IN THE LABOUR COURT OF SOUTH AFRICA

HELD AT PORT ELIZABETH

CASE NUMBER: P 170/05

In the matter between:

PUBLIC SERVANTS ASSOCIATION

O.B.O R N KHAYA **APPLICANT**

AND

COMMISSION FOR CONCILIATION,

MEDIATION AND ARBITRATION **FIRST**

RESPONDENT

THE MEC FOR THE PROVINCE OF EASTERN CAPE:

THE DEPARTMENT OF EDUCATION **SECOND RESPONDENT**

THE DEPARTMENT OF EDUCATION:

PROVINCE OF EASTERN CAPE **THIRD RESPONDENT**

JUDGMENT

MOLAHLEHI J

Introduction

[1] The applicants brought an application in terms of which they sought an order making the arbitration award issued under case No. 11/99 077862 an order of court in terms of s158 (1) (c) of the Labour Relations Act 66 of 1995 ("the LRA").

[2] The respondents opposed the application on the grounds that the arbitration had prescriped in terms of the Prescription Act 68 of 1969 (the Act). The award was also opposed on the basis of illegality.

[3] After hearing arguments by both parties on 7 June 2007, the judgement was reserved. Thereafter Mr Bloem, counsel for the respondent filed supplementary heads of argument, without leave of the Court.

[4] The applicant objected to the approach adopted by the respondent in a letter dated 15 June 2007.

[5] The matter was set down for 7 December 2007, to consider the objection. However, on that day the applicant's counsel indicated that the applicant would not pursue the objection any further. It needs to be pointed out that whilst the approach adopted by the applicant's counsel may be inappropriate it was not irregular because the purpose

of the supplementary heads was to assist the court with law regarding the issues before it. It was also brought to the court's attention that the applicants had already filed their own supplementary heads of argument. The need for the Court to express a view on the approach adopted by the respondents fell away the applicants having correctly abandoned their objection.

Background facts

[6] The award which the applicants sought to be made an order of court was issued on the 22 February 2001. In terms of this award the second respondent was ordered to confirm the appointment of the applicant as Head of Division at the second respondent's workplace, with immediate effect. The applicant bought the application to make the award an order of Court because the respondent failed to give effect to the award.

[7] As indicated above the respondent opposed the application on two

grounds. The first ground of opposition is prescription and the second, illegality of the award. It is common cause that the application was brought more than three years since its issuance.

[8] It is trite that this Court is empowered by s158 (1) (c) of the LRA to make any arbitration award an order of court. However, the LRA does not prescribe the time period within which the application must be filed and to make an arbitration award an order of Court.

[9] The court in *Mpanzama v Fidelity Guards Holding (Pty) Ltd* [2000] 12 BLLR 1459 (LC), correctly held that the provisions of the Prescription Act 68 of 1969 ("the Act") apply to the provisions of the LRA. See also *Cape Town Municipality v Allie NO* 1981 (2) SA 1 (C). The same approach was adopted in the case of *Uitenhage Municipality v Mooley* 1998 (19) ILJ 757 (SCA), where the court held that the provisions of s12 (1) of the Act were applicable to a determination of whether the debts which were due to the employee were recoverable in terms of the Basic Conditions of Employment Act 3 of 1983 (the BCEA).

[10] It is common cause that the arbitration award in the present case

came to the attention of the applicant on 24 April 2001, and the three years period would have expired on 23 April 2004.

[11] The applicant contended that an additional year should be added to the three-year period after which the award came to the applicant's attention because of the provisions of s11 of the Act.

