CONSTITUTIONAL COURT OF SOUTH AFRICA

Case CCT 232/15

In the matter between:

SIZWE MYATHAZA	Applicant
and	
JOHANNESBURG METROPOLITAN BUS SERVICES (SOC) LTD t/a METROBUS	First Respondent
MINISTER OF JUSTICE AND CORRECTIONAL SERVICES	Second Respondent
CELLUCITY (PTY) LTD	Third Respondent
CONGRESS OF SOUTH AFRICAN TRADE UNIONS	Fourth Respondent

Neutral citation:	*Myathaza v Johannesburg Metropolitan Bus Services (SOC) Limited t/a Metrobus and Others* [2016] ZACC 49
Coram:	Nkabinde ADCJ, Froneman J, Jafta J, Khampepe J, Madlanga J, Mbha AJ, Mhlantla J and Zondo J
Judgments:	JAFTA J (first judgment): [1] to [65] FRONEMAN J (second judgment): [66] to [98] ZONDO J (third judgment): [99] to [146]
Heard on:	1 September 2016
Decided on:	15 December 2016
Summary:	Prescription Act, 1969 — Labour Relations Act, 1995 — dismissal dispute — arbitration award — section 158(1)(c) application — prescription of arbitration award

Prescription of debt — meaning of "debt" — is an arbitration award a "debt" in terms of the Prescription Act — applicability of the Prescription Act to the LRA dispute resolution system

---

ORDER

On appeal from the Labour Appeal Court (hearing an appeal from the Labour Court):

1. Leave to appeal is granted.
2. The appeal is upheld.
3. The orders of the Labour Court and the Labour Appeal Court are set aside and that of the Labour Court is replaced with the following:

   "The arbitration award issued on 17 September 2009 in favour of Mr Sizwe Myathaza is made an order of the Labour Court."
4. Johannesburg Metropolitan Bus Services (SOC) Ltd t/a Metrobus is ordered to pay costs in the Labour Court, Labour Appeal Court and this Court, including costs of two counsel where applicable.

JUDGMENT

Although three judgments were prepared here, all of them support the same order but for different reasons. That order appears at the end of the first judgment.

JAFTA J (Nkabinde ADCJ, Khampepe J and Zondo J concurring):

Introduction

[1] This matter concerns the question whether an arbitration award issued in terms of the Labour Relations Act[1] (LRA) in favour of the applicant has prescribed in terms of the Prescription Act[2] on the expiry of three years from the date on which the award was issued. The resolution of the dispute requires us first and foremost to consider whether the Prescription Act applies to matters governed by the LRA. If it does, the next question would be whether the current award constitutes a debt envisaged in section 10 of the Prescription Act. If the award is a debt contemplated in the Prescription Act, then the final question would be whether in present circumstances that debt has prescribed.

Facts and litigation history

[2] The facts are simple and not contested. Mr Sizwe Myathaza (applicant) was employed as a bus driver by the Johannesburg Metropolitan Bus Service (SOC) Limited t/a Metrobus (Metrobus) for a period of seven years. In September 2007 he was suspended together with other bus drivers for receiving money without issuing tickets to commuters. In April 2008 Metrobus reached an agreement with two unions that represented the suspended employees. Metrobus agreed not to take further disciplinary action against the affected employees if they pleaded guilty to the charge of irregular ticketing and accepted a final written warning as a sanction.

[3] Maintaining his innocence, the applicant declined to plead guilty and insisted on facing a disciplinary inquiry. He did not return to work and Metrobus charged him with absenting himself from work without

[1] 66 of 1995.

[2] 68 of 1969.

permission. A telegram was sent to his address, informing him about the disciplinary action. Without confirming that he had received notice, Metrobus went ahead with the enquiry in his absence. At its conclusion, he was found guilty of being absent from work without permission. He was dismissed for that misconduct. An internal appeal by his union was rejected on the ground that it was lodged out of time.

[4] Unhappy with the turn of events, the applicant submitted a dispute of an unfair dismissal to the relevant bargaining council which appointed an arbitrator to arbitrate it since conciliation had failed. The arbitration was held in September 2009. Metrobus conceded at the commencement of the arbitration proceedings that the applicant's dismissal was procedurally unfair. What remained for determination by the arbitrator was whether the dismissal was also substantively unfair.

[5] Having heard evidence from both sides, the arbitrator issued an award in these terms:

"(a) The applicant's dismissal was both substantively and procedurally unfair;

(b) The respondent City of Johannesburg (Metrobus) is ordered to reinstate the applicant, Sizwe Myathaza, with retrospective effect from his date of dismissal, 9 July 2008 on the same terms and conditions that were applicable but for the unfair dismissal and without any loss of benefits that would have accrued to him;

(c) The applicant is ordered to submit valid proof of his remuneration to calculate the back pay payable to him in terms of the award, within 5 days of receipt of this award;

(d) The applicant is ordered to report to work within 5 days of receipt of this award; and

(e) No order as to costs is made as the parties genuinely attempted to settle the matter on their own."

[6] It appears that the applicant discharged his obligations under the award because the arbitrator issued a supplementary award in terms of which his back pay was quantified and set at the amount of R90 747 excluding tax. Metrobus was directed to pay him within 14 days from the date of receipt of the supplementary award.

[7] But Metrobus failed to pay the amount fixed by the arbitrator. When the applicant reported for duty within five days as required by the award, Metrobus sent him home telling him that it had decided to challenge the award in review proceedings. Metrobus instituted its review application on 21 October 2009. The applicant opposed the review and eventually pleadings in the matter were closed. It was ripened for hearing but no date was sought and fixed for the hearing. As a result the review is still pending in the Labour Court, seven years later.

[8] Out of desperation and frustration arising from Metrobus's inaction, the applicant approached the Labour Court in August 2013 with the request that the award be made an order of court. Metrobus opposed his request, advancing two grounds. First, it was asserted that the award could not be made an order of court whilst the review application was still pending. Second, Metrobus argued that the award had prescribed on the expiry of three years under the Prescription Act, on 16 September 2012. In response the applicant submitted that the award did not constitute a debt envisaged in the Prescription Act and consequently it did not prescribe.

[9] The Labour Court held that the present award for reinstatement constituted a "debt" for purposes of prescription and that it prescribed on the expiry of three years from the date of publication. The fact that an arbitration award

issued in terms of the LRA amounted to administrative action, the Court concluded, did not preclude the application of the Prescription Act.[3]

[10] The applicant appealed to the Labour Appeal Court. His appeal was considered together with two other similar matters involving orders by two other Judges of the Labour Court. In two of the three matters, the Labour Court had held that arbitration awards prescribed after three years and in one matter the Labour Court had held that the Prescription Act was not applicable to awards made in terms of the LRA.

[11] In defining the issues it was called upon to determine the Labour Appeal Court listed the following:

(a) Whether the Prescription Act applies to arbitration awards made in terms of the LRA;

(b) What the relevant period of prescription was;

(c) Whether the institution of an application to review an award interrupts the running of prescription; and

(d) Whether a review application constitutes an impediment to the completion of prescription as contemplated in section 13 of the Prescription Act.

[12] The Labour Appeal Court proceeded to review its decisions and those of the Labour Court which applied the Prescription Act to claims that arose from the LRA. Rightly that Court commenced the enquiry by considering whether the Prescription Act should be applied to claims arising from the LRA. The point at which it started its analysis was whether the Prescription Act was inconsistent with the LRA. For the Prescription Act itself excludes

[3] *Myathaza v Johannesburg Metropolitan Bus Services (SOC) Limited t/a Metrobus*, unreported judgment of the Labour Court, Case No J1901/13 (17 October 2014) at para 3.

its operation in the event of inconsistency with provisions of another Act of Parliament.[4]

[13] But as this judgment shows, while the Labour Appeal Court began at the correct point, it erred by holding that the applicability of the Prescription Act depended on whether an arbitration award such as the present is a debt contemplated in section 10 of the Prescription Act.[5] Proceeding from this premise the Labour Appeal Court placed heavy reliance on *Desai*[6] which construed the word "debt" to include any obligation to do something or refrain from doing something.

[14] Based on this construction the Labour Appeal Court held:

> "Treating a compensation award differently from a reinstatement award appears to be erroneous in light of the wide general meaning to be given to the term 'debt'. Both those kinds of award impose obligations on the person or entity against whom the award is made. That person or entity has an obligation to pay compensation and/or to reinstate as stated in the award. The award creates a 'debt' for that person and/or entity.
>
> In my view any arbitration award that creates an obligation *to pay or render to another, or to do something, or to refrain from doing something,* does meet the definitional criteria of a 'debt' as contemplated in the Prescription Act.

[4] This exclusion is based on section 16 of the Prescription Act.

[5] Section 10 of the Prescription Act provides:

> "(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.
>
> (2) By the prescription of a principal debt a subsidiary debt which arose from such principal debt shall also be extinguished by prescription."

[6] *Desai NO v Desai NNO* [1995] ZASCA 113; 1996 (1) SA 141 (SCA).

> Generally, arbitration awards pertaining to unfair dismissals, in which compensation and/or reinstatement, with or without back pay are awarded, shall constitute 'debts' as contemplated in the Prescription Act."[7]

[15] Having concluded that an arbitration award made in terms of the LRA is a debt envisaged in the Prescription Act, the Labour Appeal Court considered whether the LRA prescribed time limits within which an award must be enforced. In that process the Court got entangled in the debate on whether an award is a "judgment debt" to which a 30-year prescription period applied or a simple debt in relation to which the prescription period was three years. With reference to various provisions of the LRA, the Court concluded that an award is not a judgment debt but a simple debt that prescribes on the expiry of three years.[8]

[16] Relying on section 15 of the Prescription Act,[9] the Labour Appeal Court concluded that the institution of a review application does not interrupt the running of prescription because a review application is not a "process whereby the creditor claims payment of the debt". Accordingly, the Court held that the award issued in favour of the applicant in September 2009 had prescribed and dismissed the appeal.

Leave to appeal

[17] It cannot be gainsaid that this matter raises a constitutional issue. It concerns the applicant's right to enforce an arbitration award issued in his favour in terms of the LRA. It is now settled that the interpretation and application of legislation like the LRA, which was enacted to give effect to

[7] *Myathaza v Johannesburg Metropolitan Bus Service (SOC) Limited t/a Metrobus; Mazibuko v Concor Plant; Cellucity (Pty) Limited v CWU obo Peters* [2015] ZALAC 45; 2016 (3) SA 74 (LAC) (Labour Appeal Court judgment) at paras 40-2.

[8] Id at para 55.

[9] Section 15(1) provides:

> "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."

rights entrenched in the Bill of Rights, constitutes a constitutional issue. This case is about whether the application of the LRA to enforce the award is excluded by the intervention of the Prescription Act.

[18] Moreover, it is beyond controversy that the application of the Prescription Act alone constitutes a constitutional issue. As this Court observed in *Mdeyide*:

> "The Prescription Act deals with prescription in general. In terms of section 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."[10]

[19] There are good prospects of success on the merits and, as a result, it is in the interests of justice to grant leave. This is borne out by the divergent views held by the Labour Courts on whether the Prescription Act applies. In addition, the decision of this Court on the issue would benefit employers and employees who may have awards issued in terms of the LRA. They need to know whether, for example, an award converted into a court order is enforceable for as long as 30 years has not lapsed as contemplated in the Prescription Act or whether other awards are enforceable up to three years. Workers and their employers also need to know when prescription starts running against an award and whether the institution of a review application or an application to convert the award into a court order interrupts prescription. These issues are of fundamental importance to the entire labour market.

[20] But before considering them, I need to mention that Cellucity (Pty) Limited and the Congress of South African Trade Unions were permitted to

[10] *Road Accident Fund v Mdeyide* [2010] ZACC 18; 2011 (2) SA 26 (CC); 2011 (1) BCLR 1 (CC) (*Mdeyide*) at para 10.

join and participate in the proceedings as third and fourth respondents, respectively.

Issues

[21] As mentioned, the core issue is whether the award that was issued in favour of the applicant in terms of the LRA has prescribed under the Prescription Act. The antecedent question is whether the Prescription Act applies to such award. Two subsidiary issues arise from the latter question. They are whether the award constitutes a debt envisaged in section 10 of the Prescription Act and whether the running of prescription was interrupted.

