IN THE CONSTITUTIONAL COURT OF SOUTH AFRICA

CASE NO. CCT 236/16

In the matter between:

FOOD AND ALLIED WORKERS' UNION
o.b.o. J GAOSHUBELWE & OTHERS Applicant

and

Respondent
PIEMANS PANTRY (PTY) LTD

APPLICANT'S WRITTEN ARGUMENT

INTRODUCTION

1. This is an application in terms of Rule 19(2) for leave to appeal against a judgment[1] handed down by the Labour Appeal Court ("the LAC"). The LAC concluded that the Prescription Act 68 of 1969, applies to 'all litigations' under the Labour Relations Act 66 of 1995 ("the LRA"), including unfair dismissal claims in terms of section 191, and that the unfair dismissal claim in the present matter had prescribed.

[1] LAC Judgment, record, pp128-159.

2. The LAC judgment was delivered on 8 September 2016, before the judgment of this Court in *Myathaza*,[2] which was handed down on 15 December 2016. The LAC judgment in this matter accepted the correctness of the LAC judgment in the Myathaza case.[3] As appears more fully from the last section of these heads, in the Myathaza decision of this Court, the judgment of the LAC was set aside.

3. The relevant facts are set out below. Thereafter, brief submissions are made regarding the jurisdiction of this Court to hear the matter and whether leave to appeal should be granted. Finally, argument on the merits of the appeal is presented.

CHRONOLOGY OF MATERIAL FACTS

4. The material facts that gave rise to the issues to be determined in this matter are common cause.[4]

5. On 1 August 2001 the union's members were dismissed for

[2] Myathaza v Johannesburg Metropolitan Bus Services (SOC) Ltd t/a Metrobus & others [2016] ZACC 49.
[3] LAC Judgment, paragraph [15], p134.
[4] LAC Judgment paragraph [6], p129.

alleged participation in an unprotected strike.[5]

6. On 7 August 2001 the union referred an unfair dismissal dispute to the Commission for Conciliation, Mediation and Arbitration ("the CCMA") in terms of section 191(1) of the LRA.[6]

7. On 3 September 2001 the CCMA certified that the dispute remained unresolved.[7]

8. Following the issuing of the certificate, the union requested that the dispute be arbitrated.[8]

9. On 15 March 2002 the CCMA ruled that it did not have jurisdiction to arbitrate the unfair dismissal dispute because the union's members were dismissed for participation in a strike that did not comply with the provisions of Chapter IV of the LRA.[9]

10. The union applied to the Labour Court to review and set aside

[5] Pre-trial conference minute, paragraph 2.7, record, p89.
[6] Certificate of outcome, record, p37, pre-trial conference minute, paragraph 2.8, record, p89.
[7] Certificate of outcome, record, p37. pre-trial conference minute, paragraph 2.8, record, p89.
[8] Pre-trial conference minute, paragraph 2.9, record, p89.

the jurisdictional ruling. [10]

11. On 9 December 2003 the Labour Court dismissed the review application.[11]

12. On 16 March 2005 the union referred the unfair dismissal claim to the Labour Court for adjudication in terms of section 191(5)(b) by delivering a statement of claim.[12]

13. On 19 April 2005 the company delivered a response to the statement of claim in which it pleaded that the claim had prescribed[13] and contended that the statement of claim had been delivered late without a 'proper' application for condonation.[14]

14. On 22 June 2008 the Labour Court granted the union's application for condonation of the late delivery of its statement

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[9] Jurisdictional ruling, record, pp38-9.
[10] LAC Judgment para 6.6, p130.
[11] Labour Court order, record, p43; Labour Court judgment, paragraph [5], record, p107.
[12] Statement of claim, record, pp1-20; pre-trial conference minute, paragraph 2.10, record, p89.
[13] Answering statement, paragraphs 1.1 to 1.8, record, pp44-5.
[14] Answering statement, paragraphs 3.1 to 3.7, record, pp46-7.

of claim and dismissed the plea of prescription.[15]

15. On 24 June 2009 the Labour Court, by agreement between the parties, varied the order of 22 June 2008 to remove the order dismissing the plea of prescription and to provide that this issue remained for determination when the matter proceeded to trial.[16]

16. On 15 August 2014 the Labour Court upheld the plea of prescription.[17]

17. The union appealed to the LAC against the judgment upholding the plea of prescription.[18]

JURISDICTION

18. The issues raised by this application are the correct interpretation of section 191 (and section 210) of the LRA read with the Prescription Act, and the application of that interpretation to the facts of this case.

[15] Labour Court judgment, paragraph [1], record, p106.
[16] Labour Court judgment, paragraph [2], record, p106.
[17] Labour Court judgment, paragraph [22], record, p114.
[18] Notice of Appeal, record, p122.

19. The interpretation of the LRA, a statute that gives effect to the constitutional right to fair labour practices, is a constitutional matter.[19] This Court has also held that the application of the Prescription Act alone constitutes a constitutional issue, implicating as it does the right of access to courts.[20]

20. In addition, it is submitted that the matter raises an arguable point of law of general public importance that ought to be considered by this Court.[21]

21. It is accordingly submitted that the Court has jurisdiction to hear the matter.

LEAVE TO APPEAL

22. Taking into account all relevant factors, including the above

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[19] National Union of Metalworkers of South Africa v Intervalve (Pty) Ltd & others 2015 (2) BCLR 182 (CC) at paragraph [25]; Food and Allied Workers' Union v Ngcobo N.O. & another 2013 (12) BCLR 1343 (CC) at paragraph [24]; Sidumo & another v Rustenburg Platinum Mines Ltd & others 2008 (2) SA 24; (2007) 28 ILJ 2405; 2008 (2) BCLR 158; [2007] 12 BLLR 1097 (CC) at paragraph [50]; National Education, Health and Allied Workers' Union v University of Cape Town & others 2003 (3) SA 1 (CC); 2003 (2) BCLR 154 at paragraphs [14] to [15]; National Union of Metalworkers of South Africa & others v Bader Bop (Pty) Ltd & another 2003 (3) SA 513 (CC); 2003 (2) BCLR 182 at paragraph [15].

[20] Road Accident Fund v Mdeyide [2010] ZACC, 2011(2) SA 26 (CC), 18 at paragraphs [6] and [10]; Links v Department of Health, Northern Cape Province [2016] ZACC 10 at paragraph [22]; Makate v Vodacom Ltd [2016] ZACC 13 at paragraphs [90] and [91]; Myathaza, footnote 2 above, at paragraph [18]; National Union of Metalworkers of South Africa & others v Hendor Mining Supplies (a division of Marschalk Beleggings (Pty) Ltd [2017] ZACC 9 at paragraph [8].

[21] DE v RH 2015 (9) BCLR 1003 (CC) at paragraphs [8] and [10]; Paulsen and Another v Slipknot Investments 777 (Pty) Ltd 2015 (5) BCLR 409 (CC) at paragraph [16].

considerations and the applicant's prospects of success, it is submitted that it would be in the interests of justice for leave to appeal to be granted.[22]

THE MERITS OF THE APPEAL

23. Subsequent to the launching of this application, this Court handed down judgment in *Myathaza*.[23] The Court unanimously upheld Mr Myathaza's appeal.

24. In dealing with the merits of the appeal, it is not intended to repeat the submissions advanced in the affidavit filed in support of the application for leave to appeal.[24]

25. Approximately three months after the judgment in *Myathaza*, this Court handed down judgment in *Mogaila*.[25]

26. After being dismissed in November 2007 by Coca Cola, Ms Mogaila referred an unfair dismissal dispute to the CCMA. On 29 April 2008 she obtained an award in her favour

[22] See, for example, Equity Aviation Services (Pty) Ltd v CCMA & others 2009 (1) SA 390 (CC) at paragraph [31]; S v Shaik & others 2008 (2) SA 208 (CC) at paragraph [15]; Gcaba v Minister for Safety and Security & others 2010 (1) SA 238 (CC) at paragraph [18].
[23] Myathaza, footnote 2 above.
[24] Supporting Affidavit, record, pp162-175.

reinstating her with effect from 2 June 2008 with six months backpay. Despite asking the CCMA to certify the award in terms of section 143 of the LRA, when Ms Mogaila reported for work, she was told that Coca Cola intended to review the award. The review application was launched soon afterwards but dismissed by the Labour Court. The Labour Appeal Court was petitioned for leave to appeal but the petition was refused on 2 October 2013. When Ms Mogaila thereafter again reported for work, she was told that the award had prescribed and that she would not be reinstated.[26]

27. Ms Mogaila approached this Court directly in terms of section 167(6)(a) of the Constitution seeking an order that her award had not prescribed. This Court found that her case corresponded in material respects with Mr Myathaza's and that in the compelling circumstances of her case, she should be allowed direct access.[27]

28. The Court summarised the judgment in *Myathaza* as follows:

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[25] Mogaila v Coca Cola Fortune (Pty) Ltd [2017] ZACC 6.
[26] Mogaila, footnote 23 above, paragraphs [4] to [8].
[27] Mogaila, footnote 23 above, paragraphs [10] to [13].