[12] Section 11 read with s10 of the Act, provides for the period within which a debt becomes prescriped. The extinctive prescription period of thirty years applies to, (a) any debt secured by a mortgage bond, (b) any judgment debt, and (c) any debt in respect of any debt in relation to any taxation imposed under the law. The prescriptive period of fifteen years applies in respect of any debt owed to the State. And the prescriptive period of six years applies in the case of a debt arising from a bill of exchange or negotiable instrument. Any other debts that do not fall under any of the above categories are governed by a three year prescriptive period. In *Deloitte Haskins and Sells Consultants (Pty) Ltd v Bowthope Hellerman Deutsch (Pty) Ltd* 1991 (1) SA 525 (A) page 532G-I, the court held that:

> *"... prescription shall commence to run as soon as the debt is*

due. This means that there has to be a debt immediately claimable by the debtor or, stated in another way, that there has to be a debt in respect of which the debtor is under an obligation to perform immediately.''

[13] In the present case there is no dispute as to when the debt became claimable. The contention relates to the additional year of the prescription period provided for under s13 (1) (f) of the Act. There is also no dispute that the arbitration award is a debt as envisaged in the Act. It has been held that arbitration awards are debts within the meaning of the Act. See in this regard *Cape Town Municipality v Allie* (supra) and *Mpanzama v Fidelity Guard Holdings* (supra).

[14] Section 13 (1) (f) of the Act deals with certain circumstances in which completion of prescription will be delayed. It is apparent from reading of this section that the legislature provided for the delay of prescription where the creditor was not able to lodge his or her claim within the three years period because of any of the impediments listed in subsection 1 (a) to (h). With specific reference to the issue raised in this case, section 13(1) (f) makes provision for the delay of

prescription if the debt is the "*object of a dispute subjected to arbitration."*

[15] The Act does not however define the word *"arbitration"* in section 13(1) (f). If the word is defined to mean the outcome of the arbitration process, i.e. the award, then the award in the present case would be regarded as not having prescriped. The arbitration award would have prescriped if the word was to be interpreted in its ordinary meaning of the arbitration proceedings, i.e. the debt is an object of a dispute that has been submitted to an arbitration process.

[16] The issue in the present matter turns around the issue of whether the arbitration award is *"the object of a dispute subjected to arbitration."* Mr Dyke counsel for the applicant argued that the arbitration award is a debt and such debt is the object of a dispute subjected to arbitration. The source of argument is that the word *"arbitration"* in s13 (1) (f) means the award and not the arbitration process.

[17] In support of his argument Mr Dyke relied on the decision of Friedman JP in the case of *Primavera Construction SA v Government, North West Province and another* 2003 (3) SA 579 (B).

[18] I agree with *Primavera Construction (supra)* to the extent that it held that a valid arbitration award will either dissolve the existing rights or bring an end to a dispute as to whether certain rights existed or not.

[19] In the absence of voluntary compliance, the arbitration award can only be enforced through a Court order. The course of action in seeking to enforce an arbitration award lies in the award itself and not the original contract from which the dispute arose. Once made an order of Court, an arbitration award acquires the status of a judgment debt and will therefore prescribe after 30 years in terms of section 11 (a) (ii) of the Act.

[20] The central issue in this case is whether an arbitration award prescripes after three years in terms of section 10 (d) or after four years in terms of s13 (1) (f) of the Act.

[21] I am of the view that the court in *Primavera Construction SA case* erred when it held that:

"…and it is plain that unless it is made an order of court, an arbitrator's award will prescribe after 4 years (see section 13(f) read with 11(d) of the Prescription Act)."

[22] The correct approach in my view is that which was adopted by the Appellate Division in the case of *Murray & Roberts Construction (Cape) (Pty) Ltd v Upington Municipality* 1984 (1) SA 571 (AD), where the court held that for the purpose of s13 (1) (f) of the Act, the legislature had intended to embrace the referral both to arbitration and to the person tasked to deal with the dispute. The court held that s13 (1) (f) of the Act contemplates that some step, having the effect of unequivocally initiating the arbitration process, must first be taken before the dispute becomes "subjected to arbitration" within the meaning of the section so that the running of prescription is delayed.