Applicability of the Prescription Act

[22] Since the Prescription Act limits rights in the Bill of Rights, when interpreting it we are obliged by section 39(2) of the Constitution "to promote the spirit, purport and objects of the Bill of Rights."[11] In *Makate* this Court affirmed this principle thus:

> "Since the coming into force of the Constitution in February 1997, every court that interprets legislation is bound to read a legislative provision through the prism of the Constitution. In *Fraser*, Van der Westhuizen J explained the role of section 39(2) in these terms:
>
> > 'When interpreting legislation, a court must promote the spirit, purport and objects of the Bill of Rights in terms of section 39(2) of the Constitution. This Court has made clear that section 39(2) fashions a mandatory constitutional canon of statutory interpretation.'
>
> It is apparent from *Fraser* that section 39(2) introduced to our law a new rule in terms of which statutes must be construed. It also appears from the same statement that this new aid of interpretation is mandatory. This means that courts must at all times bear in mind the provisions of section 39(2) when interpreting legislation. If the provision under construction implicates or affects rights in the Bill of Rights, then the

[11] Section 39(2) provides that "[w]hen interpreting any legislation, and when developing the common law or customary law, every court, tribunal or forum must promote the spirit, purport and objects of the Bill of Rights".

obligation in section 39(2) is activated. The court is duty-bound to promote the purport, spirit and objects of the Bill of Rights in the process of interpreting the provision in question.

The objects of the Bill of Rights are promoted by, where the provision is capable of more than one meaning, adopting a meaning that does not limit a right in the Bill of Rights. If the provision is not only capable of a construction that avoids limiting rights in the Bill of Rights but also bears a meaning that promotes those rights, the court is obliged to prefer the latter meaning. For, as this Court observed in *Fraser*:

> 'Section 39(2) requires more from a court than to avoid an interpretation that conflicts with the Bill of Rights. It demands the promotion of the spirit, purport and objects of the Bill of Rights.'

It cannot be disputed that section 10(1) read with sections 11 and 12 of the Prescription Act limits the rights guaranteed by section 34 of the Constitution. Therefore, in construing those provisions, the High Court was obliged to follow section 39(2), irrespective of whether the parties had asked for it or not. This is so because the operation of section 39(2) does not depend on the wishes of litigants. The Constitution in plain terms mandates courts to invoke the section when discharging their judicial function of interpreting legislation. That duty is triggered as soon as the provision under interpretation affects the rights in the Bill of Rights."[12]

[23] Section 34 of the Constitution does not only guarantee access to courts.[13] But also safeguards the right to have a dispute resolved by the application of law in a fair hearing before an independent and impartial tribunal or forum. There can be no doubt that the Commission for Conciliation, Mediation and Arbitration (CCMA) and bargaining councils established in terms of the LRA constitute independent and impartial forums contemplated in section 34 of the Constitution. Notably, these forums, just

[12] *Makate v Vodacom (Pty) Ltd* [2016] ZACC 13; 2016 (4) SA 121 (CC); 2016 (6) BCLR 709 (CC) at paras 87-90.

[13] Section 34 of the Constitution provides:

> "Everyone 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."

like courts, perform the function of resolving labour disputes in arbitration by applying the law.

[24] An award issued at the conclusion of an arbitration represents the resolution of the dispute. It defines the parties' rights and obligations in the same way a court order would. It is issued after affording parties on both sides the opportunity to lead evidence and present argument just like in a court hearing. As a result section 143 of the LRA proclaims that such award "is final and binding and it may be enforced as if it were an order of the Labour Court in respect of which a writ has been issued".[14]

[25] This means that, once the award is certified by the relevant functionary, it may be enforced without the need to obtain a writ. However, an arbitration award in terms of which a party is required to pay an amount of money is treated as an order of the Magistrate's Court for purposes of enforcing or executing it.

[26] The other route through which an award may be enforced is having it made an order of the Labour Court in terms of section 158(1)(c) of the LRA.

---

[14] Section 143 of the LRA provides:

> "(1) An arbitration award issued by a commissioner is final and binding and it may be enforced as if it were an order of the Labour Court in respect of which a writ has been issued, unless it is an advisory arbitration award.
>
> (2) If an arbitration award orders a party to pay a sum of money, the amount earns interest from the date of the award at the same rate as the rate prescribed from time to time in respect of a judgment debt in terms of section 2 of the Prescribed Rate of Interest Act, 1975 (Act No. 55 of 1975), unless the award provides otherwise.
>
> (3) An arbitration award may only be enforced in terms of subsection (1) if the director has certified that the arbitration award is an award contemplated in subsection (1).
>
> (4) If a party fails to comply with an arbitration award certified in terms of subsection (3) that orders the performance of an act, other than the payment of an amount of money, any other party to the award may, without further order, enforce it by way of contempt proceedings instituted in the Labour Court.
>
> (5) Despite subsection (1), an arbitration award in terms of which a party is required to pay an amount of money must be treated for the purpose of enforcing or executing that award as if it were an order of the Magistrate's Court."

Subsection (5) was substituted as a result of amendments by section 22 of Act 6 of 2015.

Once the award is made a court order, then it becomes enforceable as a court order.

[27] Significantly, this outline demonstrates that the LRA creates special dispute resolving forums that operate separately from the courts except where an award is reviewed or converted into a court order. Even so, the review or conversion takes place in a specialist court established in terms of the LRA.

[28] All of this could never have been contemplated when the Prescription Act was enacted in 1969. The differences between it and the LRA are vast and run deep. The two Acts differ in the objectives each one of them seeks to achieve and the manner in which each operates. The purpose of the Prescription Act is to prompt creditors to institute legal proceedings without inordinate delays which may adversely affect the quality of adjudication if witnesses are no longer available or their memories have faded. Unquestionably the focus here is on having a claim settled without undue delay. It is a legitimate government purpose.

[29] In *Uitenhage Municipality* Mahomed CJ said:

> "One of the main purposes of the Prescription Act is to protect a debtor from old claims against which it cannot effectively defend itself because of loss of records or witnesses caused by the lapse of time. If creditors are allowed by their deliberate or negligent acts to delay the pursuit of their claims without incurring the consequences of prescription that purpose would be subverted."[15]

[30] That the protection of debtors and the preservation of quality and reliable evidence is the objective of the Prescription Act was reaffirmed in *Mdeyide*, where Van der Westhuizen J stated:

[15] *Uitenhage Municipality v Molloy* [1997] ZASCA 112; 1998 (2) SA 735 (SCA) at 742I-743A.

"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. The quality of adjudication is central to the rule of law. For the law to be respected, decisions of courts must be given as soon as possible after the events giving rise to disputes and must follow from sound reasoning, based on the best available evidence."[16]

[31] It is apparent from the various prescription periods in section 11 of the Prescription Act that, where there is no risk of losing evidence or having its quality diminished, the Act affords longer prescription periods. For example, a debt secured by a mortgage bond prescribes after 30 years and a debt arising from a bill of exchange or negotiable instrument prescribes after six years. In respect of the former, a creditor may beat prescription by instituting an action on the last day of 30 years. In contrast, it is unjustifiable that a party to a labour dispute governed by the LRA may wait that long before seeking to enforce its rights.

[32] All prescription periods fixed by section 11 of the Prescription Act are at odds with the scheme of the LRA. Even the shortest period of three years is way out of line with the speed and periods within which the LRA requires disputes to be resolved. The period of three years is far too long to have an award enforced. Without condonation granted on good cause, a party who sits on an award until the last day of three years allowed by the Prescription Act, would be barred under the LRA from enforcing the award on the basis that such party did not act within a reasonable time.

[16] *Mdeyide* above n 10 at para 8.

[33] Employment disputes by their very nature are urgent matters that require speedy resolution so that the employer's business may continue to operate and the employees may earn a living. Undue delays, even of a period of three years, may have catastrophic consequences to the employer's business and the employee whose only source of income is remuneration received from the employer. Such employees can hardly survive for three years without a salary.

[34] In *Equity Aviation* this Court lamented delays in resolving labour disputes despite the speedy framework provided by the LRA. Nkabinde J expressed the Court's disapproval in these words:

> "I should add in this regard that it is a matter of great concern that the system of expedited adjudication of unfair dismissal disputes which the LRA sought to establish often operates far from expeditiously. The case at hand is a good example of how labour disputes are taking far too long to reach finality. The adverse effects of these delays impose burdens both on employers and on workers, as this case again illustrates."[17]

[35] In similar vein the Supreme Court of Appeal in *Shoprite Checkers* declared:

> "The entire scheme of the LRA and its motivating philosophy are directed at cheap and easy access to dispute resolution procedures and courts. Speed of result was its clear intention. Labour matters invariably have serious implications for both employers and employees. Dismissals affect the very survival of workers. It is untenable that employees, whatever the rights or wrongs of their conduct, be put through the rigours, hardships and uncertainties that accompany delays of the kind here encountered. It is equally unfair that employers bear the brunt of systemic failure."[18]

---

[17] *Equity Aviation Services (Pty) Ltd v Commission for Conciliation, Mediation and Arbitration* [2008] ZACC 16; 2009 (1) SA 390 (CC); 2009 (2) BCLR 111 (CC) (*Equity Aviation*) at para 52.

[18] *Shoprite Checkers (Pty) Ltd v Commission for Conciliation, Mediation and Arbitration* [2009] ZASCA 24; 2009 (3) SA 493 (SCA) (*Shoprite Checkers*) at para 34.

[36] All of this underscores the differences between the LRA and the Prescription Act. It is in this context that the interpretation of section 16 of the Prescription Act must be approached.

Meaning of section 16

[37] Section 16 of the Prescription Act provides:

> "(1) Subject to the provisions of subsection (2)(b), the provisions of this chapter shall, save in so far as they are inconsistent with the provisions of any Act of Parliament which prescribes a specified period within which a claim is to be made or an action is to be instituted in respect of a debt or imposes conditions on the institution of an action for the recovery of a debt, apply to any debt arising after the commencement of this Act.
>
> (2) The provisions of any law—
>
> (a) which immediately before the commencement of this Act applied to the prescription of a debt which arose before such commencement."

[38] What plainly emerges from this text is that the section recognises the fact that there were other pieces of legislation which regulated prescription and were in force before the Act came into force. Section 16(2) safeguards the continued application of the legislation concerned in certain defined circumstances. But what is important for present purposes is section 16(1) which delineates the reach of the prescription regime established by the Act. Significantly, it states that the whole Chapter III shall not apply to matters regulated by an Act of Parliament that is inconsistent with it and which prescribes a period within which to claim or institute an action in respect of a debt. Crucial to the operation of this exclusion is the meaning of "inconsistent".

[39] Bearing in mind the judicial obligation in section 39(2) of the Constitution, we must ascribe to this word a meaning that avoids limiting

the right of access to dispute resolution forums established by the LRA to give effect to the guarantees in section 23 of the Constitution. But if "inconsistent" is reasonably capable of an interpretation which over and above that promotes those guarantees, we are duty bound to choose the latter construction. In the context of the Constitution, inconsistency is given a wider meaning which goes beyond contradiction or conflict. Legislation or conduct is taken to be inconsistent with a provision in the Constitution if it differs with a constitutional provision. Sometimes this arises from the overbroad language of a statute.

[40] In conformity with this approach this Court in *Mdeyide* held that the differences between the Prescription Act and the Road Accident Fund Act[19] established the inconsistency that excluded the application of the Prescription Act to claims under the Road Accident Fund Act. This Court stated:

"There is therefore a clear reason for the difference between the Prescription Act and the RAF Act. The Prescription Act regulates the prescription of claims in general and the RAF Act is tailored for the specific area it deals with, namely claims for compensation against the Fund for those injured in road accidents. 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. Looking for consistency in this context, is a quest bound to fail."[20]

[41] Elaborating on the differences between the two Acts, the Court continued:

"To argue that the Prescription Act and the RAF Act are not inconsistent, because the RAF Act says nothing about the issue of knowledge, and that knowledge of the

[19] 56 of 1996.