"[14] Metrobus employed Mr Myathaza as a bus driver. Aggrieved by a dismissal, he referred a dispute to the relevant bargaining council, which appointed an arbitrator to adjudicate. The arbitrator found that the dismissal was unfair and ordered reinstatement with retrospective effect. Metrobus was also ordered to pay Mr Myathaza back pay. But Metrobus failed to do so.

[15] When Mr Myathaza reported for work, Metrobus told him it intended to have the arbitration award reviewed. Mr Myathaza opposed the review proceedings. Those proceedings, at the time this Court heard oral argument, were still pending before the Labour Court. Mr Myathaza then applied to have the arbitration award made an order of court. Metrobus opposed the application on two grounds. First, it contended that the arbitration award could not be made an order of court whilst the review application was pending. Second, the arbitration award had, it said, in any event prescribed.

[16] The Labour Court held that the arbitration award constituted a "debt" for the purposes of the Prescription Act. On this basis, the award had prescribed and the application was dismissed. On appeal, the Labour Appeal Court[28] upheld the Labour Court's findings. That Court held that—

> "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

[28] Reported in (2016) 37 ILJ 413.

'debt' as contemplated in the Prescription Act."

Since an arbitration award constituted a "debt" in terms of the Prescription Act, the Labour Appeal Court found that the award prescribed three years from the date it was issued. Mr Myathaza's award had thus prescribed, and his appeal was dismissed.

[17] Mr Myathaza sought leave to appeal from this Court. His appeal succeeded. Three judgments were delivered. The first, penned by Jafta J, with Nkabinde ADCJ, Khampepe J and Zondo J concurring, held that the Prescription Act was incompatible with the provisions of the LRA. In interpreting section 16 of the Prescription Act, the first judgment found that in the context of the Constitution, "inconsistency" was to be afforded a meaning wider than contradiction or conflict. Relying on this Court's decision in *Mdeyide*, the first judgment held that "[i]t is enough if there are material differences between [the two pieces of legislation]".

[18] Based on the fundamental differences between the LRA and the Prescription Act, the first judgment concluded that the latter did not apply to the LRA. The result was that Mr Myathaza's arbitration award had not prescribed. In a statement that was additional to the judgment's basis of decision (obiter), the first judgment further held that, even if the Prescription Act were to apply, Mr Myathaza's reinstatement award could not prescribe because it did not constitute a "debt" for the purposes of the Prescription Act. This was because the order of reinstatement was "not an obligation to pay money or

deliver goods or render services by Metrobus to the applicant".

[19] In a judgment concurring with the approach of Jafta J, Zondo J wrote separately to underscore why the Labour Court and the Labour Appeal Court were mistaken in their approach (third judgment). The third judgment buttressed the first judgment's finding that the Prescription Act was not applicable to LRA matters. It disagreed that a referral of a dismissal dispute to the CCMA interrupted prescription since that could occur only by the service on the debtor of the process contemplated in section 15(1) read with subsection (6) of the Prescription Act.

[20] The third judgment in addition concluded that an arbitration award did not constitute a "debt" for the purposes of the Prescription Act.

[21] The second judgment in *Myathaza* was penned by Froneman J, with Madlanga J, Mbha AJ and Mhlantla J concurring. The second judgment held that the Prescription Act was not inconsistent with the LRA, but complementary to it. It found that the provisions of the two statutes 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.

[22] After finding the two statutes consistent, the second judgment examined the meaning of "process" and "debt" in section 15 of the Prescription Act. It held that commencing proceedings before the CCMA interrupted prescription in

accordance with section 15(1) of the Prescription Act.

[23] In determining whether a claim for unfair dismissal under the LRA constitutes a "debt", the second judgment held that "only a claim for the enforcement of legal obligations should qualify as a 'debt' under the Prescription Act". An unfair dismissal claim sought to enforce three possible kinds of legal obligations, namely reinstatement, re-employment and compensation. This meant it was a "debt", because each of those obligations "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. The employer must provide employment and pay remuneration. Both fall within the meaning of a 'debt' under the Prescription Act, however narrowly interpreted."

[24] Since the service of process initiating the CCMA dispute resolution process interrupted prescription, prescription remained interrupted until any review proceedings seeking to nullify the CCMA outcome were finalised:

> "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 right of appeal is allowed. An interpretation that best protects the right of access should

> be preferred. 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."

[25] The referral of the dispute to the CCMA interrupted prescription, which remained interrupted until the finalisation of the review proceedings. Hence the second judgment found that Mr Myathaza's arbitration award had not prescribed and, like the first and third judgments, that the appeal should succeed.

[26] The order the Court in *Myathaza* unanimously granted read thus:

> "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.""

29. The Court noted that because of the parity of votes in *Myathaza*, in which none of the judgments secured a majority,

no ratio emerges from the Court's decision.[29] The Court, however, held that on either approach (that of Jaftha J and Zondo J, or that of Froneman J), Ms Mogaila was entitled to succeed:

> "[28] Whether the arbitration award in [Ms Mogaila's] favour could not have prescribed because the Prescription Act does not apply at all to LRA matters, as the first and third judgments held (or because, even if that statute were applicable, the reinstatement order was "not an obligation to pay money, deliver goods or render services"), or because, as the second judgment held, the CCMA referral interrupted prescription, persisting until the finalisation of the review proceedings in October 2013, Ms Mogaila must succeed."

30. It is submitted that the same can be said about the appeal in the present matter. Whether the unfair dismissal claim could not have prescribed because the Prescription Act does not apply to "*the dispute resolution system concerning dismissals under the LRA*", as the first and third judgments held, or because the referral of the dispute to the CCMA interrupted prescription (which will remain interrupted until the matter is

[29] Mogaila, footnote 25 above, at paragraph [27].

finalised in the Labour Court), as the second judgment held, the claim has not prescribed.

CONCLUSION

31. In the circumstances, it is submitted that the appeal should be upheld and that the decision of the LAC should be replaced with a decision upholding the appeal to it and substituting the Labour Court's order with an order dismissing the respondent's plea of prescription.

32. In addition, should the respondent persist in its opposition despite the decisions of this Court in *Myathaza* and *Mogaila*, it is submitted that a costs order against the respondent is warranted.

J G VAN DER RIET SC

Counsel for the Applicant

Chambers, Sandton

13 April 2017

LIST OF AUTHORITIES

Myathaza v Johannesburg Metropolitan Bus Services (SOC) Ltd t/a Metrobus & others [2016] ZACC 49

National Union of Metalworkers of South Africa v Intervalve (Pty) Ltd & others 2015 (2) BCLR 182 (CC)

Food and Allied Workers' Union v Ngcobo N.O. & another 2013 (12) BCLR 1343 (CC)

Sidumo & another v Rustenburg Platinum Mines Ltd & others 2008 (2) SA 24; (2007) 28 ILJ 2405; 2008 (2) BCLR 158; [2007] 12 BLLR 1097 (CC)

National Education, Health and Allied Workers' Union v University of Cape Town & others 2003 (3) SA 1 (CC); 2003 (2) BCLR 154

National Union of Metalworkers of South Africa & others v Bader Bop (Pty) Ltd & another 2003 (3) SA 513 (CC); 2003 (2) BCLR 182

Road Accident Fund v Mdeyide [2010] ZACC, 2011(2) SA 26 (CC)

Links v Department of Health, Northern Cape Province [2016] ZACC 10

Makate v Vodacom Ltd [2016] ZACC 13

National Union of Metalworkers of South Africa & others v Hendor Mining Supplies (a division of Marschalk Beleggings (Pty) Ltd [2017] ZACC 9

DE v RH 2015 (9) BCLR 1003 (CC)

Paulsen and Another v Slipknot Investments 777 (Pty) Ltd 2015 (5) BCLR 409 (CC)

Equity Aviation Services (Pty) Ltd v CCMA & others 2009 (1) SA 390 (CC)

S v Shaik & others 2008 (2) SA 208 (CC)

Gcaba v Minister for Safety and Security & others 2010 (1) SA 238 (CC)

Mogaila v Coca Cola Fortune (Pty) Ltd [2017] ZACC 6

IN THE CONSTITUTIONAL COURT OF THE REPUBLIC OF SOUTH AFRICA
(Held at Johannesburg)

CC Case No: CCT 236 / 16

LAC Case no: JA 20 / 15

In the matter between:

FAWU obo JOB GAOSHUBELWE & OTHERS **Applicants**

and

PIEMANS PANTRY (PTY) LTD **Respondent**

RESPONDENT'S WRITTEN ARGUMENT

These heads of argument are submitted by the respondent in the above application before the Constitutional Court. The respondent opposes the application on the basis that leave to appeal be refused, as well as on the merits of the application, should this Court decide to entertain the appeal.

The two principal pieces of legislation at stake in this application are the Prescription Act 68 of 1969 (hereinafter referred to as 'the PA') and the Labour Relations Act 66 of 1995 (hereinafter referred to as 'the LRA').

1. LEAVE TO APPEAL

1.1. It is true that the application of the PA to claims under the LRA, and the issue of prescription *per se*, raises a constitutional issue.[1]

[1] *Road Accident Fund v Mdeyide* 2011 (2) SA 26 (CC) at para 6; *Links v Department of Health, Northern Cape Province* 2016 (4) SA 414 (CC) at para 22; *Makate v Vodacom Ltd* 2016 (4) SA 121 (CC) at paras 90-91; *National Union of Metalworkers of South Africa and Others v Hendor Mining Supplies (a division of Marschalk Beleggings (Pty) Ltd)* [2017] ZACC 9 (30 March 2017) at para 8.

