.

(3) The reference to 'arbitration' in subsection (2) must be interpreted to include arbitration-

(a) under the auspices of the Commission;

(b) under the auspices of an accredited council;

(c) under the auspices of an accredited agency;

(d) in accordance with a private dispute resolution procedure; or

(e) if the dispute is about the interpretation or application of a collective agreement."

[21]]In my judgment, for at least the above reasons, I find that the Prescription Act is inconsistent with the LRA. Its application to LRA claims would create inequalities between litigants using different routes for their disputes and furthermore will be unworkable where disputes move between tribunal and court and vice versa. It will be beneficial if these issues are considered by the LAC and I give leave to the parties to appeal and cross appeal the following order together with the main order on the merits."

Evaluation

[8] The matter before me provides a further and a clear illustration of why the Prescription Act should not be applied to unfair dismissal disputes under the LRA. Over and above the considerations I raised in the matter above, the question of public policy comes strongly into focus in this case. Public

policy and the boni mores are now deeply rooted in the Constitution and its underlying values.[6] The application of the Prescription Act to LRA claims can be used to frustrate the realisation of employees' rights to fair labour practices. This is particularly so in cases where such dismissed employees are members of vulnerable groups in our society. Many of these individuals may struggle to afford the means to execute on an award in their favour, or are unable to timeously pursue their rights because of a lack of resources.

[9] In this matter, the employer (despite losing at each stage of the LRA process), now asks the court to finally stay the execution of an award using the Prescription Act as its shield, in an attempt to evade the payment of compensation to Peters, compensation to which the employer acknowledges she was entitled. Unscrupulous tactics that aim to exhaust the ability of a dismissed employee to obtain what is rightfully their due should be frowned upon by this court. Given the inbuilt imbalance of power between an employer and a dismissed employee to enjoy the fruits of access to justice, I consider that there is a strong case on public policy grounds to find that prescription does not apply to unfair dismissal claims under the LRA. The facts of this case underscore this in strong terms.

[10] In the result I make the following order:

1. The application is dismissed.
2. The Registrar is directed to serve this judgment on the Respondent.

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H. Rabkin-Naicker

Judge of the Labour Court of South Africa

[6] Barkhuizen v Napier 2007 (5) SA 323 (CC) at paragraph 28

APPEARANCES

APPLICANTS: Mr S. Snyman for the applicant