[20] *Mdeyide* above n 10 at para 50.

> identity of the debtor could thus be read into the RAF Act, would amount to circular reasoning. The argument would ignore the essential difference between the two Acts. Practically the meaning of the two different provisions would be the same. Section 23(1) of the RAF Act would be rendered meaningless. This is not logically tenable.
>
> Furthermore, while section 12(3) stipulates prescription to begin to run as soon as the debt is due, in other words in terms of a claimable debt, section 23(1) states that prescription is to start running as soon as the cause of action has arisen, which generally refers to the date of the accident. The very fact that sections 12(3) and 23(1) define the point at which prescription begins to run in different terms gives rise to an inconsistency.
>
> The Prescription Act and RAF Act are thus inconsistent. Section 12(3) of the Prescription Act cannot apply to claims under the RAF Act. The finding of the High Court in this regard was correct."[21]

[42] According to *Mdeyide* section 16(1) of the Prescription Act does not contemplate that there should be conflict of the nature that renders the two Acts mutually exclusive. It is enough if there are material differences between them. The meaning of inconsistency adopted in *Mdeyide* imposes less restriction on the guarantee to have access to cheaper and expeditious dispute resolution forums established specifically for settling labour disputes in a manner that promotes the objects of the Bill of Rights. If a word or provision under interpretation carries only a construction that intrudes on constitutional rights, it must be interpreted in a manner least intrusive of the rights concerned.[22]

Is the LRA inconsistent with the Prescription Act?

[43] As illustrated above, there are fundamental differences between the two Acts. The Prescription Act envisages civil courts as the only forums at which claims or debts may be enforced. In contrast, in terms of the LRA the

[21] Id at paras 51-3.

[22] *South African Transport and Allied Workers Union (SATAWU) v Moloto NO* [2012] ZACC 19; 2012 (6) SA 249 (CC); 2012 (11) BCLR 1177 (CC).

CCMA and bargaining councils are forums that must resolve labour disputes and do so far more expeditiously than the time taken in courts. Secondly, the Prescription Act bars creditors who fail to enforce their debts by instituting legal actions within specified periods which are far longer than the periods prescribed by the LRA at pre-arbitration stage. Thirdly, an arbitration award constitutes an outcome in terms of which a claim or dispute is finally settled between the parties. On the other hand, apart from a judgment debt that prescribes after 30 years, the Prescription Act is designed to extinguish the right to enforce a claim that is still to be determined by a court.

[44] The Prescription Act does not cater for a situation where the claim or dispute has been adjudicated and an outcome binding on the parties has been reached but before that outcome is made an order of court. In terms of section 143 of the LRA, a certified arbitration award is deemed to be an order of court and is enforced as if it were an order of the Labour Court, except an arbitration award for payment of money, which is executed as if it were an order of a Magistrate's Court. Since an award is a final and binding remedy, it is difficult to determine a prescription period applicable to it under the Prescription Act. The three year period is meant for claims or disputes which are yet to be determined and in respect of which evidence and witnesses may be lost if there is a long delay.

[45] The LRA constitutes a legal framework for resolving labour disputes and not debt collection. The role played by the CCMA and the bargaining councils in that process was aptly described in *Sidumo* in these terms:

"Its statutory task is to resolve disputes that arise in the workplace by implementing the provisions of the Labour Relations Act read in the light of the provisions, in particular, of section 23 of the Constitution. Section 23(1) of the Constitution provides that workers and employers are entitled to fair labour practices. The adjudicative task performed by the CCMA involves the determination of disputes

often involving the question of fair labour practices that are of importance to the litigants before the CCMA. It is not an institution for private, agreed arbitration but a state institution established for the resolution of disputes. The procedures provided for in the Labour Relations Act make plain that the disputes are to be speedily and cheaply resolved by the CCMA. No appeal lies from the CCMA, but the Labour Relations Act expressly requires that the Labour Courts are to scrutinise the decisions of the CCMA."[23]

[46] The other difficulty in seeking to apply the Prescription Act to arbitration awards relates to determining the time from which prescription begins to run. In terms of section 12 of the Act, prescription commences to run when the debt becomes due. In *Mdeyide* it was proclaimed:

"Section 12(1) of the Prescription Act stipulates that [prescription] 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 section 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 arose."[24]

[47] It is apparent that the incidents mentioned in section 12 do not apply to an award because there the underlying debt becomes due before the dispute is referred to arbitration and even before it is submitted to conciliation. Prescription can also not run from the date the award is published because section 145 of the LRA affords the party against whom the award is made a period of six weeks within which to challenge the award on review. Although section 145(3) of the LRA empowers the Labour Court to stay enforcement of an award pending a review application, this does not mean that automatically the award is enforceable. If this were to be so, applicants

[23] *Sidumo v Rustenburg Platinum Mines Ltd* [2007] ZACC 22; 2008 (2) SA 24 (CC); 2008 (2) BCLR 158 (CC) at para 139.

[24] *Mdeyide* above n 10 at para 13.

for review would be prejudiced, in the event that the award is set aside. In some instances the harm would be irreparable.

[48] Moreover, under the LRA the creditors may not interrupt prescription "by service on the debtor of any process whereby the creditor claims payment of the debt" while review proceedings are pending. If the award is challenged on review and the respondent opposes the review, service of opposing papers upon the applicant may not interrupt prescription because it is not a process by which the respondent may claim payment. Furthermore the creditor cannot obtain an order making the award an order of court so that it may be enforced. This is because the conversion would defeat the very purpose of the review. Once an award is made an order of court, it ceases to be an award and becomes a court order which cannot competently be reviewed.

[49] The structure of section 15 of the Prescription Act underscores the fact that the judicial interruption envisaged there relates to claims that are still to be prosecuted to final judgment or where the judgment is abandoned or set aside. This does not accord with an arbitration award which is itself a final and binding decision.

[50] Furthermore, the LRA scheme reveals shorter periods for the enforcement of awards. A party in whose favour an award was made must enforce it without delay unless the party against whom the award was issued challenges it on review. Ordinarily such review must be instituted within six weeks from the date on which the award was served on the applicant for review. Section 145(5) requires that the review must be heard within six months from the date it was launched. Of course, the Labour Court may extend this period on good cause.

[51] This scheme shows that even where there is a review challenge, an award that has survived the challenge must be enforced within one year. If the Prescription Act were to apply, it would mean that the award may not be enforced within a year. The party in whose favour it was issued may wait for almost three years and only seek to enforce it on the last day of the third year to interrupt prescription. If this were to happen such party may find out that it is no longer open to it to enforce the award under the LRA, owing to a long delay. This would be the position despite the fact that the award would not have prescribed. Consequently, it would serve no purpose to apply the Prescription Act to awards which are not enforceable under the LRA. This is because an unenforceable award is as good as a prescribed one. Both cannot be enforced.

[52] In addition, since an award made in terms of the LRA constitutes administrative action,[25] applying the Prescription Act to it would defeat the primary purpose of the LRA which is to provide expeditious finality in resolving labour disputes. And this would also mean that a party who has failed to challenge the award by means of a review may still invoke the Prescription Act to avoid obligations arising from the award. This would seriously undermine the purpose of the six-week period within which a review must be instituted by rendering the unchallenged award nugatory.

[53] But more importantly the LRA, unlike the Prescription Act, is not designed to regulate time limits that apply to the enforcement of debts. On the contrary, it was enacted to give effect to the rights entrenched in sections 23 and 33 of the Constitution. The effective resolution of labour disputes is one of the primary objects of the LRA. Both the CCMA and bargaining councils, which are unquestionably organs of state, were established with the aim of achieving this objective speedily and cheaply. And therefore awards issued by these bodies resolve labour disputes and do not enforce

[25] *Sidumo* above n 23 at paras 88-94 and 141.

debts. Hence these awards constitute administrative action and not claims capable of being enforced.

[54] Affirming the last proposition in *Sidumo* O'Regan J said:

> "It is clear that the CCMA has been established to expedite the resolution of labour disputes in an efficient and cost-effective manner. Special procedures have been created to avoid the delays and costs associated with dispute resolution in the ordinary courts. In this sense, the CCMA is properly understood as an administrative tribunal. Our Constitution recognises the need for the conduct of administrative agencies to be scrutinised, to ensure that they act lawfully, reasonably and procedurally fairly. As the Labour Relations Act already provides for the scrutiny on review of decisions of the CCMA by the Labour Court, no further delay will be caused by that scrutiny being on the basis of the constitutional standards established in section 33. So the need for speedy and cheap resolution of disputes does not mean that the CCMA should not be held accountable for its decisions, nor that it should not be monitored by the Labour Court to ensure that it acts lawfully, reasonably and procedurally fairly. Indeed, as Sachs J has reasoned, it is entirely consistent with our constitutional order that the procedures and decisions of the CCMA should be lawful, reasonable and procedurally fair and that this should be ensured by appropriate scrutiny by the Labour Courts."[26]

[55] Lastly, a debt contemplated in the Prescription Act cannot be reviewed or appealed against, except if it is a judgment debt. Again, apart from a judgment debt, debts that prescribe under the Prescription Act do not earn interest unless it is by agreement between parties to a contract. But an arbitration award earns interest from the date it is made according to section 143(2) of the LRA. It can be reviewed in terms of section 145 and may be appealed against in terms of section 24(7) of the LRA.

[56] All these differences support the proposition that the LRA is not consonant with the Prescription Act. But the inconsistency does not flow

[26] Id at para 140.

from the fact that the LRA and the Prescription Act prescribe different time periods only. It also arises from the fact that section 158 of the LRA empowers the Labour Court to make an award an order of court for purposes of enforcement. The application of the Prescription Act to such awards effectively achieves the opposite outcome. Once prescribed, an award becomes unenforceable and the Labour Court may not exercise its power to make the award an order of court. In these circumstances the Prescription Act defeats the LRA process that was specifically designed to enforce the right to fair labour practices.

[57] Section 210 of the LRA resolves this conflict by declaring that the LRA takes precedence over legislation with which it is in conflict.[27] The reason for this is not hard to find. The LRA, as its long title declares, was passed to give effect to section 23 of the Constitution.[28] It was enacted to promote

[27] Section 210 provides:

> "If any conflict, relating to the matters dealt with in this Act, arises between this Act and the provisions of any other law save the Constitution or any Act expressly amending this Act, the provisions of this Act will prevail."

[28] Section 23 of the Constitution provides:

> "(1) Everyone has the right to fair labour practices.
>
> (2) Every worker has the right—
>
> (a) to form and join a trade union;
>
> (b) to participate in the activities and programmes of a trade union; and
>
> (c) to strike.
>
> (3) Every employer has the right—
>
> (a) to form and join an employers' organisation; and
>
> (b) to participate in the activities and programmes of an employers' organisation.
>
> (4) Every trade union and every employers' organisation has the right—
>
> (a) to determine its own administration, programmes and activities;
>
> (b) to organise; and
>
> (c) to form and join a federation.
>
> (5) Every trade union, employers' organisation and employer has the right to engage in collective bargaining. National legislation may be enacted to regulate collective bargaining. To the extent that the legislation may limit a right in this Chapter, the limitation must comply with section 36(1).

and regulate the exercise of the rights entrenched in the Bill of Rights. It establishes the framework within which the rights contained in section 23 including the right to fair labour practices, may be enforced. Moreover, it is inherently implausible that old-order legislation like the Prescription Act may displace the LRA that was passed in compliance with an obligation imposed by the Constitution to give effect to fundamental rights. Applying the Prescription Act here also disables the Labour Court from exercising its jurisdictional power under section 158(c) of the LRA.

[58] The LRA establishes the CCMA and bargaining councils as some of the mechanisms for enforcing the right to fair labour practices. In addition, the LRA prescribes remedies which may be granted to vindicate the right to fair labour practices.[29] If an arbitrator in the CCMA or bargaining council finds, as it happened here, that a dismissal was unfair he or she must issue an award in terms of which reinstatement of the dismissed employee may be ordered. The award constitutes the means of enforcing the employee's right

---

(6) National legislation may recognise union security arrangements contained in collective agreements. To the extent that the legislation may limit a right in this Chapter, the limitation must comply with section 36(1)."