1.2. But it must be submitted principle of prescription does not *per se* infringe on the provisions of the Constitution and the right of access to justice.[2] There is room for prescription even under the new constitutional dispensation.

1.3. The applicants' constitutional case, in short, is that the PA should not apply to unfair dismissal claims that arise under the LRA and are then prosecuted in terms of the dispute resolution processes under the LRA. The applicants argue that the judgment of this Court in *Myathaza v Johannesburg Metropolitan Bus Services (SOC) Ltd t/a Metrobus and Others*[3] in effect disposes of this matter.

1.4. The respondent contends that the case *in casu* is distinguishable from the judgment in *Myathaza* on the simple basis that it concerns a claim that has not yet been determined, meaning there has been no outcome to what is simply an existing undecided dispute. In this context, and considering the LRA places a particular emphasis on expedition[4] with time limits ranging from 30 days to 90 days for prosecuting unfair dismissal disputes, it has to be said that there can be no in principle inconsistency between the LRA and the PA and that the application of the PA could be considered perverse or unfair.[5]

1.5. The mere filing of the process to pursue an unfair dismissal dispute stops prescription. There can be no hardship or undue administrative burden in just doing this, which is completely in the hands of the employee party to do. As was said in *Mdeyide*:[6]

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[2] See *Mohlomi v Minister of Defence* 1997 (1) SA 124 (CC) at para 11; *Mdeyide* (*supra*) at para 8.
[3] (2017) 38 ILJ 527 (CC).
[4] See *Billiton Aluminium SA Ltd t/a Hillside Aluminium v Khanyile and Others* (2010) 31 *ILJ* 273 (CC) at para 46; *Strategic Liquor Services v Mvumbi NO and Others* (2009) 30 *ILJ* 1526 (CC) at paras 12–13.
[5] See the dictum of Van der Westhuizen J in *Mdeyide* (*supra*) at para 82.
[6] Id at para 69

> 'In *Brümmer* this court went further and also considered the general steps one needs to take to lodge an application.'

The Court in *Mdeyide* accepted that a simple process in prosecuting a claim was an important factor in deciding that a prescription provision does not infringe on access to justice.[7]

1.6. Section 167(3)(b)(ii) of the Constitution[8] provides that this Court can also consider matters other than constitutional matters, 'if the Constitutional Court grants leave to appeal on the grounds that the matter an arguable point of law of general public importance which ought to be considered by that Court.' The applicants also rely on this provision.

1.7. Section 167(3)(b)(ii) has been dealt with in *Paulsen and Another v Slip Knot Investments 777 (Pty) Ltd*[9]. The Court first dealt with the concept of an 'arguable point of law' and said:[10]

> 'To summarise, a holding that a matter raises an arguable point of law of general public importance does not inexorably lead to a conclusion that the matter must be entertained. Whether the matter will, in fact, receive our attention will depend on the interests of justice ….'

The Court further said:[11]

> '…. It cannot be any and every argument that renders a point of law arguable for purposes of s 167(3)*(b)*(ii). Surely, a point of law which, upon scrutiny, is totally unmeritorious cannot be said to be arguable. Indeed, in *Baloi* Centlivres JA said 'there are very few cases which

[7] Id at para 84.
[8] Added by the Constitution Seventeenth Amendment Act 72 of 2012.
[9] 2015 (3) SA 479 (CC).
[10] Id at para 18. See also para 30.
[11] Id at paras 21 – 22.

> are not arguable in the wide meaning of that word'. The notion that a point of law is arguable entails some degree of merit in the argument.
>
> I make bold to say in order to be arguable, a point of law must have some prospects of success. ….'

1.8. Finally, and as to the issue of 'general public importance', the Court in *Paulsen* held:[12]

> '…. In sum, for a matter to be of general public importance, it must transcend the narrow interests of the litigants and implicate the interest of a significant part of the general public.'

1.9. Applying the above *in casu*, it is the submission of the respondent that the applicants have very little prospects of success. This will be elaborated on hereunder, when dealing with the merits of the appeal. Even though the points raised by the applicants are certainly arguable, these points do not fulfil the requirements of Section 167(3)(b)(ii) because they have little prospects of success. It is accordingly respectfully submitted by the respondent that leave to appeal be refused.

2. ISSUES ON APPEAL

2.1. The applicants' main case on appeal to this Court is that PA does not apply to the dispute resolution process under the LRA, where it comes to unfair dismissal claims by dismissed employees.

2.2. The applicants' secondary case on appeal is that even if the PA applies, prescription was interrupted by the initial referral of the dispute to the CCMA for conciliation.

[12] Id at para 26.

3. SUMMARY OF MATERIAL FACTS

3.1. The material facts in this matter are either undisputed, or common cause, and have been set out in the judgment of the Court *a quo*. For convenience sake, the applicant union will be referred to in these submissions as 'FAWU' and the individual applicants as 'the employees'.

3.2. The employees were all dismissed on 1 August 2001 for participation in unprotected strike action.

3.3. FAWU contended that the employees were not on strike but that the respondent had unlawfully locked them out. FAWU brought an urgent application to the Labour Court under case number J 3153 / 01, seeking to interdict this alleged lockout, which application was dismissed with costs.

3.4. Following negotiation between the parties, it was agreed that the employees sign an undertaking on 20 July 2001 to stop their unprotected strike action, and return to work on 23 July 2001.

3.5. Despite the employees undertaking to return to work on 23 July 2001, they again refused to report for work.

3.6. Disciplinary proceedings against the employees followed, in which they were charged with participation in unprotected strike action, and they were then dismissed pursuant to these disciplinary proceedings.

3.7. On 7 August 2001, FAWU referred a dispute relating to the alleged unfair dismissal of the employees to the CCMA.

3.8. The CCMA resolved on 3 September 2001 at conciliation proceedings that it had been unable to settle the dispute, and issued a certificate of failure to settle in terms of Section 135 of the LRA on such date.

3.9. FAWU then referred the dispute relating to the alleged unfair dismissal of the employees to the CCMA for arbitration. The respondent raised an objection *in limine* at arbitration that the CCMA did not have jurisdiction to entertain the matter, as the employees were dismissed for participation in unprotected strike action, which dispute had to be referred to the Labour Court for adjudication.

3.10. On 15 March 2002, Commissioner Phala of the CCMA ruled, after hearing and considering evidence by both parties, by way of a written arbitration award, that the employees were dismissed for participation in unprotected strike action, and that the CCMA had no jurisdiction to determine the matter.

3.11. FAWU did not refer the alleged unfair dismissal dispute to the Labour Court, following this award. Instead, FAWU sought to challenge this award on review in the Labour Court, under case number JR 400 / 02. This review application was dismissed with costs on 9 December 2003 by Revelas J in the Labour Court.

3.12. FAWU then only referred this unfair dismissal dispute pertaining to the employees to the Labour Court, by way of a statement of claim filed on 16 March 2005.

3.13. The respondent opposed the applicants' claim, and contended that the referral to the Labour Court on 16 March 2005 had become prescribed by virtue of the application of the PA. The Labour Court and the Labour Appeal Court then both upheld the respondent's prescription plea, and determined that the employees' claim had become prescribed. The appeal to this Court then followed.

3.14. The case of deciding whether the PA applies to disputes under the LRA consists of answering two pertinent questions. The first question is whether an unfair dismissal claim under the LRA is a 'debt' for the purposes of the application of the PA. If this question is answered in the negative, then that is the end of the matter and the PA cannot apply. If however the question is answered in the affirmative, then the second question arises, namely whether the dispute resolution process and time limits prescribed, in the LRA, operates to the exclusion of the PA, which is in essence an inconsistency enquiry. Both these questions will be next addressed, under separate headings.

4. SUBMISSIONS: THE MEANING OF 'DEBT'

4.1. Turning first to the meaning of 'debt' as contemplated by the PA, it seems to be a controversy that continues to endure, in particular where it comes to the concept of a 'claim' as part of the definition of a 'debt'. In the respectful submission of the respondent, this issue must be decided with due consideration of proper historical context. In *Oertel en Andere v Direkteur van Plaaslike Bestuur en Andere*[13] it was held that the term 'debt' in the PA meant an obligation to either do something or not to do something, and must equally be interpreted in the wider sense in this context. This ratio was applied in the judgment of *Desai NO v Desai*[14], referred to by the LAC in the Court *a quo*. The Court in *Desai* said that a 'debt' means:[15]

> '… The term 'debt' is not defined in the Act but in the context of section 10(1) it has a wide and general meaning, and includes an obligation to do something or refrain from doing something.'

[13] 1983 (1) SA 354 (A) at 370. See also *Drennan Maud and Partners v Pennington Town Board* 1998 (3) SA 200 (SCA) at 212G.
[14] 1996 (1) SA 141 (A).
[15] Id at 146I.

4.2. The above ratio in *Desai*, if considered on face value, could mean any kind of obligation could be a 'debt', irrespective of whether it is founded in a right of a claimant or whether the obligation is even enforceable. However, and in the respectful submission of the respondent, this Court in *Mdeyide*[16] and the SCA in *Duet and Magnum Financial Services CC (In Liquidation) v Koster*[17] sought to give proper meaning to what is meant by the 'obligation to do something or not to do something'. In *Mdeyide*[18], this Court, in dealing with a claim under the RAF Act, said:

> 'Generally under the Prescription Act, prescription applies to a debt. For the purposes of this Act, the term debt has been given a broad meaning to refer to an obligation to do something, be it payment or delivery of goods or to abstain from doing something. Although it may on occasion be doubtful whether an obligation is indeed a debt in terms of the Act, there is no doubt that a claim under the RAF Act constitutes a debt.'

And in *Koster* the SCA said:[19]

> 'A debt for purposes of the [Prescription] Act is sometimes described as entailing a right on one side and a corresponding obligation on the other. But if obligation is taken to mean that a debt exists only when the debtor is required to do something, then I think the word is too limiting. At times the exercise of a right calls for no action on the part of a debtor, but only for the debtor to submit himself or herself to the exercise of the right. And if a debt is merely the complement of a right, and if all rights are susceptible to prescription, then it seems to me that the converse of a right is better described as a liability, which admits of both an active and a passive meaning.'

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[16] (*supra*) footnote 1.
[17] 2010 (4) SA 499 (SCA).
[18] Id at para 11.
[19] Id at para 24.

4.3. It would appear that it was therefore fairly clear what was meant by a 'claim' as part of the concept of a 'debt' in terms of the PA. There had to be an actual right to enforce a claim, with the corresponding liability or obligation of the part of the party against whom the claim is enforced to subject itself to the claim.[20] However, controversy then arose as a result of the manner in which the High Court sought to apply the *ratio* in *Desai* in the matter of *Makate v Vodacom (Pty) Ltd*[21], cited as it ultimately came before this Court in 2016. In *Makate*, Jafta J said:[22]

> 'On this construction of *Desai*, every 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 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. However, the Appellate Division in *Desai* did not spell out anything in section 10(1) that demonstrated that "debt" was used in that sense. What needs to be determined is whether the pre-constitutional interpretation of the relevant provisions is still good law. …'

4.4. In considering the above construction of what was said in *Desai*, Jafta J relied on what the Court in *Electricity Supply Commission v Stewarts and Lloyds of SA (Pty) Ltd*[23] said about what constitutes a 'debt' for the purposes of the PA, in which judgment it was held:

> '…. Something owed or due: something (as money, goods or service) which one person is under an obligation to pay or render to another.

[20] See *Bester NO and Others v Schmidt Bou Ontwikkelings CC* 2013 (1) SA 125 (SCA) at para 12; *Boundary Financing Ltd v Protea Property Holdings (Pty) Ltd* 2009 (3) SA 447 (SCA) at para 13.
[21] 2016 (4) SA 121 (CC).
[22] Id at para 84.
[23] 1981 (3) SA 340 (A) at 344E-G.

> 2. A liability or obligation to pay or render something; the condition of being so obligated'

4.5. Jafta J then applied this *dictum* in *Electricity Supply Commission* as follows:[24]

> 'To the extent that *Desai* went beyond what was said in *Escom* it was decided in error. There is nothing in *Escom* that remotely suggests that "debt" includes every obligation to do something or refrain from doing something apart from payment or delivery. It follows that the trial Court attached an incorrect meaning to the word "debt". A debt contemplated in section 10 of the Prescription Act does not cover the present claim.'

It may be said that according to Jafta J, the claim by Makate in that case dealt with in the judgment, was not that of seeking to enforce any of obligations, but all he sought was an order forcing Vodacom to commence negotiations with him for determining compensation for the profitable use of an idea he had.[25]

4.6. Accordingly, this Court in *Makate* in effect accepted and applied the meaning of 'debt' for the purposes of the PA, ascribed to in *Electricity Supply Commission*. This is perhaps best illustrated by a minority concurring judgment written by Wallis AJ in *Makate*, where the learned Judge said:[26]

> 'In my view the plea of prescription is not established in this case for the simple reason that on the established meaning of "debt" the obligation in issue – an obligation to negotiate a reasonable

[24] Id at para 93.
[25] See para 92 of the judgment. Jafta J in fact held in this paragraph that 'However, in present circumstances it is not necessary to determine the exact meaning of "debt" as envisaged in section 10 …'.
[26] Id at para 186.

> remuneration – is not a debt at all. Until those negotiations reach a conclusion there will be nothing that is due by Vodacom to Mr Makate and nothing in respect of which he is able to make any claim. The Prescription Act provides for debts to be extinguished by prescription, as they would be by payment or performance. But as yet nothing exists that can be extinguished and participation in negotiations will not extinguish any obligation. One can test that by asking at what point in time the obligation would be extinguished as a result of negotiating. There was accordingly no debt that was due prior to the commencement of the present litigation and there could accordingly be no question of prescription.'

Wallis AJ in fact referred with approval[27] to the same meaning ascribed to a 'debt' relied on in *Electricity Supply Commission.*

4.7. The SCA in *Off-Beat Holiday Club and Another v Sanbonani Holiday Spa Share Block Limited and Others*[28] recently said the following, which in the respectful submission of the respondent is fully in line with the respondent's submissions as to what constitutes the actual *ratio* in *Makate*:

> 'As our courts have frequently observed, the Prescription Act does not define the term "debt". However, it is established that for purposes of this Act the term has a wide and general meaning; that it includes an obligation to do something or refrain from doing something and entails a right on one side and a corresponding obligation on the other.'

4.8. Then came the judgment of this Court in *Myathaza*[29]. From the outset, it must be pointed out that this judgment is completely distinguishable on the facts, to the matter *in casu*. In the case of *Myathaza*, the claim

[27] Id at para 187.
[28] [2016] JOL 35815 (SCA) at para 32.
[29] (*supra*) footnote 3.

concerned the enforcement of an arbitration award in terms of which the claim brought by the claimant had already been decided, and consequential relief granted. The difficulty with the judgment in *Myathaza* is however where it comes to the issue of the judgment serving as a precedent, considering that there existed an equal votes in two conflicting judgment written in the same matter. In this respect, and considering the judgment in *Myathaza*, this Court in *Mogaila v Coca Cola Fortune (Pty) Limited*[30] said:

> 'Because of the parity of votes in Myathaza, in which none of the judgments secured a majority, no binding basis of decision (ratio) emerges from the Court's decision. …'

4.9. In the respectful submission of the respondent, and considering the above *dictum* in *Mogaila*, what must remain as binding precedent is the meaning of 'debt' articulated in *Electricity Supply Commission*, as ascribed to in *Makate*, and *Off Beat Holiday Club*. That means, respectfully, that the approach adopted by the judgment of Froneman J in *Myathaza* is the correct one, which should be followed and applied. Froneman J said:[31]

> 'An unfair dismissal claim under the LRA seeks to enforce three possible kinds of legal obligations against an employer: reinstatement, re-employment and compensation. 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. The employer must provide employment and pay remuneration. Both fall within the meaning of a 'debt' under the Prescription Act, however narrowly interpreted.

[30] [2017] JOL 37484 (CC) at para 27.
[31] Id at paras 79 – 81.

> This approach in no way contradicts that of the majority in *Makate*. 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* — of the word 'debt'. Plainly accepting a definition of the word in *Escom*, Jafta J said:
> "[85] 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 court 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 …"*
>
> On the authority of *Escom*, which was accepted in *Makate*, obligations to reinstate, re-employ or compensate in terms of s 193 of the LRA are each '[a] liability … to … render something'.'

4.10. This then leaves only the judgment in *National Union of Metalworkers of South Africa and Others v Hendor Mining Supplies (a division of Marschalk Beleggings (Pty) Ltd)*[32] to be considered. Madlanga J, with Froneman J, Khampepe J and Mbha AJ concurring, dealt with the meaning of 'debt' in the PA, specifically in the context of a dispute under the LRA, and said:[33]

> 'This Act does not define the word. Although this Court in Makate consciously eschewed delineating the exact meaning of "debt", it accepted the restrictive interpretation of that word by the Appellate Division in Escom …'

The learned Judge further held:[34]

[32] [2017] ZACC 9 (30 March 2017).
[33] Id at para 16.
[34] Id at para 22.

> '… Although a reinstatement order places a primary obligation on the employer to reinstate, it creates an obligation in terms of which an employee must first present her- or himself for resumption of duties. The employer must then accept her or him back in employment. These are reciprocal obligations. The employee's obligation to present her- or himself for work and the corresponding obligation to accept her or him back to work flow from the court order. On the authority of Escom, which was accepted by this Court in Makate, these obligations are each a judgment debt. As in all cases where a dispute is settled by adjudication, the judgment becomes the source of the debt, whether the judgment is viewed as strengthening the original underlying debt or novating it …'

4.11. Zondo J in *Hendor Mining*, with Mogoeng CJ, Jafta J and Mhlantla J concurring, did not deal with the meaning of debt in terms of the PA, and dealt with the matter on the basis of an acceptance that the PA applied to the case.[35]

4.12. Every employee has a right not to be unfairly dismissed.[36] This right creates a reciprocal obligation on the part of an employer to only dismiss an employee based on a fair reason relating to conduct, capacity or operational requirements, and pursuant to a fair procedure.[37] Where an employee alleges that an employer has infringed on this right and seeks to assert it, it follows that what the employee seeks is the enforcement of this legal obligation resting on the employer, which can take on three possible forms, namely reinstatement, re-employment or compensation.[38] In terms of the authorities discussed above, the enforcement of such legal obligation(s) would qualify as a 'debt' under the PA, because each of

[35] See paras 177 – 178 of the judgment.
[36] See Section 185 of the LRA which reads: 'Every employee has the right not to be- *(a)* unfairly dismissed'
[37] Section 188(1) and (2) of the LRA.
[38] See Section 193(1) of the LRA

those obligations enjoins and obligates the employer to do something positive.