[29] Section 193 provides:

"(1) If the Labour Court or an arbitrator appointed in terms of this Act finds that a dismissal is unfair, the Court or the arbitrator may—

(a) order the employer to reinstate the employee from any date not earlier than the date of dismissal;

(b) order the employer to re-employ the employee, either in the work in which the employee was employed before the dismissal or in other reasonably suitable work on any terms and from any date not earlier than the date of dismissal; or

(c) order the employer to pay compensation to the employee.

(2) The Labour Court or the arbitrator must require the employer to reinstate or re-employ the employee unless—

(a) the employee does not wish to be reinstated or re-employed;

(b) the circumstances surrounding the dismissal are such that a continued employment relationship would be intolerable;

(c) it is not reasonably practicable for the employer to reinstate or re-employ the employee; or

(d) the dismissal is unfair only because the employer did not follow a fair procedure."

to fair labour practices. But the LRA requires a further step to be taken before the award can be enforced. One such step is to make it an order of court. Once it is made an order of court, execution can be effected and this constitutes the last stage in the enforcement chain. Therefore, the Prescription Act, which is the apartheid era legislation, should not be invoked to frustrate the wishes of the democratic Parliament set out in the LRA.

[59] But even if the Prescription Act were to apply, the main award granted in favour of the applicant could not prescribe because it is not an obligation to pay money or deliver goods or render services by Metrobus to the applicant. *Desai*, on which the Labour Appeal Court relied for holding that "debt" means an obligation to do something or refrain from doing something, was overruled by this Court in *Makate*.[30]

[60] I have had the benefit of reading judgments by my colleagues Froneman J and Zondo J. I agree with Zondo J that the Prescription Act does not apply to arbitration awards issued in terms of the LRA and I embrace the additional reasons in his judgment supporting this conclusion.

[61] What remains for consideration, albeit briefly, is the new section 145(9) of the LRA which came into force in January 2015. It provides that an application to set aside an arbitration award interrupts the running of prescription. This provision does not apply to the present arbitration award which was made and challenged on review long before it was enacted. But it is doubtful that the amendment supports sufficiently an indication that the Prescription Act was intended to apply to arbitration awards. It seems to me that the amendment constitutes a response by Parliament to many decisions of the Labour Court and the Labour Appeal Court which applied the

[30] *Makate* above n 12 at para 93.

Prescription Act to labour disputes and arbitration awards.[31] However, we need not express a final view on the matter in present proceedings because section 145(9) does not apply here.

[62] It follows that the appeal must succeed and that the orders of the Labour Court and the Labour Appeal Court should be set aside. Since the review application has not been prosecuted to finality even though the pleadings were closed a long time ago, it would be just and equitable to grant an order which the Labour Court should have granted. That order is to make the award an order of the Labour Court. In terms of section 145(5) of the LRA, Metrobus was obliged to apply for a date for the review to be heard within six months of lodging the review, subject to the rules of the Labour Court. Its unduly long delay in this regard undermines the LRA's object of speedy resolution of disputes and has seriously prejudiced the applicant who we were informed during the hearing has been without income since his unfair dismissal in 2009.

[63] Metrobus, as an organ of state under an obligation to "respect, protect, promote and fulfil the rights in the Bill of Rights",[32] has conducted itself in pursuit of this matter in a manner not befitting an exemplary employer. It has put the applicant through untold hardships by denying him a livelihood in circumstances where Metrobus had conceded that the dismissal was procedurally unfair. It persisted to do so even after the arbitrator had issued an award that declared the dismissal to have been both substantively and procedurally unfair.

---

[31] *Concor Holdings (Pty) Ltd v Mazibuko* [2013] ZALCJHB 141; (2014) 35 *ILJ* 477 (LC); *FAWU v Country Bird* [2011] ZALCCT 28; (2012) 33 *ILJ* 865 (LC); *Mangengenene v PPC Cement (Pty) Ltd* [2011] ZALCJHB 31; (2011) 32 *ILJ* 2518 (LC); [2011] 12 BLLR 1198 (LC); *Fredericks v Grobler NO* [2010] ZALC 18; *National Union of Metalworkers of South Africa ("NUMSA") v Espach Engineering* [2009] ZALCJHB 109; *Public Servants Association o.b.o Khanya v Commission For Conciliation, Mediation and Arbitration* [2008] ZALC 1; (2008) 29 *ILJ* 1546 (LC); *Solidarity v Eskom Holdings Limited* [2007] ZALAC 19; (2008) 29 *ILJ* 1450 (LAC); *Mpanzama v Fidelity Guards* [2000] ZALC 91; [2000] 12 BLLR 1459 (LC).

[32] Section 7(2) of the Constitution provides:

"The state must respect, protect, promote and fulfil the rights in the Bill of Rights."

[64] Were it not for the intervention of Legal Aid South Africa, the applicant could not have afforded to bring his matter to this Court. Metrobus's conduct warrants an adverse costs order.

Order

[65] The following order is made:

1. Leave to appeal is granted.
2. The appeal is upheld.
3. The orders of the Labour Court and the Labour Appeal Court are set aside and that of the Labour Court is replaced with the following:

> "The arbitration award issued on 17 September 2009 in favour of Mr Sizwe Myathaza is made an order of the Labour Court."

4. Johannesburg Metropolitan Bus Services (SOC) Limited t/a Metrobus is ordered to pay costs in the Labour Court, Labour Appeal Court and this Court, including costs of two counsel where applicable.

FRONEMAN J (Madlanga J, Mbha AJ and Mhlantla J concurring):

Introduction

[66] I have had the privilege of reading the judgment of Jafta J (first judgment) and agree that leave to appeal must be granted and that the appeal must succeed. I also agree that the Prescription Act[33] must be re-interpreted in order to give proper constitutional effect to, amongst others, the right of access to justice.[34] I disagree, however, that this necessitates a finding that its provisions are inconsistent with the provisions of the Labour Relations

[33] 68 of 1969.

[34] Section 34 of the Constitution.

Act (LRA).[35] The relevant provisions of the two Acts are capable of complementing each other in a way that best protects the fundamental right of access to justice, whilst at the same time preserving the speedy resolution of disputes under the LRA.

[67] The manifest injustice of depriving the applicant of the arbitration award in his favour by first avoiding its implementation by way of instituting review proceedings and then crying prescription on the back of the time wasted by the review can be met by application of the principle that prescription should not run until court proceedings are finalised. That is indeed the general scheme of the Prescription Act and the new dispute resolution processes under the LRA can comfortably be accommodated within that framework under a re-interpretation of the Prescription Act to give effect to constitutional imperatives.

[68] The building blocks of that re-interpretation are that:

(a) The general principle underlying the Prescription Act is that the running of prescription is interrupted from the commencement of adjudicative proceedings until their final conclusion;

(b) The Commission for Conciliation, Mediation and Arbitration (CCMA) established under the LRA,[36] is an "independent and impartial forum" that can resolve disputes before it by "the application of law" in terms of section 34 of the Constitution;

(c) The initiation of proceedings before the CCMA under the LRA amounts to the commencement of adjudicative proceedings that interrupts prescription under the Prescription Act; and

[35] 66 of 1995.

[36] Section 112 of the LRA.

(d) Review of an arbitration award under the LRA fulfils the same role in the finalisation of court proceedings as an appeal does in cases heard by the Labour Court.

Prescription interrupted until proceedings finalised

[69] Prescription under the Prescription Act is "interrupted by the service on the debtor of any process whereby the creditor claims payment of the debt".[37] Once the judicial process commences it proceeds in terms of the court rules and any delays within that process do not affect the statutory interruption of prescription.[38] Interruption lapses if, for whatever reason, the judgment is not pursued to become a "final judgment".[39] The interruption lasts until the "final" judgment becomes executable.[40] Pending an appeal the judgment is not usually executable in terms of court rules.[41] Even if it becomes executable if special application is made, that does not make the judgment finally executable, because if the judgment on appeal is unfavourable the execution cannot stand. Hence, the judgment only becomes final and executable when the appeal is finally disposed of.[42]

[70] In *Van der Merwe v Protea*[43] Smalberger J stated:

> "The 'process in question' [in section 15(2)] is clearly that by which prescription was originally interrupted. It is that process which must be successfully prosecuted to final judgment by the creditor, and not any other. The reference to 'final judgment', in the context, contemplates judgment in the court in which the process is instituted

[37] Section 15(1) of the Prescription Act.

[38] Compare *Kuhn v Kerbel* 1957 (3) SA 525 (A); [1957] 3 All SA 365 (A), approved and applied in *Titus v Union and SWA Insurance Co Ltd* 1980 (2) SA 701 (TkS); [1980] 3 All SA 607 (Tk) at 704F-G.

[39] Section 15(2) of the Prescription Act.

[40] Section 15(4) of the Prescription Act.

[41] Section 18 of the Superior Courts Act 10 of 2013.

[42] Section 15(4) of the Prescription Act. See also Loubser *Extinctive Prescription* (Juta & Co Ltd, Cape Town 1996) at 139.

[43] *Van der Merwe v Protea Insurance Co Ltd* 1982 (1) SA 770 (E) at 773A-C.

> or, if the creditor is unsuccessful in such court, any higher tribunal in which the creditor is ultimately successful on appeal in relation to the 'process in question'. Where a creditor is successful in the court in which the process in question commences legal proceedings prescription stands interrupted unless the judgment is abandoned or set aside on appeal.
>
> It seems to me that the whole purpose of section 15(2) is that, if a creditor fails to prosecute successfully his claim under the process which interrupts prescription, either in the court in which such process commences legal proceedings, or on appeal to a higher tribunal, or, having been successful in the initial prosecution of his claim, abandons the judgment in his favour, or it is set aside on appeal at the instance of the debtor, the running of prescription is deemed not to have been interrupted."[44]

[71] Where a debt is the object of a dispute subjected to arbitration the period of prescription is delayed.[45] The award of an arbitrator in terms of an arbitration agreement has the status of a court order between the parties and the applicable prescription period is that which is applicable to a judgment debt.[46] There seems little reason why parties subjected to statutory arbitration should not enjoy similar protection in respect of arbitration awards in their favour.

The CCMA – an independent and impartial judicial tribunal

[72] Section 34 of the Constitution provides:

> "Everyone 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."

---

[44] So too Howie J in *Cape Town Municipality v Allianz Insurance Co Ltd* 1990 (1) SA 311 (C) at 334 states:

> "A creditor prosecutes his claim under that process to final, executable judgment, not only when the process and the judgment constitute the beginning and end of the same action."

[45] Section 13(1)(f) of the Prescription Act.

[46] *Blaas v Athanassiou* 1991 (1) SA 723 (W); [1991] 3 All SA 330 (W) at 725H.

[73] It is not necessary to belabour the point that the CCMA is an independent and impartial tribunal[47] that falls within the purview of section 34, nor that it resolves disputes in accordance with the provisions of the LRA.[48] In this regard I agree with the first judgment.[49]

CCMA process: commencement of adjudicative proceedings?

[74] In terms of section 15(1) of the Prescription Act prescription is interrupted by the service on the debtor of "any process whereby the creditor claims payment of the debt". Two questions thus arise: The first is whether the means of commencing proceedings before the CCMA is a "process" under the Act; and the second is whether a claim before the CCMA is for payment of a "debt".

[75] Unfair dismissal disputes must be referred to the CCMA[50] or bargaining councils and if conciliation fails can then be referred to arbitration or the Labour Court.[51] The CCMA Rules provide for service of referrals and the further steps when arbitration follows.[52] Section 15(6) of the Prescription Act defines "process" as including 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". In *Mountain Lodge Hotel*[53] Georges CJ held in relation to a similar provision in Zimbabwean legislation that:

[47] Section 113 of the LRA.

[48] Section 115 of the LRA.

[49] First judgment at [23] to [24].

[50] Section 134 of the LRA.

[51] Section 138 of the LRA.

[52] Rules 5, 10 and 18 of the Rules for the Conduct of Proceedings before the Commission for Conciliation Mediation and Arbitration (CCMA Rules).