4.13. In short, and as said in *CGU Insurance Ltd v Rumdel Construction (Pty) Ltd*[39], where is comes to deciding what constitutes a 'debt':

> 'The debt is not the set of material facts. It is that which is begotten by the set of material facts. …'

What would be begotten by the facts in any unfair dismissal case is either reinstatement, re-employment or compensation, which is without doubt an enforceable legal obligation as contemplated by the judgment in *Electricity Supply Commission*.

4.14. The respondent thus respectfully submits, in conclusion in this respect, that this Court uphold the determination by the LAC *a quo* that an unfair dismissal claim under the LRA is indeed a 'debt' as contemplated by the PA.

5. SUBMISSIONS: INCONSISTENCY

5.1. Based on the conclusion that an unfair dismissal claim under the LRA constitutes a 'debt' for the purposes of the PA, what must next be considered is the issue of inconsistency, or in other words incompatibility, between the PA and the LRA, and in particular the dispute resolution processes under the LRA. This consideration is founded on Section 16(1) of the PA, which reads:

> '…. The provisions of this Chapter shall, save insofar 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

[39] 2004 (2) SA 622 (SCA) at para 6.

> the institution of an action for the recovery of a debt, apply to any debt arising after the commencement of this Act'

5.2. The LRA is indeed 'any Act of Parliament' as contemplated by Section 16. Further, the LRA prescribes a specific process for resolving disputes that arise under Chapter VIII, which includes unfair dismissal disputes. This is found in Section 191 of the LRA. It is of course so that Section 191 prescribes time periods within which an unfair dismissal claim must be brought and prosecuted.

5.3. Firstly, an unfair dismissal dispute must be referred to the CCMA or applicable bargaining council, as the case may be, for conciliation, within 30(thirty) days of the date of dismissal.[40] In the dispute remains unresolved, and secondly, the dispute must be referred to adjudication at the Labour Court or arbitration at the CCMA (or bargaining council) within 90(ninety) days of the date when the CCMA (or bargaining council) resolved that it has been unable to settle the dispute or 30(thirty) days has expired since the date of the original referral with the dispute remaining unresolved.[41] Both these 30 and 90 day time limits can be condoned on good cause shown.[42]

5.4. As opposed to these time limits under the LRA, the PA stipulates a three year prescription period in terms of Section 11(d), as read with Section 10(1),[43] calculated from the date when the debt 'is due'.[44]

5.5. From the aforesaid, two possible grounds of inconsistency arise. The first ground relates to the different stipulated time limits. The second relates to the determination of the date from when the debt arises, for

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[40] See Section 191(1)(a) and (b)(i).
[41] Section 191(5)(b) as read with Section 191(11)(a).
[42] See Sections 191(2) and 191(11)(b).
[43] In terms of Section 10(1) of the Prescription Act, any debt is extinguished by prescription after the elapse of the period prescribed by the Prescription Act, which period is determined by Section 11. In terms of Section 11(d), the period of prescription in respect of a 'normal' debt, which is applicable *in casu*, is three years.
[44] Section 12(1) of the PA.

the purposes of calculation when the time periods concerned expire. If there is any inconsistency found to exist in either of these two respects, then the PA cannot apply in the case of LRA claims. In *Moloi and others v Road Accident Fund*[45] the Court said:

> '…. Although section 16 of the Prescription Act is not drafted as clearly as it might be it is reasonably plain that what is intended is that the provisions of Chapter III will apply to all debts save where they are ousted by the provisions of an Act of Parliament which is inconsistent and then only to the extent of the inconsistency.'

Also in *Mdeyide*[46] the Court said:

> 'Whether the provisions of the Prescription Act apply is determined by s 16 of the Act. It states that the provisions apply save insofar as they are inconsistent with the provisions of any Act of Parliament …. A consistency evaluation is thus necessary. ….'

5.6. What is involved in such a consistency evaluation? Firstly, is has to be considered that the issue of consistency has to be decided in the context of the fundamental principle behind the concept of prescription, as enunciated by Didcott J in *Mohlomi v Minister of Defence* as follows:[47]

> 'Rules that limit the time during which litigation may be launched are common in our legal system as well as many others. Inordinate delays in litigating damage the interests of justice. They protract the disputes over the rights and obligations sought to be enforced, prolonging the uncertainty of all concerned about their affairs. Nor in the end is it always possible to adjudicate satisfactorily on cases that have gone stale. By then witnesses may no longer be available to

[45] [2000] JOL 7488 (A) at para 13.
[46] (*supra*) at para 11.
[47] 1997 (1) SA 124 (CC) at para 11.

> testify. The memories of ones whose testimony can still be obtained may have faded and become unreliable. Documentary evidence may have disappeared. Such rules prevent procrastination and those harmful consequences of it. They thus serve a purpose to which no exception in principle can cogently be taken.'

And also in *Mdeyide*[48] Van Der Westhuizen J held:

> '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.'

5.7. There is a particular requirement of, and emphasis on, expeditious resolution of employment disputes under the LRA.[49] It is for this very reason that the periods of 30 and 90 days imposed by Section 191, all things considered, are very short. And because there periods are so short, it is an imperative to ensure that the Court should be given the opportunity to extend the period if circumstances dictate so as to not unduly prevent access to justice and the Court. Hence the condonation provisions. In *Brümmer v Minister for Social Development and Others*[50], Ngcobo J held:

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[48] (*supra*) at para 8.
[49] See footnote 4 (*supra*).
[50] 2009 (6) 323 (CC) at para 51. See also *Mdeyide* (*supra*) at para 69.

> '…. The principles that emerge from these cases are these: time-bars limit the right to seek judicial redress. However, they serve an important purpose in that they prevent inordinate delays which may be detrimental to the interests of justice. But not all time limits are consistent with the Constitution. There is no hard-and-fast rule for determining the degree of limitation that is consistent with the Constitution. The enquiry turns wholly on estimations of degree. Whether a time-bar provision is consistent with the right of access to court depends upon the availability of the opportunity to exercise the right to judicial redress. To pass constitutional muster, a time-bar provision must afford a potential litigant an adequate and fair opportunity to seek judicial redress for a wrong allegedly committed. ….'

5.8. A proper consideration of Section 191(11) of the LRA shows that it is a time bar, or to use another description, a time limit. However, nothing in the Section provides for the expiry or prescription of the claim. In effect, the claim will continue to exist *ad infinitum*, even if the time bar has not been complied with, subject of course to the Court allowing it to proceed on the basis of good cause shown. The crisp point is that Section 191(11) does not provide for the expiration or otherwise extinguishing of the claim. It only encourages expeditious prosecution of the claim, and failing which having a litigant face the risk that a Court may decline to hear it because the Court does not accept that good cause is shown for the delay. In *Commissioner for Customs and Excise v Standard General Insurance Company Limited*[51] the Court held as follows:

> '….In our law there is a difference between limitation periods and prescription periods. The term "prescribe" (or in Afrikaans "verjaar") is a well known and juristically well understood term. So too is the concept of a "limitation or expiry period" (in Afrikaans a

[51] 2001 (1) SA 978 (SCA) at paras 10 – 11.

> "vervaltermyn"). …. limitation or expiry periods are encountered in statutes dealing with subjects as diverse, to mention but a few, as Compensation for Occupational Injuries and Diseases (Act 130 of 1993); Education and Training (Act 90 of 1979); Intelligence Services (Act 38 of 1994).
>
> A question which often arises (as it does in this case) is whether and to what extent such provisions are to be reconciled with the Prescription Act. What is called for in each instance is a determination of the intention of the legislature in enacting the particular limitation or expiry period. ….'

5.9. The simple reality is that without actual expiration of the claim, there can never be finality in the true sense of the word. In line with the fundamental principle behind the concept of prescription (actual expiry) of claims as referred to above, even a claim under the LRA must surely finally expire at some point in time. This would then be where the PA comes into play. The purpose of the PA is to impose a time limit upon a claim under the LRA beyond which no good cause can be shown, as the claim has expired. As the Court said in *Mdeyide*[52]:

> '…. the Prescription Act also does not provide for condonation ….'

5.10. The respondent respectfully submits that the two concepts of a time bar on the one hand, and a prescription on the other, are not mutually exclusive. These concepts can competently exist in conjunction with one another, and are compatible. The simple reason for this is that a time bar does not cause a claim to finally expire, but a prescription period does. A time bar encourages expeditious litigation against the penalty of a Court deciding that the litigation should not continue if good cause is not shown for the lack of expedition. If a Court decides not to allow the litigation to continue at this point, then prescription as an

[52] (*supra*) at para 88.

issue does not even arise. With respect, there can be no inconsistency in this.