[53] *Mountain Lodge Hotel v McLoughlin* 1984 (2) ZSC 567 (ZSC) at 570H-571A.

> "The definition of 'process' in subsection (6) is not exclusive in its scope. The section merely enumerates some documents which fall within the ambit of the word. It clearly contemplates that other documents may fall within that ambit."

Given the CCMA's constitutionally compliant status as an independent and impartial tribunal resolving judicial disputes I can see no reason why the service of a referral under the provisions of the LRA and the CCMA Rules should not fall within the ambit of section 15(1) of the Prescription Act.

[76] Is a claim for unfair dismissal under the LRA a "debt" for the purposes of section 15 of the Prescription Act? The first judgment appears to hold that the reinstatement order is incapable of being a "debt" under the Prescription Act. I must confess that I find it difficult to follow the reasoning in coming to that conclusion.

[77] There has been some recent debate in this Court on the meaning that should be given to the word "debt" in the Prescription Act, it being contended that a more restrictive meaning better accords with the right of access to justice in section 34 of the Constitution. This is said to be necessary because a less restrictive meaning of the word will give less room for infringement of the right of access to justice.[54] I will adopt this point of departure, namely that the meaning of "debt" must be in closest harmony to the demands of section 34 of the Constitution.

[78] Section 34 guarantees the right of access to justice for "any dispute that can be resolved by the application of law". So, for a start, the meaning of "debt" under the Prescription Act must be restricted to a claim that can be resolved by the application of law. That means only a claim for the enforcement of legal obligations should qualify as a "debt" under the Prescription Act. Legal obligations may take different forms. They may

[54] *Makate* above n 12 at paras 90-3.

entail a positive obligation to do something or a negative obligation to refrain from doing something. A positive obligation may involve rendering performance of a legal obligation in the form of payment of money in the case of a debt sounding in money, or performing some other act where the obligation does not sound in money. A negative legal obligation to refrain from doing something will obviously also not sound in money. All this is not new and the different ways of enforcement of these different kinds of legal obligations have long been recognised in our law: execution by writ for money debts (claims or orders *ad pecuniam solvendam*) and enforcement by way of contempt proceedings for claims or orders to do something or refrain from doing something (claims or orders *ad factum praestandum*).

[79] An unfair dismissal claim under the LRA seeks to enforce three possible kinds of legal obligations against an employer: reinstatement, re-employment and compensation.[55] Each one of them enjoins the employer to do something positive. In the case of reinstatement, as was claimed and ordered here, it means the resuscitation of the employment agreement with all the attendant reciprocal rights and obligations.[56] The employer must provide employment and pay remuneration. Both fall within the meaning of a "debt" under the Prescription Act, however narrowly interpreted.[57]

[80] This approach in no way contradicts that of the majority in *Makate*.[58] In that case the Court did not take issue with the idea that there may be debts beyond a claim for payment. It accepted that other types of obligations may constitute debts. What it rejected was the "broad construction" – in *Desai*[59]

[55] Section 193 of the LRA.

[56] As per Nkabinde J in *Equity Aviation* above n 17 at para 36.

[57] See *Makate* above n 12 at paras 92-3.

[58] Id.

[59] *Desai* above n 6. In *Makate* above n 12 at para 84 the Court captured its rejection of the *Desai* definition thus:

> "[E]very obligation irrespective of whether it is positive or negative, constitutes a debt as envisaged in section 10(1). This in turn meant that any claim that required a party to do

– of the word "debt".[60] Plainly accepting a definition of the word in *Escom*,[61] Jafta J said:

> "The absence of any explanation for so broad a construction of the word 'debt' [in *Desai*] is significant because it is inconsistent with earlier decisions of the same [C]ourt that gave the word a more circumscribed meaning. In *Escom* the Appellate Division said that the word 'debt' in the Prescription Act should be given the meaning ascribed to it in the *Shorter Oxford Dictionary*, namely:
>
> > '1. Something owed or due: something (as money, goods or service) which one person is under an obligation to pay or render to another.
> > 2. A liability or obligation to pay or render something; the condition of being so obligated.'
>
> *Escom* was cited and followed in subsequent cases. It was also cited as authority for the proposition in *Desai NO*. It is unclear whether the [C]ourt in *Desai* intended to extend the meaning of the word 'debt' beyond the meaning given to it in *Escom*."[62]

[81] On the authority of *Escom*, which was accepted in *Makate*, obligations to reinstate, re-employ or compensate in terms of section 193 of the LRA are each "[a] liability . . . to . . . render something".[63]

[82] Service of process setting in motion the dispute resolution process under CCMA auspices in terms of the LRA thus serves to interrupt prescription under section 15 of the Prescription Act.

Review: final step in arbitration process

[83] The principle that prescription should not run until court proceedings are finalised under the Prescription Act has, as we have seen, been applied in

---

something or refrain from doing something, irrespective of the nature of that something, amounted to a debt that prescribed in terms of section 10(1). Under this interpretation, a claim for an interdict would amount to a debt."

[60] *Makate* above n 12 para 93.

[61] *Electricity Supply Commission v Stewarts and Lloyds of SA (Pty) Ltd* 1981 (3) SA 340 (A) (*Escom*).

[62] *Makate* above n 12 at para 85.

[63] The *New Shorter Oxford Dictionary* 3 ed (1993) vol 1 at 604 as quoted in *Makate* id.

relation to finalisation of the process on appeal.[64] Logically there is little reason to say that instituting review proceedings does not also have the effect of extending the finalisation of a judgment until the review is decided. But there are no statutory time limits for bringing a common law review and court rules do not make provision for the automatic default position of suspending execution as they do in the case of appeals. The position is, however, somewhat different for the review of arbitration awards under the LRA.

[84] The broad general scheme of dispute resolution under the LRA is that the process commences in the same way, namely by an initial referral to conciliation.[65] If conciliation fails, however, adjudication of justiciable disputes under the LRA takes two different routes.[66] The one is through arbitration by the CCMA or bargaining councils,[67] the other is through adjudication by the Labour Court. Unfair dismissal disputes about an employee's conduct or capacity; continued employment made intolerable by the employer; or where the employee does not know the reason for her dismissal, go the arbitration route. Those where it is alleged that the dismissal is automatically unfair; based on the employer's operational requirements; the employee's participation in an unprotected strike; and union or closed shop membership disputes, go to the Labour Court.[68]

---

[64] See [69] and [70].

[65] See, for example, sections 9, 21, 22 and 24 of the LRA.

[66] There are other byways along the route before adjudication by way of arbitration or in the courts, but for present purposes these need not concern us.

[67] Or accredited councils; see Parts C and D of the LRA.

[68] Section 191(5) of the LRA provides:

> "If a council or a commissioner has certified that the dispute remains unresolved, or if 30 days or any further period as agreed between the parties have expired since the council or the Commission received the referral and the dispute remains unresolved—
>
> (a) the council or the Commission must arbitrate the dispute at the request of the employee if—
>
> (i) the employee has alleged that the reason for dismissal is related to the employee's conduct or capacity, unless paragraph (b)(iii) applies;

[85] It is important to note that this division of adjudicative labour is not premised on a substantive distinction between the nature of the different disputes: all are disputes "that can be resolved by the application of law". A pragmatic choice was made that certain disputes should preferably be resolved through the possibly speedier process of arbitration and that choice was fortified by not allowing appeals against arbitration awards, only review.[69] In contrast, Labour Court judgments are subject to appeals to the Labour Appeal Court and further up the judicial hierarchy.[70] Arbitration under the LRA is merely adjudication without a right of appeal. Instead of a right of appeal only a right to review exists.

[86] The restriction to review only provides a cogent and compelling reason for re-interpreting the Prescription Act to include statutory reviews under section 145 of the LRA as included in the judicial process that interrupts prescription until finality is reached under section 15 of that Act. The restriction infringes the right of access to courts more severely than where a

---

(ii) the employee has alleged that the reason for dismissal is that the employer made continued employment intolerable or the employer provided the employee with substantially less favourable conditions or circumstances at work after a transfer in terms of section 197 or 197A, unless the employee alleges that the contract of employment was terminated for a reason contemplated in section 187;

(iii) the employee does not know the reason for dismissal; or

(iv) the dispute concerns an unfair labour practice; or

(b) the employee may refer the dispute to the Labour Court for adjudication if the employee has alleged that the reason for dismissal is—

(i) automatically unfair;

(ii) based on the employer's operational requirements;

(iii) the employees participation in a strike that does not comply with the provisions of Chapter IV; or

(iv) because the employee refused to join, was refused membership of or was expelled from a trade union party to a closed shop agreement."

[69] Section 145(1) of the LRA.

[70] See section 166 of the LRA.

right of appeal is allowed. An interpretation that best protects the right of access should be preferred.[71] That can be achieved by allowing the right of review to play the same role of finality as the right of appeal does in ordinary matters.

[87] Just as there are statutory provisions and court rules regulating the lodging and prosecution of appeals, the LRA provides that the review of an arbitration award must take place within six weeks of the date of service of the award, or within six weeks of the date that the applicant discovers corruption where the defect involves corruption.[72] This avoids the difficulty that the absence of certain time limits may have in the case of common law review. And, to reiterate, logically a judgment cannot be final and executable under section 15 of the Prescription Act while it is still subject to a final pronouncement by a court.

[88] The institution of a review of the arbitration award by the employer in this case was thus part of the process that interrupted prescription in terms of section 15(1) of the Prescription Act. Until the review was finally determined prescription did not run. The new section 145(9) of the LRA, which came into force in January 2015, merely confirms what I consider to have been the legal position before its enactment. It provides that an application to set aside an arbitration award interrupts the running of prescription.

---

[71] Currie and De Waal *The Bill of Rights Handbook* 6 ed (Juta & Co Ltd, Cape Town 2013) at 41, 59-60.

[72] Section 145(1) reads as follows:

> "Any party to a dispute who alleges a defect in any arbitration proceedings under the auspices of the Commission may apply to the Labour Court for an order setting aside the arbitration award—
>
> (a) within six weeks of the date that the award was served on the applicant, unless the alleged defect involves the commission of an offence referred to in Part 1 to 4 or section 17, 20 or 21 (in so far as it relates to the aforementioned offences) of Chapter 2 of the Prevention and Combating of Corrupt Activities Act, 2004; or
>
> (b) if the alleged defect involves an offence referred to in paragraph (a), within six weeks of the date that the applicant discovers such offence."

[89] There are also alternative ways to achieve the same result. The applicant's opposition to the review proceedings could be seen as interrupting prescription anew, because a defence to a claim may also be regarded as "commencing process for payment of a debt" under section 15(1).[73] And the arbitration award could, as in private arbitration, be regarded between the parties as having the status of a judgment debt.[74]

[90] Whichever way, until the review is finalised the applicant's claim cannot prescribe.

Other considerations

[91] Although the fundamental differences between the approach in this judgment and that in the first judgment should be apparent from what has been stated, it is necessary, briefly, to allude to other aspects of difference.

[92] In *Mdeyide* this Court stated:

> "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."[75]

[93] The first judgment finds material inconsistency between the shorter time periods that the LRA provides, in contrast to those of the Prescription Act.[76] Unfair dismissal referrals must be done within 30 days of the date of

[73] *Mountain Lodge Hotel* above n 53 at 570H-571C.

[74] *Blaas* above n 46 at 725.

[75] *Mdeyide* above n 10 at para 8.

[76] First judgment at [33] to [36].

dismissal.[77] On the face of it these shorter time periods under the LRA thus present a more drastic infringement of the right to access to justice than the provisions of the Prescription Act. It seems to me that an interpretive approach that seeks to give best effect to recognition to the right of access to justice would then lean in favour of the provisions of the Prescription Act, rather than the other way around. But fortunately this stark choice can be avoided.

[94] Our law distinguishes between time-bars and true prescription periods.[78] The former may admit of amelioration through condonation, the latter not.[79] It is conceptually quite feasible to have time-bar limits operating in tandem with the provisions of the Prescription Act. The Institution of Legal Proceedings Against Certain Organs of State Act[80] is an example. It enjoins a person who wishes to sue the State to give six months' notice from the date on which the debt becomes due, with provision for condonation of the late giving of the notice.[81] This notice period does not replace the extinctive prescription periods under the Prescription Act.[82] There is no reason why the specific periods for the institution of, for example, unfair dismissal proceedings cannot co-exist in the same manner with the provisions of the Prescription Act.[83]

---

[77] Section 191(1) of the LRA.

[78] Pre-constitutional case law characterised time-bars as forming part of procedural law, not affecting substantive rights. See, for example, *President Insurance Co Ltd v Yu Kwam* 1963 (3) SA 766 (A) at 778E-779A. For a general discussion, doubting the validity of the distinction, see Loubser *Extinctive Prescription* above n 42 at 3.

[79] *Brummer v Gorfil Brothers Investments (Pty) Ltd* [2000] ZACC 3; 2000 (5) BCLR 465; 2000 (2) SA 837 (CC) at para 3.

[80] 40 of 2002.

[81] Section 3 of the Institution of Legal Proceedings Against Certain Organs of State Act.

[82] Sections 2 and 3(4)(b)(i) of the Institution of Legal Proceedings Against Certain Organs of State Act.

[83] Under the provisions of the LRA condonation may be sought for non-compliance with certain time periods. If the Prescription Act applied in tandem, condonation would not be possible once a claim has prescribed. Compare section 3(4)(b)(i) of the Institution of Legal Proceedings Against Certain Organs of State Act which provides that a court may grant an application for condonation if it is satisfied that "the debt has not been extinguished by prescription".

[95] Unlike the provisions of the Road Accident Fund Act[84] (RAF Act) that were at issue in *Mdeyide*, the LRA contains no specific prescription periods comparable to those of the Prescription Act.[85] Section 23(1) of the RAF Act is stated to apply "[n]otwithstanding anything to the contrary in any law". Section 23(2) of the RAF Act provides protection for minors, persons detained on the grounds of their mental health and persons under curatorship.[86] Once again the LRA contains none of these provisions.

[96] Ordinary statutory interpretation thus also points to the conclusion that the 30 day period for the referral of unfair dismissal disputes in the LRA is a time-bar clause that exists in conjunction with the normal prescription periods under the Prescription Act. There is no express indication that these time-bar limits are intended as prescription periods to replace those of the Prescription Act. To replace the general time within which rights must be further enforced under the LRA as merely subject to reasonable limits undermines the certainty and speedy resolution of disputes. The same applies to the lack of provisions in the LRA allowing for the delay of completion of prescription,[87] interruption of prescription by acknowledgement of liability,[88] and the judicial interruption of prescription.[89] There is no need for the wheel to be reinvented under the LRA to deal with these kinds of situations.

---

[84] 56 of 1996.

[85] Section 23 of the RAF Act had a prescription period of three years, which, except for the knowledge requirement, is the same period as that of an ordinary debt in terms of the Prescription Act.

[86] Section 23(2) reads:

> "Prescription of a claim for compensation referred to in subsection (1) shall not run against—
>
> (a) a minor;
>
> (b) any person detained as a patient in terms of any mental health legislation; or
>
> (c) a person under curatorship."

[87] Compare section 13 of the Prescription Act.

[88] Compare section 14 of the Prescription Act.

[89] Compare section 15 of the Prescription Act.

[97] After the completion of this judgment I also had the opportunity of reading the judgment prepared by Zondo J. Our differences in approach need no further clarification, except that I disagree that interpretation of legislation in attempted conformity with the Constitution under section 39(2) of the Constitution infringes upon the separation of powers. Re-interpretation in conformity with the Constitution is demanded by the Constitution itself. We may disagree on the reasonableness of each other's interpretation, but the difference does not necessarily translate into infringement of separation of powers.

Conclusion

[98] For these reasons I agree with the order proposed in the first judgment.

ZONDO J:

Introduction

[99] The first issue for determination in this matter is whether the Prescription Act[90] applies to the dispute resolution system concerning dismissals under the Labour Relations Act[91] (LRA). If the answer is that it does not apply, that is the end of the matter and the appeal must succeed. If the answer is that it does apply, the next question will be whether an arbitration award issued under the LRA in regard to a dismissal dispute and requiring the employer to reinstate a dismissed employee is a "debt" as contemplated in section 11(d) of the Prescription Act. If it is not, that is the end of the matter and the appeal must succeed. If the answer is that it is, then the next question will be whether that debt had prescribed by the time the applicant instituted an application in the Labour Court to have the arbitration award made an order of that court in terms of section 158(1)(c) of the LRA. If it had prescribed, the appeal falls to be dismissed. If it had not prescribed, the appeal stands to succeed.

Background

[100] After the applicant had obtained an arbitration award in his favour in a dismissal dispute between himself and the first respondent in terms of which the first respondent was ordered to reinstate him with retrospective effect from the date of his dismissal, he reported for duty. The first respondent turned him away and told him that it intended bringing an application for the review and setting aside of the arbitration award. He had been dismissed on 9 July 2008. The arbitration award was issued on 17 September 2009. The first respondent instituted the review proceedings on 21 October 2009.

[90] 68 of 1969.

[91] 66 of 1995.

[101] The review application remained pending before the Labour Court without the first respondent setting it down for hearing for over three years. Then, the applicant instituted an application in the Labour Court in terms of section 158(1)(c) of the LRA for an order making the arbitration award an order of that Court.[92] Although the LRA provides that such an arbitration award is binding,[93] it cannot be enforced until it has been made an order of the Labour Court in terms of section 158(1)(c). Once it has been made an order of the Labour Court, in law it ceases to be an arbitration award and becomes an order of the Labour Court and may then be enforced as an order of that Court.

[102] When the applicant instituted his application to have the arbitration award made an order of the Labour Court, a period of three years had lapsed from the date on which the arbitration award was issued. The first respondent took two points against the section 158(1)(c) application. The first was that the arbitration award could not be made an order of court because the review application was still pending. The second was that the arbitration award was a "debt" as contemplated in Chapter III of the Prescription Act. Under Chapter III of that Act certain debts prescribe upon the expiry of three years from the date on which they became due unless the running of prescription is interrupted in the manner contemplated in the Prescription Act. The first respondent contended that the arbitration award was one of those debts. It argued that, as three years had lapsed since the

[92] Section 158(1)(c) reads:

> "(1) The Labour Court may—
>
> . . .
>
> (c) make any arbitration award or any settlement agreement an order of the Court."

[93] See section 143(1) of the LRA which provides:

> "(1) An arbitration award issued by a commissioner is final and binding and it may be enforced as if it were an order of the Labour Court in respect of which a writ has been issued, unless it is an advisory arbitration award."

arbitration award had been issued, the arbitration award, as a debt under the Prescription Act, had prescribed. In other words, the first respondent's second defence to the section 158(1)(c) application was that the arbitration award could not or should not be made an order of court because the first respondent did not owe the applicant that debt anymore.

[103] The Labour Court upheld the first respondent's second defence. The Labour Appeal Court did the same in a subsequent appeal. The question that has arisen for determination by this Court is whether these two courts were right in this conclusion.

[104] I have had the opportunity of reading the judgment by my Colleague, Jafta J (first judgment) and the judgment by my Colleague, Froneman J (second judgment). I concur in the first judgment. However, I write separately to add to the reasons why the Labour Appeal Court and Labour Court erred in their conclusions. Some of the reasons I propose to add may go to show that the Prescription Act is not applicable or that, even assuming that the Prescription Act is applicable to matters dealt with under the LRA, the provisions of the Prescription Act relied upon for the conclusion that the arbitration award had prescribed had no application to the arbitration award. Indeed, I also write to deal with the question whether an arbitration award such as the one involved in this case is a "debt" under the Prescription Act.

[105] The point of departure for the prescription point that was raised by the first respondent against the applicant and upheld by the Labour Court and Labour Appeal Court is that the arbitration award issued in favour of the applicant was a debt as contemplated in Chapter III of the Prescription Act. The second point was that the period of prescription applicable to the arbitration award as a debt was three years from the date when the arbitration award was issued. The first question that, therefore, arises is whether the arbitration award was a debt as contemplated in Chapter III.

Does the Prescription Act apply to the LRA dispute resolution system?

[106] In the context of this case, the first issue that requires consideration in regard to whether the Prescription Act applies to the dispute resolution system concerning dismissal disputes under the LRA (LRA dispute resolution system) is the question whether an arbitration award issued under the LRA in the context of a dismissal dispute is a debt as contemplated in the Prescription Act.

[107] The word "debt" is not defined in the Prescription Act. However, there have been a number of judicial pronouncements on the meaning of this word. The first judgment deals with this aspect of the matter from a certain perspective. In this judgment I deal with it from another perspective.

[108] The heading to Chapter III is: "PRESCRIPTION OF DEBTS". It consists of sections 10 to 16. Section 10 deals with the extinction of debts by prescription. Section 10(1) provides:

> "(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."

Section 11 deals with periods of prescription. It reads:

> "11. Periods of prescription of debts
>
> The periods of prescription of debt shall be the following:
>
> (a) thirty years in respect of—
>
> (i) any debt secured by mortgage bond;
>
> (ii) any judgment debt;
>
> (iii) any debt in respect of any taxation imposed or levied by or under any law;

(iv) any debt owed to the State in respect of any share of the profits, royalties or any similar consideration payable in respect of the right to mine minerals or other substances;

(b) fifteen years in respect of any debt owed to the State and arising out of an advance or loan of money or a sale or lease of land by the State to the debtor, unless a longer period applies in respect of the debt in question in terms of paragraph (a);

(c) six years in respect of a debt arising from a bill of exchange or other negotiable instrument or from a notarial contract, unless a longer period applies in respect of the debt in question in terms of paragraph (a) or (b);

(d) save where an Act of Parliament provides otherwise, three years in respect of any other debt."

Since the first respondent linked the arbitration award to a prescription period of three years, its contention has to be that the arbitration award is a debt as contemplated in section 11(d).

[109] A careful reading of the list of debts in section 11 reveals that, except for the judgment debt, all the debts listed therein are debts in respect of which there is no judgment as yet that has determined the liability of the debtor for the debt. In other words, except for the judgment debt, the other debts are debts in respect of which no proceedings have been instituted to determine whether the debtor is liable for the debt or to determine the creditor's claim against the debtor. Section 12 bears the heading: "When prescription begins to run". Section 12(1) reads:

"(1) Subject to the provisions of subsection (2), (3) and (4), prescription shall commence to run *as soon as the debt is due*."

This provision supports the point I made in the first sentence of this paragraph because it requires a debt to be due before prescription can start running and a debt must be

due before proceedings may be instituted to recover it by way of legal proceedings. One cannot issue a summons before a debt is due.

[110] Section 12(2) to (4) reads:

> "(2) If the debtor wilfully prevents the creditor from coming to know of the existence of the debt, prescription shall not commence to run until the creditor becomes aware of the existence of the debt.
>
> (3) A debt shall not be deemed to be due until the creditor has knowledge of the identity of the debtor and of the facts from which the debt arises: Provided that a creditor shall be deemed to have such knowledge if he could have acquired it by exercising reasonable care.
>
> (4) Prescription shall not commence to run in respect of a debt based on the commission of an alleged sexual offence as contemplated in sections 3, 4, 17, 18(2), 20(1), 23, 24(2) and 26(1) of the Criminal Law (Sexual Offences and Related Matters) Amendment Act, 2007, and an alleged offence as provided for in sections 4, 5, and 7 and involvement in these offences as provided for in section 10 of the Prevention and Combating of Trafficking in Persons Act, 2013, during the time in which the creditor is unable to institute proceedings because of his or her mental or psychological condition."

[111] Section 14 also supports the point I made that, except in respect of a judgment debt, the debt contemplated in Chapter III is a debt in respect of which liability has not been settled. Section 14 reads:

> "14. Interruption of prescription by acknowledgement of liability
>
> (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."

[112] Section 14(1) says that in respect of a debt the running of prescription is interrupted by an express or tacit acknowledgement of liability by the debtor. Once you have obtained an arbitration award or a judgment, acknowledgement of liability by the debtor is irrelevant because that has been settled. However, before that, an acknowledgement of liability by the debtor makes a difference.