5.11. But where another Act of Parliament provides for a time limit different to that imposed by the PA, and then in such Act determines that a claim actually expires, then there would be inconsistency between that Act and the PA. This was precisely the case in *Mdeyide*[53]. The Court in *Mdeyide* considered the Road Accident Fund Act, which provided for the actual expiry of claims. The Court also considered the issue of the intention of the legislature and said that:[54]

> '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 ….'

5.12. Perhaps the best way to illustrate the difference between a time bar (limit) and a prescription (expiration) period is by way of a simple distinction. Time bars (limits) prescribe a specific period within which claims must be prosecuted. Prescription (expiration) periods do not prescribe a specific period within which a claim must be brought, but provides a point in time when a claim finally expires. In this context, there are several examples where the Courts have distinguished between time bars and prescription periods, as a basis for finding that either the PA did, or did not apply. These are the following:

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[53] (*supra*) footnote 1.
[54] Id at para 50.

5.12.1. In *Standard General Insurance Company*[55] the Court considered Section 99(5) of the Customs and Excise Act, which provided that any liability in terms of certain sections of that Act shall cease after the expiration of a period of two years from the date on which it was incurred. The Court decided that Section 99(5) was inconsistent with the PA because, *inter alia*, Section 99(5) itself clearly provided for the final expiry of the claim.[56] The Court said in so finding, as a basis of distinction, and of particular relevance *in casu*:[57]

> '…. One is not in this case concerned with an Act which prescribes a specific period within which a claim must be made or an action instituted,….

5.12.2. In *Investec Employee Benefits Ltd v Marais and Others*[58] the Court dealt with complaints submitted to the Pension Funds Adjudicator in terms of Section 30A of the Pension Funds Act, which had to be submitted within a period of three years with the opportunity to show good cause of this time period was not complied with (Section 30I). The Court, despite recognizing the similarities between the PA and the Pension Funds Act in this respect, still held:[59]

> 'In my opinion, this subsection does not assist the first respondent because section 30I of the Act is not inconsistent with the Prescription Act. A claim which is the subject of a complaint to the Adjudicator and which has not prescribed (because, for example, the creditor is under an impediment), will still have to be lodged in the period prescribed in section

[55] (*supra*) footnote 51.
[56] See paras 15 and 16 of the judgment.
[57] Id at para 14.
[58] [2012] 3 All SA 622 (SCA).
[59] Id at para 31.

> 30I and may not be considered by the Adjudicator unless he or she grants an extension in terms of section 30I(3) to enable him or her to investigate the complaint. Totally different language would, however, be required if it was the intention of the Legislature to empower the Adjudicator to extend a period of prescription which has already run its course and thus to deprive an erstwhile debtor against whom a claim has been extinguished of its right to plead prescription …'

5.12.3. In *Mnyaka v Minister of Safety and Security*[60] the Court dealt with Section 57(1) of the Police Service Act which provided for a general period of limitation of 12 months for the institution of legal proceedings against the police services. The Court said:[61]

> 'Although the nature and effect of a limitation period coincides with that of extinctive prescription, they have been held to be separate concepts …. The practical importance of the distinction between a limitation period and prescription period is that save for certain common-law rules such as *lex non cogit ad impossibilia*, the general principles relating to prescription do not find application to a limitation period (see *Hartman v Minister van Polisie* 1983 (2) SA 489 (A) and *Montsisi v Minister van Polisie* 1984 (1) SA 619 (A)). …'

In *Mnyaka*, the Court concluded that these provisions of the Police Service Act was inconsistent with the Prescription Act, because it in itself finally barred the claim and prevented the claimant from enforcing his claim.[62]

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[60] [2014] JOL 32131 (ECM).
[61] Id at para 9.
[62] See para 12 of the judgment.

5.13. As touched on above, this Court recently in *Myathaza*[63] dealt with the issue of inconsistency between the PA and the LRA. But in this respect, this Court sharply differed by way of two judgments with an equality of votes, resulting in no precedent on the issue.

5.14. In the judgment of Jafta J, it was held that held that the PA was indeed inconsistent with the dispute resolution processes under the LRA.[64] On the other hand, in the judgment of Froneman J, it was accepted that there was nothing inconsistent between the PA and the LRA, and the PA indeed applied to the dispute resolution process under the LRA.[65] The various reasons for these differing conclusions will be next dealt with in these submissions.

5.15. According to the judgment of Jafta J, the prescription periods contemplated by the PA are too long to find a home in the dispute resolution processes under the LRA, and because the LRA places particular emphasis on expeditious dispute resolution, the time periods must be short, rendering the prescription time periods under the PA at odds with the scheme of the LRA which envisages much shorter periods.[66] In the respectful submission of the respondent, this reasoning completely loses sight of the material distinction between time bars and prescription periods, which do not operate to the exclusion of one another, but supplement each other. This distinction was indeed recognized in the judgment of Froneman J[67], where it was held:

> 'Our law distinguishes between time-bars and true prescription periods. The former may admit of amelioration through condonation, the latter not. It is conceptually quite feasible to have time-bar limits

[63] (*supra*) footnote 29.
[64] Id at para 28.
[65] Id at para 66.
[66] Id at paras 31 – 33.
[67] Id at para 94.

> operating in tandem with the provisions of the Prescription Act. … 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.'

5.16. In the respectful submission of the respondent, the reasoning in the judgment of Froneman J is in line with the wealth of precedent referred to above, and should be accepted. This can perhaps be best illustrated by a simple example. An employee refers an unfair dismissal dispute for determination under the LRA one year after the employee was dismissed. This would of course be outside the time limit prescribed by the LRA, and condonation would be needed. Applying the imperative of expeditious dispute resolution, as referred to in the judgment of Jafta J, it may well be that the Court declines to condone the matter, and proceedings are at an end. The issue of prescription does not even arise, because this is not a case where the claim has expired, but is a case where the Court (or the CCMA / bargaining council for that matter) exercises a discretion to bring the matter to an end on the basis of a lack of expeditious prosecution outside the prescribed time limit. But where an employee refers an unfair dismissal dispute for determination four years after the employee was dismissed, the claim has been already extinguished, in that it expired after three years. It is then not up to a Court (or the CCMA / bargaining council) to exercise a discretion. All that can be done in such a case is to declare that the claim has expired, and the matter is at an end. Respectfully, it is difficult to understand how these two scenarios could be seen to be inconsistent. They clearly supplement one another.

5.17. In short, time bars, as considered with prescription periods, should be seen as an inner and an outer ring of time periods, with the claim squarely in the middle. If the claim is prosecuted within the inner ring of the time bar, the Court will consider it without further ado. If the claim is

prosecuted outside the inner ring but within the outer ring, it is up to the Court to exercise a discretion in deciding whether or not to entertain the matter. But if the claim is prosecuted outside the outer ring, then the claim is expired, and all the Court can do is to declare it as such. There is no reason why such a dispensation should not be the case in dispute resolution under the LRA, which would not in any manner subvert the essential requirement of expedition under the LRA. In the respectful submission of the respondent, the approach adopted in the judgment of Froneman J in *Myathaza* is the correct one, properly supported by ample other precedent, and should be applied.

5.18. The next ground relied on in the judgment of Jafta J in *Myathaza* in deciding that the PA is inconsistent with the LRA is that the PA was designed to extinguish claims that still need to be determined by a Court, and it does not cater for a situation where the claim has been adjudicated and an outcome binding on the parties has been reached, but that outcome has no yet been made an order of Court to render it enforceable.[68] However, and critically, this reasoning can only apply to the instance of disputes already determined in the CCMA or bargaining councils, and in respect of which an arbitration award has been issued. The case *in casu* is completely distinguishable, as it concerns unfair dismissal claims prior to the dispute being decided and which dispute thus remains undermined. Also, and according to the judgment of Jafta J, the LRA provides a framework for resolving labour disputes and not debt collection, the latter being envisaged by the PA. However, and as fully dealt with above, it is the respectful submission of the respondent that an undecided unfair dismissal claim under the LRA is just the same as any other claim for the exercise of a positive obligation. Also, it is trite that the PA does not just apply to collection of debts, but also to claims and in particular, the enforcement of positive obligations. None of these reasons advanced in the judgment of Jafta J, referred to

[68] Id at paras 43 – 44.

above, can thus serve to establish inconsistency between the LRA and PA where it comes to undecided claims under the LRA.

5.19. In the respectful submission of the respondent, the bulk of the reasoning in the judgment of Jafta J in *Myathaza*, is devoted to illustrating why the application of the PA to claims arising from arbitration awards issued in terms of the dispute resolution processes under the LRA is inconsistent with the LRA. This includes, in particular, consideration of the consequences of pending review applications brought in the Labour Court to challenge such arbitration awards.[69] But none of these considerations apply *in casu*. What one has in this instance is an undecided unfair dismissal claim. This claim can be decided in the CCMA / bargaining council, or the Labour Court, depending on the nature of the alleged unfair dismissal dispute, as a matter of first instance. The same time periods apply equally to both *fora*.