[113] Section 14(2) is to the effect that, if the debtor has interrupted prescription by an acknowledgement of liability, prescription will start running 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". Quite clearly, this refers to a case where liability has not been determined in a manner that is binding upon the debtor. Where an arbitration award has been issued such as the one in issue in this case, liability has been decided and that decision is binding upon the debtor. At that stage there can be no arranging another due date. That was settled by the arbitration award. What remains for the "debtor" is to comply with the arbitration award.

[114] The provisions of section 15 make it quite clear that Chapter III does not deal with the situation where an arbitration award has been issued under the LRA and the employee institutes a section 158(1)(c) application to make the arbitration award an order of court. The heading to section 15 is: "Judicial interruption of prescription". Section 15(1) reads:

> "(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*."

This provision must be read with section 15(6) which defines what "process" in this provision means. Section 15(6) reads:

"(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."

Section 15(2) to (5) reads:

"(2) Unless the debtor acknowledges liability, the interruption of prescription in terms of subsection (1) shall lapse, and the running of prescription shall not be deemed to have been interrupted, *if the creditor does not successfully prosecute his claim under the process in question to final judgment or if he does so prosecute his claim but abandons the judgment or the judgment is set aside*.

(3) *If the running of prescription is interrupted as contemplated in subsection (1) and the debtor acknowledges liability, and the creditor does not prosecute his claim to final judgment*, prescription shall commence to run afresh from the day on which the debtor acknowledges liability or, if at the time when the debtor acknowledges liability or at any time thereafter the parties postpone the due date of the debt, from the day upon which the debt again becomes due.

(4) *If the running of prescription is interrupted as contemplated in subsection (1) and the creditor successfully prosecutes his claim under the process in question to final judgment* and the interruption does not lapse in terms of subsection (2), prescription shall commence to run afresh on the day on which the *judgment of the court* becomes executable.

(5) If any person is joined as a defendant on his own application, the process whereby the creditor claims payment of the debt shall be deemed to have been served on such person on the date of such joinder."

[115] The heading to section 15 makes it clear that the interruption of prescription that section 15 deals with is "judicial interruption". Judicial interruption can only mean interruption by way of a judicial process. A judicial process is a court process. That this is what section 15 deals with is also supported by the appearance of either the word "process" or

"judgment" or both in each of the subsections to section 15. That the word "judgment" supports the proposition that section 15 is about the interruption of prescription by way of a court process needs no elaboration or clarification. In section 15(4) we find the words: "judgment of the court" where the provision says: ". . . on the day on which the judgment of the court becomes executable". This is the clearest indication that the "process" with which the running of prescription is required to be interrupted in terms of section 15(1) is not only a court process but also it is a court process that, if the claim is successfully prosecuted, must lead to a "judgment of the court". However, the reference to "process" may need elaboration. Section 15(6) defines the word "process" used in section 15 as follows:

> "(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."

[116] It will be noticed that all the processes that are specified in subsection (6) are processes that are used in court and are provided for in the rules of courts. Except for the pleading in reconvention and the third party notice, they are all normally used for commencing legal proceedings in courts. I accept that subsection (6) uses the word "includes" and not the word "means" to say what the word "process" refers to. This means that it does not only refer to the processes specified in subsection (6) but may also refer to other documents not mentioned in subsection (6). However, I think that such other document would have to be a document by which legal proceedings are commenced. That is made clear by the last portion of subsections (4) and (6). Section 15(4) makes it clear that the "process" contemplated in section 15(1) is a process that leads to a "judgment of the court" if the creditor successfully prosecutes his or her claim. So, interruption of prescription has to be by way of the commencement of legal proceedings or a third party notice or a pleading in reconvention.

[117] It seems to me that the Prescription Act provides for only two ways of interrupting the running of prescription, one by the debtor and the other by the creditor. The one is the acknowledgement of liability by the debtor. That is provided for in section 14(1). The second is judicial interruption in terms of section 15(1) by way of proceedings launched by the creditor in terms of which "the creditor claims payment of the debt".

[118] Section 15(1) tells us how the running of prescription is interrupted. It says:

> "(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*."

So, the process that a creditor serves on the debtor within the specified period provided for in the Prescription Act, such as three years, in order to interrupt prescription must be a "process whereby the creditor claims payment of the debt". In the present case the first respondent contends that the applicant failed to institute the section 158(1)(c) application within three years, which would have interrupted the prescription of the arbitration award. However, section 15(1) reveals that that cannot be correct because the section 158(1)(c) application was not a "process whereby" the applicant "claim[ed] payment" of the alleged debt which is a requirement of subsection (1) read with subsection (6).

[119] To the extent that it can be said that, after the first respondent had dismissed the applicant unfairly, it owed the applicant a debt as contemplated in Chapter III of the Prescription Act, by the time the arbitration award was issued, the applicant had already served upon the first respondent a document whereby he claimed payment of such debt and an arbitrator had upheld his claim by issuing the arbitration award. This shows that the debt contemplated in section 11(d) of the Prescription Act is a debt

which can still be interrupted by the service on the debtor of a process whereby the creditor claims payment. A debt as contemplated in section 11(d) – which is the debt to which the prescription period of three years applies – does not include an arbitration award.

[120] That what interrupts the running of prescription in terms of section 15(1) of the Prescription Act is the service of a process commencing legal proceedings by which the creditor claims payment of the debt is supported by various indications. Subsections (2), (3) and (4) of section 15 provide many indications that support the proposition that the "process" contemplated by section 15(1) is a court process that initiates proceedings that must lead to a judgment on the debt.

[121] Section 15(2) deals with the lapsing of the interruption of the running of prescription and the resumption of the running of prescription thereafter. Subject to one qualification, section 15(2) provides that the interruption of the running of prescription contemplated in subsection (1) lapses if either—

(a) the creditor does not successfully prosecute his claim under the process in question (i.e the process by which the running of prescription was interrupted in terms of subsection (1)) to final judgment; or

(b) he does prosecute his claim under the process referred to in subsection (1) to final judgment but abandons the judgment or the judgment is set aside.

[122] The qualification is when the debtor acknowledges liability. So, if, having interrupted the running of prescription by means of the process contemplated in subsection (1) read with subsection (6), a creditor fails to successfully prosecute his claim under that process to final judgment, or, if, having successfully prosecuted his claim to final judgment, he abandons the judgment or the judgment is set aside and the debtor does not acknowledge

liability, the interruption of the running of the prescription lapses and the prescription is deemed not to have been interrupted in the first place.

[123] Then there is section 15(3). This provision deals with what happens when the running of prescription is interrupted as contemplated in subsection (1) and the creditor acknowledges liability and the creditor fails to prosecute his claim to final judgment. Section 15(3) says that in that case prescription commences to run afresh from the day on which the debtor acknowledges liability, or, if, at the time when the debtor acknowledges liability, or, at any time thereafter, the parties postpone the due date of the debt from the day upon which the debt again becomes due.

[124] Section 15(4) deals with a situation where the running of prescription has been interrupted as contemplated in section 15(1) and the creditor successfully prosecutes his claim under the process in question to final judgment and the interruption does not lapse. Section 15(4) provides that in that case prescription will only commence to run afresh on the day on which the *judgment of the court* becomes executable.

[125] There are three important principles on which the Prescription Act is based. The first is that, once a debt is due to a creditor by a debtor, prescription starts running. The second is that the creditor must interrupt the running of prescription before it runs for the whole period of prescription applicable to that debt. The third is that, if the creditor fails to interrupt prescription in the manner contemplated in the Prescription Act before the relevant prescription period expires and the debtor has not acknowledged liability during that period, the debt prescribes upon the expiry of the prescription period. What these principles reveal is that, once prescription has commenced running, unless the debtor acknowledges liability or the creditor interrupts the running of prescription in the manner prescribed by section 15(1) read with subsection (6) before the expiry of the period

prescribed for that debt, the debt is extinguished upon the expiry of the period. The running of prescription is one side of the coin and the interruption of the running of prescription is the other. This is evident from section 10(1) read with sections 12, 14 and 15.

[126] The types of debt and the prescribed periods of prescription appear in section 11. One of them is a judgment debt. A judgment debt is one of the debts the prescription period of which is thirty years. Another prescription period is three years and it applies to any debt other than those listed in section 11(a) to (c) if no Act of Parliament provides otherwise. Both the debtor and creditor may interrupt prescription. The debtor may interrupt prescription in one way only. That is by acknowledging liability for the debt. The creditor also has one way of interrupting the running of prescription. The prescribed manner is provided for in section 15(1) read with section 15(6). That is "by the service on the debtor of any *process* whereby the creditor *claims* payment of the debt".

[127] I have said that the arbitration award in this case was not a debt as contemplated in the Prescription Act. However, assuming that the first respondent was right in its contention that the arbitration award was a debt as contemplated in the Prescription Act and that it became due on the date when the arbitration award was issued, the question that would arise is whether an application to make an arbitration award an order of the Labour Court is a process contemplated in section 15(1) read with subsection (6). That is a process to "commence legal proceedings" by which "the creditor claims payment of debt" which claim, it is expected, the creditor would prosecute till final judgment as can be seen from subsections (2), (3) and (4) of section 15.

[128] The answer is no. A section 158(1)(c) application or a notice of motion that accompanies a section 158(1)(c) application is not a "process whereby

the creditor claims payment of the debt" as contemplated in section 15(1). By the time of the launch and service of a section 158(1)(c) application by an applicant, his claim for reinstatement or for the payment of compensation for unfair dismissal has long been prosecuted by way of arbitration which resulted in the arbitration award in his or her favour. The applicant in such a case – invariably an employee or his or her trade union or representative – cannot be said to be commencing proceedings to prosecute his claim to final judgment. All that he or she seeks to do by way of a section 158(1)(c) application is to have the arbitration award made an order of court for purposes of enforcement.

[129] Section 15 contemplates a creditor who has a claim that must still be prosecuted by way of litigation to final judgment and not a creditor who has pursued his or her claim through arbitration. This, therefore, means that service of the section 158(1)(c) application on the first respondent by the applicant within three years of the issuing of the arbitration award could not have interrupted the running of prescription even if the applicant had instituted it within the three year period. If that is so, that means that prescription would have commenced running when the arbitration award was issued but the applicant would not have had any way of interrupting the running of prescription as contemplated in section 15(1). Of course, that prescription runs against someone's claim or debt and in law he or she cannot interrupt the running of prescription is simply untenable. That that is what the legal position would have to be in the case of a section 158(1)(c) application if we agree with the first respondent that the Prescription Act applies after the issuing of an arbitration award and that the award is a debt as contemplated in the Prescription Act is a clear indication that the Prescription Act does not and cannot apply in such a case and before the arbitration award has been made an order of court.

[130] The second judgment is to the effect that the Prescription Act is applicable to the LRA dispute resolution system in respect of dismissal disputes. It goes on to say that the Commission for Conciliation, Mediation and Arbitration (CCMA) is "an independent and impartial forum" as contemplated in section 34 of the Constitution.[94] It further holds that the document used to refer a dismissal dispute to the CCMA or a bargaining council for conciliation is a process such as is contemplated in section 15(1) of the Prescription Act. By reason of that, continues the second judgment, service of the referral document on the employer by a dismissed employee interrupts the running of prescription. The second judgment, therefore, concludes that "the initiation of proceedings before the CCMA under the LRA amounts to the commencement of adjudicative proceedings that interrupts prescription under the Prescription Act".

[131] While I agree that the CCMA is an "independent and impartial forum" as contemplated in section 34 of the Constitution, I disagree with the second judgment that the Prescription Act has any role to play in, or is applicable to, the LRA dispute resolution system. The LRA dispute resolution system is a special self-standing dispute resolution system with its own prescribed periods within which various steps are required to be taken. It is a system for specific disputes which is based on special processes and principles underlying the LRA and fora specially created for their appropriateness to that system. The Prescription Act, with its own prescription periods, has no application between the dismissal and the handing down of a judgment of the Labour Court making an arbitration award an order of that Court. Whether or not the Prescription Act has any application after a judgement of the Labour Court or after an order of the Labour Court making an arbitration

[94] Section 34 of the Constitution reads:

> "Everyone 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."

award an order of that Court is an issue that does not arise for decision and should rather be left for another day and another case.