5.20. Also, the dispute is referred to either arbitration, in the case of determination by the CCMA / bargaining council, or adjudication, in the case of determination by the Labour Court, by way of comparable processes. In the case where the dispute proceeds to arbitration, it is done by serving and filing an arbitration referral as contemplated by Form 7.13 under Schedule 8 to the LRA. In the case where the dispute proceeds to arbitration, it is done by filing a statement of claim under Rule 6 of the Labour Court Rules. Thus, and in each case, there is proper and prescribed process under which the unfair dismissal claim is prosecuted to the stage of determination, and in the respectful submission of the respondent, this process can without difficulty be considered to be the kind of process that would serve to interrupt prescription as contemplated by the PA. This was recognized in the judgment of Froneman J in *Myathaza*, where it was held that this kind

[69] Id at paras 48 – 51.

of process can readily be interpreted and applied to mean process as contemplated by Section 15(1) of the PA that interrupts the running of prescription.[70] It is thus squarely in the hands of an employee party, pursuing an unfair dismissal claim, to without much difficulty avoid the extinguishing of his or her claim, by simply filing such process. The application of the PA thus cannot be seen to create any undue hardship if applied to LRA claims.

5.21. The 90 day time limit under Section 191(11) can still effectively operate within the three year parameter prescribed by the PA. It is certainly not rendered superfluous by the application of the PA. Despite the PA, and for example, the Labour Court can decline to hear a case and decide that good cause has not been shown for a delay of 87 days[71], or 6 months[72] or 90 days[73]. The point is that the Court can even decline to hear a matter that has been prosecuted in a period of delay of far less than the three year prescription period. Thus, at a practical level, the provisions of Section 191(11) of the LRA and Section 11(d) of the PA do not impede on one another.

5.22. Section 191 of the LRA does not deal with or determine any of the issues as set out in Chapter III of the PA. There are thus no conflicting provisions, but indeed supplementing provisions. These would include judicial interruption of prescription under certain circumstances, which could readily be applied to LRA claims.[74]

5.23. In summary, it is the respondent's respectful submission that the LRA and the PA are complimentary, where it comes to undecided unfair dismissal claims under the LRA. There is no inconsistency. In simple terms, all an employee party must do is to refer an unfair dismissal

[70] Id at para 75.
[71] See *National Education Health and Allied Workers Union and Others v Vanderbijlpark Society for the Aged* (2011) 32 ILJ 1959 (LC).
[72] See *Balmer and Others v Reddam (Bedfordview) (Pty) Ltd* (2011) 32 ILJ 2121 (LC).
[73] See *Parker v V3 Consulting Engineers (Pty) Ltd* (2000) 21 ILJ 1192 (LC).
[74] See Section 13(1) of the PA.

claim for arbitration or adjudication within 90 days from the date upon which the matter remains unresolved, as contemplated by Section 191(5) of the LRA. The filing of this referral will in itself serve as process to interrupt prescription. If this referral is filed prior to the expiry of three years from the date as contemplated by Section 191(5), but after the 90 day time bar, the claim has not been extinguished, but good cause must still be shown to an arbitrator or judge to allow it to continue. However, if this referral is filed after the expiry of three years, then it interrupts prescription too late, the claim has expired, and the showing of good cause is no longer permissible. This can be nothing complex, perverse, onerous or unfair in any of this, and is fully in line with the objectives of both the LRA, and what is sought to be achieved by prescription.

6. SUBMISSIONS: HAS THE CLAIM PRESCRIBED?

6.1. On the undisputed facts, the applicants' claim is based on a case of unfair dismissal of the employees as a result of participation in unprotected strike action. That means that following unsuccessful conciliation, this dispute had to be referred to the Labour Court as a matter of first instance.[75]

6.2. Once it is concluded that the PA does apply to the applicants' claim, the next question is whether the applicants referred the unfair dismissal dispute for determination within 3(three) years of the date when the unfair dismissal claim arose. In this regard, Section 15(1) of the PA reads:

> '[t]he 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.'

[75] See Section 191(5)(b)(iii) of the LRA.

6.3. As referred to above, the case of the applicants is that prescription had been interrupted by the referral made by FAWU of the employees' unfair dismissal dispute to conciliation, which indeed had been made within three years of the date of their dismissal. In this context, a simple question then requires determination – is a referral to conciliation process that interrupts prescription? Based on the submissions set out hereunder, the respondent respectfully contends that the answer to this must be 'No'.

6.4. As touched on above, the LRA has a unique scheme where it comes to dispute resolution. It is not competent to refer the employees' unfair dismissal claim directly to the Labour Court for adjudication or even to the CCMA / bargaining council for arbitration. It is a specific requirement of the LRA that conciliation under the auspices of the CCMA (or bargaining council) must first take place, before a dispute can be ripe for determination, so to speak. If conciliation succeeds, what was an envisaged dispute susceptible to being determined, does not even arise. In short, the very idea of conciliation is to prevent a dispute from arising that needs determination.

6.5. A critical consideration in deciding whether any process filed could be seen to be process that interrupts prescription, is whether that process would lead to an ultimate final determination of the dispute. In other words, based on this process, the applicants' claim must be able to be disposed of. As stated above, conciliation does not dispose of the dispute. It either produces a settlement or makes it possible for the claimant to indeed then only bring process to finally dispose of the claim. In dealing with a joinder application, the Court in *Peter Taylor and Associates v Bell Estates (Pty) Ltd And Another*[76] held:

[76] 2014 (2) SA 312 (SCA) at para 16. See also *Naidoo and Another v Lane and Another* 1997 (2) SA 913 (D) at 921A-D.

> '…. it appears to me that it would be stretching the interpretation of the Act a little too far to say that the application constitutes a 'process whereby the creditor claims payment of the debt' and that its service therefore interrupted prescription. First, it cannot be said that judgment in the joinder application (assuming it to be in favour of the applicant) 'finally disposes of some elements of the claim'. Indeed, it would finally dispose of no elements of the claim, but would merely make it possible, from a procedural perspective, for the plaintiff to institute a claim against the defendant who had been joined. ….'

These considerations should in the respectful submission of the respondent equally apply to a conciliation referral.

6.6. This kind of situation was recognized in the judgment of Froneman J in *Myathaza*.[77] The Court referred with approval to the following dictum from the judgment in *Van der Merwe v Protea*[78]:

> 'The "process in question" [in s 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 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". …'

6.7. The 'process in question', being the referral to conciliation, cannot lead to the ultimate success of the claim. Only if the CCMA (or bargaining council) cannot resolve the matter, is the dispute then perfected to such an extent that it can be placed before the Labour Court for adjudication

[77] Para 70 of the judgment.
[78] 1982 (1) SA 770 (E) at 773A-C.

(or CCMA or bargaining council for arbitration). Once that is the case, further, and different, process is needed to prosecute the dispute to final determination. This process is the referral to arbitration, or statement of claim to the Labour Court. The contention of the respondent in this regard is further substantiated by the fact that disputes under Section 191(5)(b) cannot be decided by the CCMA, and have to be the subject matter of separate referral to the Labour Court.

6.8. In short, an unfair dismissal claim is only perfected if it remains unresolved following prescribed conciliation proceedings at the CCMA (or bargaining council). It is only then when a claimant in an unfair dismissal claim obtains a complete cause of action. In *National Union of Metalworkers of SA v Intervalve (Pty) Ltd and Others*[79], Cameron J, writing for the majority, referred with approval to the reasoning of the majority of the LAC in *National Union of Metalworkers of SA and Others v Driveline Technologies (Pty) Ltd and Another*[80], and said:

> 'The reasoning of the *Driveline* majority is, in my view, convincing. Section 191(5) stipulates one of two preconditions before the dispute can be referred to the Labour Court for adjudication: there must be a certificate of non-resolution, or 30 days must have passed. If neither condition is fulfilled, the statute provides no avenue through which the employee may bring the dispute to the Labour Court for adjudication. As Zondo J shows in his judgment, with which I concur, this requirement has been deeply rooted in South African labour-law history for nearly a century. ….'

Zondo J in turn, in *Intervalve*, held as follows:[81]

> 'The dispute referred to in s 191(5) is the same dispute to which reference is made in s 191(1), ie a dispute about the fairness of a

[79] (2015) 36 ILJ 363 (CC) at para 32.
[80] (2000) 21 ILJ 142 (LAC) at para 73.
[81] Id at paras 112 – 113.

dismissal. Section 191(5) creates two conditions one of which must be met before a dismissal dispute may be arbitrated or may be referred to the Labour Court for adjudication. The first condition is that the CCMA or bargaining council, as the case may be, must have issued a certificate of non-resolution of the dispute. The second is that a period of 30 days from the date on which the CCMA or the bargaining council received the referral must have lapsed.

That these two events are preconditions is made clear by the use of 'if' at the beginning of the first event mentioned in s 191(5) and the repetition of that 'if' just before the second event in the provision. Either the council or commissioner must have certified that the dispute remains unresolved or 30 days must have expired since the council or the commission received the referral and the dispute remains unresolved. It follows that, if none of these preconditions has been met in a particular case, the employee may not refer the dispute to the Labour Court for adjudication under s 191(5)*(b).'*

6.9. This is the same approach followed by the LAC in *Premier Gauteng and Another v Ramabulana No and Others*[82] where the Court held:

'What the provision of s 191(5) of the Act means is that two eventualities are provided for when the CCMA or a bargaining council has received the referral of a dismissal dispute within the prescribed period for conciliation. … Where they have been made and they have been unsuccessful, the conciliator can or must issue a certificate that the dispute remains unresolved.

Where no attempts could be made or were made …. no certificate is made that the dispute remains unresolved but, once a period of 30 days from the date when the CCMA or the bargaining council received the referral has lapsed, the consequence is the same. It is that the employee acquires the right to have his dispute either

[82] (2008) 29 ILJ 1099 (LAC) at paras 10 – 11.

> arbitrated if he so requests or to have it adjudicated by the Labour Court if he refers it to that court for adjudication.' (emphasis added)

The Court concluded:[83]

> '…. a commissioner dealing with such a matter has no power to deal with the merits of the dispute in the sense of deciding whether or not a dismissal is fair or not. His authority is limited to attempting to conciliate the dispute. ….'

6.10. And finally, even more recently, the LAC in *SA Municipal Workers Union on behalf of Manentza v Ngwathe Local Municipality and Others*[84] said:

> '… As alluded to above, the jurisdiction of the CCMA or bargaining council to arbitrate an unfair dismissal or unfair labour practice dispute is not conditional upon the issue of a certificate of outcome, as an employee's right of referral to arbitration accrues on the lapse of 30 days from the date on which the CCMA or bargaining council received the referral, and the dispute remains unresolved.
>
> Whilst the issue of a certificate of outcome by a commissioner of the CCMA or bargaining council may found the right of referral of an unfair dismissal or unfair labour practice dispute to arbitration or adjudication prior to the lapse of the 30-day period contemplated in s 191(5) of the LRA, as the right of referral accrues on the issue of such certificate and is, consequently, a prerequisite for a referral to arbitration or adjudication in those circumstances only, the subsection does not impose an obligation on a commissioner of the CCMA or a bargaining council to issue a certificate of outcome on the lapse of 30 days from the date on which the CCMA or bargaining council received the referral, and the dispute remains unresolved.'

[83] Id at para 19.
[84] (2015) 36 ILJ 2581 (LAC) at paras 42 – 43.

6.11. The respectful submission of the respondent is that the *ratios* in the judgments of *Intervalve*, *Premier Gauteng* and *Manentza* are, with respect, clear. The applicants only acquired the right to pursue the dispute to adjudication after the completion of conciliation. It is the completion of the conciliation process by way of one of the two circumstances as defined in Section 191(5), that bestows the right on the employees to pursue the dispute. In *Solidarity and Others v Eskom Holdings Ltd* the Court said:[85]

> 'A debt is due in this sense, when the creditor acquires a complete cause of action for the recovery of the debt, that is when the entire set of facts which the creditor must prove in order to succeed with his or her claim against the debtor is in place or in other words when everything has happened which would entitle the creditor to institute action and to pursue his or her claim.'

6.12. This Court in *Mdeyide,*[86] said:

> 'When does prescription begin to run? …. . Section 12(1) of the Prescription Act stipulates that it begins as soon as the debt is due. A debt is due when it is 'immediately claimable or recoverable'. ....'

6.13. And in *Umgeni Water and Others v Mshengu* [87] the Court held:

> '….The words debt is due must be given their ordinary meaning. [*The Master v IL Back & Co Ltd* 1983 (1) SA 986 (A) at 1004F.] In its ordinary meaning a debt is due when it is immediately claimable by the creditor and, as its correlative, it is immediately payable by the debtor. …
>
> A debt can only be said to be claimable immediately if a creditor has the right to institute an action for its recovery. In order to be able to

[85] (2008) 29 ILJ 1450 (LAC) at para 25 – 26.
[86] (*supra*) at para 13.
[87] [2010] 2 All SA 505 (SCA) at paras 5 – 6. This *dictum* was quoted with approval in *Van Deventer v Ivory Sun Trading 77 (Pty) Ltd* 2015 (3) SA 532 (SCA) at para 21.

> institute an action for the recovery of a debt a creditor must have a complete cause of action in respect of it. The expression 'cause of action' has been held to mean: 'every fact which it would be necessary for the plaintiff to prove, ... in order to support his right to judgment of the Court. …. It includes all that a plaintiff must set out in his declaration in order to disclose a cause of action. Such cause of action does not ''arise' or ''accrue' until the occurrence of the last of such facts and consequently the last of such facts is sometimes loosely spoken of as the cause of action'. A plaintiff must thus have a complete cause of action at the stage when summons is issued or at any rate when the summons is served.'

6.14. But perhaps the most crisp articulation of the issue can be found in *Truter and Another v Deysel*[88] where the Court held:

> '…. A debt is due in this sense when the creditor acquires a complete cause of action for the recovery of the debt …. in other words, when everything has happened which would entitle the creditor to institute action and to pursue his or her claim.'

6.15. On the aforesaid basis, it was on 3 September 2001 that the applicants had a complete cause of action, this being the date of the certificate of failure to settle issued by the CCMA. That is when their unfair dismissal claim based on participation in an unprotected strike became 'claimable' in the Labour Court. It is then, using the words in the PA, the debt was 'due'. Before that date, the claim could not be referred to the Labour Court. In line with the above authorities, prescription then started to run from that date. *In casu*, the CCMA referral to conciliation preceded this date, and was simply part of the process to obtain a complete cause of action, and not to pursue it to final and successful determination. This conciliation referral thus cannot serve to interrupt prescription, as contended by the applicants.

[88] 2006 (4) SA 168 (SCA) at para 16.

6.16. The only process after 3 September 2001 which could be seen to interrupt prescription is the applicants' statement of claim filed at the Labour Court on 16 March 2005, which is more than 6(six) months after the expiry of the three year prescription period. By this time, the claim had been extinguished.

6.17. It is true that the applicants initially referred their unfair dismissal dispute to arbitration at the end of 2001, and within even the 90 day time limit as contemplated by Section 191 of the LRA. In the normal course, and had this been a dispute that was susceptible to being arbitrated, it would have been determined and decided, and prescription would never be an issue. However, the insurmountable obstacle to this arbitration referral coming to the aid of the applicants, *in casu*, is that this referral was not successfully prosecuted, and dismissed not only by the CCMA, but subsequently also by the Labour Court on review. This means that Section 15(2) of the Prescription Act finds application, which provides that:

> 'Unless the debtor acknowledges liability, the interruption of prescription in terms of ss (1) shall lapse, and the running of prescription shall not be deemed to have been interrupted, <u>if the creditor does not successfully prosecute his claim under the process in question to final judgment</u> ….' (emphasis added)

6.18. There can be no doubt that the applicants' arbitration referral and subsequent review application was such unsuccessful prosecution to final judgment. This being the case, then any interruption of the running of prescription by either the arbitration referral or with it the review application would not only lapse, but prescription would be deemed not have been interrupted in the first instance. In *Evins v*

Shield Insurance Co Ltd,[89] the Court said the following, which would be directly applicable in this instance:

> 'Now, I have assumed in appellant's favour that her first summons duly interrupted the running of prescription under s 15 (1) in respect of both elements (i) and (ii) of the right of action or debt, ie the claim in respect of her bodily injuries and loss of support respectively. Such interruption was, in terms of s 15 (1), 'subject to the provisions of ss (2)'. That first summons was 'the process in question' mentioned in ss (2). Thereafter, appellant, with respondent's tacit consent, divided and separated or split the right of action or debt into those two elements (i) and (ii); she deleted or excised (ii) completely from that 'process in question'; she successfully prosecuted her claim (i) under that process to final judgment; but she did not prosecute her claim (ii) for loss of support under that process to final judgment successfully or at all; indeed, she irrevocably abandoned its prosecution under that process. Consequently, to use the terminology of ss (2), the interruption of prescription in respect of claim (ii), effected by the service of the first summons, lapsed and the running of prescription in respect thereof should now not be deemed to have been interrupted thereby.'

6.19. Therefore, even considering the unsuccessful arbitration referral and with it Section 15(2) of the PA, there was never any interruption of prescription prior to the expiry three year period, and by the time the statement of claim was filed on 16 March 2005, the applicants' claim was extinguished.

6.20. In summary, the applicants' claim arose, for the purposes of the PA, on 3 September 2001, when the CCMA issued the certificate of failure to settle. The three year prescription period applied from that date, and could only be interrupted by filing a statement of claim with the Labour Court. As it was only filed on 16 March 2005, this was outside this

[89] 1980 (2) SA 814 (A) at 827G-828A. See also *Melamed and Another v BP Southern Africa (Pty) Ltd* 2000 (2) SA 614 (W) at 621A-H.

three year period, and too late to stop the claim from becoming prescribed.

7. CONCLUSION

7.1. The respondent accordingly prays that the applicants' application for leave to appeal be refused.

7.2. Alternatively, the respondent prays that the applicants' appeal be dismissed.

7.3. The respondent does not seek a costs order.

DATED at JOHANNESBURG on this the 26th DAY of APRIL 2017

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