[132] When an employee has been dismissed and seeks to institute civil action for wrongful dismissal or unlawful dismissal in the civil courts to secure damages or reinstatement or for an order declaring that the dismissal is unlawful, invalid and of no legal force and effect, the Prescription Act may be applicable but it has no application if the employee seeks to refer a dismissal dispute to the CCMA or a bargaining council for conciliation. There are a number of reasons why the Prescription Act has no application between the dismissal and the last step of the LRA dispute resolution system. The first statutory step in the LRA dispute resolution system concerning dismissal disputes is the referral of a dismissal dispute to either the CCMA or a bargaining council for conciliation in terms of section 191(1) of the LRA.[95] The last step is either a judgment of the Labour Court in regard to a dismissal dispute in respect of which the Labour Court has jurisdiction or an order of the Labour Court making an arbitration award an order of that Court if the dispute is one that had to be referred to arbitration after an unsuccessful conciliation process.

[133] After a dismissal dispute has been referred to a conciliation process, no adjudication takes place during the conciliation process. The parties may

[95] Section 191(1) of the LRA reads:

> "(a) If there is a dispute about the fairness of a dismissal or a dispute about an unfair labour practice, the dismissed employee or the employee alleging the unfair labour practice may refer the dispute in writing to—
>
> (i) a council, if the parties to the dispute fall within the registered scope of that council; or
>
> (ii) the Commission, if no council has jurisdiction.
>
> (b) A referral in terms of paragraph (a) must be made within—
>
> (i) 30 days of the date of a dismissal or, if it is a later date, within 30 days of the employer making a final decision to dismiss or uphold the dismissal;
>
> (ii) 90 days of the date of the act or omission which allegedly constitutes the unfair labour practice or, if it is a later date, within 90 days of the date on which the employee became aware of the act or occurrence."

hold a conciliation meeting that is chaired by a conciliator. The conciliator has no power to make any decision on the merits of the dispute. His or her role is simply to facilitate the conciliation process between the parties and, at the end of the process, certify that the dispute remains unresolved if that is the case, or, if the dispute has been resolved, make a note to the effect that the dispute has been resolved or help the parties formulate an agreement that reflects the terms of the agreement between them. Accordingly, the conciliation process that the referral document initiates does not culminate in a judgment at the end of the conciliation process. If the parties held a conciliation meeting but failed to resolve the dispute, then the conciliator would issue a certificate to the effect that the dispute remains unresolved. That certificate then marks the end of the conciliation process initiated by the referral of the dispute. If they reach an agreement by which the dispute is resolved, that agreement marks the end of the conciliation process. If the parties do not hold a conciliation meeting and do not make any attempts at conciliation within the prescribed period of 30 days after the referral, the expiry of the 30 day period marks the end of the conciliation process initiated by the referral of the dispute.

[134] The proposition that the Prescription Act applies to the LRA dispute resolution system relating to dismissal disputes, which the second judgement adopts, has difficulties. The prescription period which the second judgment says applies to a dismissal which must then be taken to be a "debt" under the Prescription Act would be the three years contemplated in section 11(d) of the Prescription Act. Under the Prescription Act the fact that a particular debt is subject to a particular prescription period, for example three years, means that the creditor does not have to serve on the debtor the process contemplated in section 15(1) "whereby [he] claims payment of the debt" until just before the expiry of that period.

[135] In the case of a debt to which the three year period applies, that means just before the expiry of three years from when the debt became due. So, assuming that the LRA did not have any prescribed periods within which the various steps have to be taken under the LRA dispute resolution system, this would have meant that a dismissed employee would have three years within which to refer the dispute to the conciliation process. That would have placed him or her in the same position as any creditor who intends instituting action in the civil courts to recover a debt from his or her debtor. However, the LRA prescribes various periods within which steps must be taken by an employee who seeks to have a dismissal dispute dealt with in accordance with the LRA dispute resolution system.

[136] With regard to referring a dismissal dispute to the CCMA or a bargaining council for conciliation, section 191 of the LRA obliges the employee to refer the dispute within 30 days from the date of dismissal unless he or she has good cause to delay beyond that period. If he or she has good cause to refer the dispute later than the 30 day period, he or she may refer it after that period and his or her delay will be condoned by the CCMA or bargaining council. If he or she fails to refer the dispute to the conciliation process within the prescribed 30 days and does not have good cause, he or she loses the right to refer the dispute to that process. In the absence of good cause for the failure to refer the dispute within that period, the CCMA or bargaining council has no jurisdiction to entertain the dispute. If the dispute is not entertained at the conciliation stage, it cannot go to arbitration or to adjudication. This places the employee in exactly the same position as a creditor whose debt has been extinguished by prescription under the Prescription Act.

[137] In the case of a dismissed employee this could happen and does normally happen long before the expiry of the three years envisaged in section 11(d) of the Prescription Act. At this stage an example may help to

illustrate the conflict between the LRA and the Prescription Act. Let us say that, instead of referring his or her dismissal dispute to the CCMA within 30 days from the date of dismissal as is required by section 191 of the LRA, an employee did not refer it until after the expiry of two years and he has no good cause for the delay. That employee would be in the same position as a creditor who failed to serve upon his debtor within three years from the date the debt became due the process contemplated in section 15(1) of the Prescription Act in respect of an action in the Magistrate's Court or High Court. The dismissed employee cannot say to the CCMA when it refuses to entertain the referral: but the three year prescription period prescribed by section 11(d) of the Prescription Act has not expired! Quite rightly, the CCMA would not be interested in the three year period.

[138] If a creditor commenced legal proceedings in a Magistrate's Court or High Court within two years from the date on which the debt became due, he or she would not have to show any good cause for taking two years to commence legal proceedings. In fact, even if he or she served the process contemplated in section 15(1) of the Prescription Act just before the expiry of three years, he or she would not need to show any good cause for taking so long to do so. Under the Prescription Act he or she is entitled to sit back and do nothing to recover the debt until just before the expiry of the three year period. That is not the case with a dismissed employee who wishes to have his or her dismissal dispute dealt with under the LRA dispute resolution system. He or she is obliged to refer the dismissal dispute to the conciliation process within 30 days from the date of his or her dismissal in the absence of good cause justifying taking longer than that period.

[139] A dismissed employee has no right to sit back and do nothing about his or her dismissal dispute until just before the expiry of three years. If the Prescription Act applies to the LRA dispute resolution system but a dismissed employee is not able to enjoy this benefit which a creditor in the

civil courts enjoys, namely, of not needing to do anything for close to three years before commencing proceedings, what benefit does the application of the Prescription Act to the LRA dispute resolution system bring for employees? This comparison of the situation of a dismissed employee who wishes to use the LRA dispute resolution system and a creditor who wishes to sue in the civil courts to recover his or her debt shows a clear conflict between the LRA and the Prescription Act, at least in respect of the period from the date of dismissal to the date of the judgment or order of the Labour Court.

[140] Furthermore, the document that an employee has to use to refer a dismissal dispute to the CCMA or a bargaining council for conciliation is not a "process" such as is contemplated in section 15(1) of the Prescription Act. Therefore, it cannot interrupt the running of prescription as contemplated by section 15(1) read with subsection (6). This is for two reasons. The first is that in terms of section 15(1) read with subsection (6) the process contemplated in section 15(1) is a process that commences legal proceedings whereas conciliation proceedings cannot by any stretch of the imagination be described as legal proceedings. They are simply proceedings aimed at helping the parties reach an agreement to resolve their dispute. Therefore, the referral of a dismissal dispute to conciliation does not commence legal proceedings which is what the "process" referred to in section 15(1) is required to do.

[141] The second is that the proceedings that are commenced by the "process" contemplated in section 15(1) leads to a judgment. The referral of a dismissal dispute to conciliation does not lead to a judgment. It leads to either an agreement by which the dismissal dispute is resolved or to a certificate to the effect that the dispute remains unresolved or with neither an agreement nor a certificate but with the expiry of the 30 day period within which the parties are required to try and resolve the dispute.

Therefore, even if it was to be correct that the Prescription Act applies to the LRA dispute resolution system, the service on the employer of a referral of a dismissal dispute to the conciliation process would not interrupt the running of prescription because under that Act the running of prescription can only be interrupted by the service on the debtor of the process contemplated in section 15(1) read with subsection (6).

[142] I believe that I have shown above why an arbitration award issued under the LRA pursuant to the arbitration of a dismissal dispute is not a debt as contemplated in the Prescription Act. It is also not a judgment debt because an arbitration award is not a court judgment. Section 15(2), (3), (4) and (5) contemplate that the process contemplated in section 15(1) is a process that leads to a judgment. One feature of an arbitration award requiring the reinstatement of an employee that shows that it is not a judgment is that it is not enforceable on its own and has to be made an order of court in order to become enforceable. A judgment is immediately enforceable unless it contains an order the terms of which render it not immediately enforceable.

[143] The proposition that an arbitration award is a debt as contemplated in the Prescription Act serves as a foundation for the contention that the prescription period applicable to the arbitration award is three years after it has been issued. On that basis, the first respondent contended in the Labour Court, Labour Appeal Court and in this Court that by failing to institute the section 158(1)(c) application within three years from the date when the award was issued, the applicant failed to interrupt the running of prescription as contemplated in section 15(1) and that, therefore, the arbitration award had prescribed by the time the applicant instituted his section 158(1)(c) application. The arbitration award in issue here was one that required the first respondent to reinstate the applicant in its employ.

[144] I said earlier that the effect of the provisions relating to the prescription period under the Prescription Act is that a creditor is entitled to sit back and do nothing to recover his debt or to enforce his rights until just before the expiry of the applicable prescription period. If an arbitration award is a debt as contemplated in section 11(d) under the Prescription Act, then it means that a dismissed employee in whose favour an arbitration award requiring the employer to reinstate him or her has been made must be able to sit back for close to three years, if he or she so chooses, before he or she can bring a section 158(1)(c) application to enforce that reinstatement award even when the employer has not lodged any review. The proposition that an employee may sit back for so long after an arbitration award has been issued requiring his or her reinstatement before taking steps to enforce the award is untenable. No employer would be required to wait for that employee for that long.

[145] In conclusion, it seems to me that what the second judgment says is a reinterpretation of the Prescription Act to bring it in harmony with the provisions of the LRA relating to the LRA dispute resolution system concerning dismissal disputes is not really a reinterpretation but constitutes legislating which is the domain of the Legislature and not the courts. For that reason, I think that it is in breach of the principle of the separation of powers. If it is desired that the Prescription Act should apply to the LRA dispute resolution system, Parliament would have to pass appropriate amendments either to the Prescription Act or the LRA. Otherwise, it is impossible to apply the Prescription Act to that system without doing serious violence to the language of the LRA or the Prescription Act or both which the second judgment does. Section 145(9) of the LRA was enacted in January 2015. It reads:

"(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."

This provision does not apply to this case. As the first judgment correctly observes, this provision was Parliament's response to various judgments of the Labour Court and Labour Appeal Court which were to the effect that the Prescription Act applies to the LRA dispute resolution system concerning dismissal disputes. NEDLAC and Parliament may have to consider whether this provision should not be repealed and instead an amendment be enacted which will be to the effect that the Prescription Act does not apply to the LRA dispute resolution system concerning dismissal disputes between a dismissal and a judgment of the Labour Court in matters falling within the jurisdiction of the Labour Court or an order making an arbitration award an order of the Labour Court in dismissal disputes that are required to be arbitrated.

[146] For these additional reasons, I support the order in the first judgment.

For the Applicant:	V Ngalwana SC, N Mbelle and R Naidoo instructed by Ndumiso Voyi Incorporated
For the First Respondent:	F A Boda SC and L M Maite instructed by Cliffe Dekker Hofmeyr
For the Second Respondent:	S K Hassim SC and M B Matlejoane instructed by the State Attorney
For the Third Respondent:	S Snyman instructed by Snyman Attorneys
For the Fourth Respondent:	J G van der Riet SC and A G Mashigo instructed by Cheadle Thompson & Hayson