[23] The court highlighted that for the prescription to be delayed; the earliest possible step having that effect would generally be a request by one of the parties to a dispute requiring the other to appoint or agree to the appointment of an arbitrator. The court went on further to say:

"It follows that the Legislature, in using the word "arbitration" in s 13 (1) (f) of the Act, did not envisage only "arbitration" in the narrow technical sense of that word but all processes by which disputes have to be determined extra-judicially."

[24] The dispute in *Murray & Roberts Construction case* was subjected to arbitration within the meaning of s13 (1) (f) of the Act, when it was submitted to the engineer who was tasked with dealing with the dispute through the arbitration proceedings. The completion of the prescription was delayed for one year when the arbitration proceedings came to an end. This would be a period prior to the issuing of the award. See John Saner, *Prescription in South African Law* 3 – 55.

[25] The same approach was adopted in the case of *Sugar Industry Central Board v Maritz and Another* 1984 4 SA 101 (T), where the court held that:

"For s13 (1) (f) to operate the debt must be "the object of a dispute subject to arbitration." If the words "subjected to" are to have any meaning, in contradistinction to "subject to" or

"subjected to" then they must mean, not that an agreement to refer disputes to arbitration is in existence, but that there must be reference to arbitration actually proceeding." (My underlining)

[26] The view that the word *"arbitration"* in s13 (1) (f) of the Act refers to the process and not the outcome thereof is supported further by what was said by Grosskopf AJA in *Murray & Roberts Construction (Cape) Pty Ltd v Upington Municipality* (supra) and quoted with approval Phillips AJ in *Sugar Industry Central Board v Maritz* (supra) where the learned Judge said:

"The subsection (s 13 (1) (f)) applies 'if... the debt is the object of a dispute subjected to arbitration'. An arbitration agreement does not necessarily oust the jurisdiction of the court. Despite the existence of such an agreement, the creditor may elect to institute legal proceedings, although he might be met by an application for a stay of proceedings or a special plea to the same effect... The court would in practice normally order a stay if requested to do so. An arbitration agreement is therefore in a sense an impediment to the recovery of a debt by means of legal

proceedings, but it is one because it provides an alternative means of resolving disputes which carries the approval of the law. This applies a fortiori where a dispute has actually been subjected to arbitration. The creditor is protected against the running of prescription because there exists an impediment to his approaching the ordinary courts, and the impediment exist because he is taking appropriate alternative steps to recover his debt. It is against this background that s 13 (1) (f) of the Act should in my view be interpreted and applied. "

[27] The above remarks clearly indicate that the impediment which is the basis for delaying the prescription comes into existence only when the creditor takes appropriate steps to recover the debt. The steps in terms of s13 (1) (f) would be the initiation of the arbitration proceedings to determine the dispute. It does not as stated earlier relate to the outcome of the proceedings, i.e. the arbitration award. The word arbitration is commonly used to refer to a process whereby a dispute is referred by one or all of the disputing parties to a neutral or acceptable third party, the arbitrator/commissioner as the case may be who fairly hears their respective cases and makes a final binding decision.

[28] In other words the prescription in terms of s13 (1) (f) is delayed for an additional one year where the debt is an object of a dispute subject to the arbitration process. The section does not envisage a situation where the debt which is the object of the dispute has already been determined through the arbitration proceedings and an award issued as a result thereof.

[29] The interpretation of s13 (1) (f) can best be illustrated by way of an example. Assuming, parties in a dispute concerning payment of overtime, agree to refer the dispute to arbitration, instead of resorting to Court litigation. And secondly assuming further that for some reason the arbitrations process is not completed within three years. In this case the employee would be entitled to litigate the dispute in the Courts. He or she would be able to successfully plead that the dispute did not prescripe after three years due to the provisions s13 (1)(f) of Act. In other words there is still a further year before the dispute concerning overtime dispute can prescripe. In these circumstances the prescription would have been delayed by the impediment of the arbitration process.

[30] A different scenario would however apply on the same set of facts if the overtime dispute is finalised during the arbitration process and an award issued in favour of the employee. In this instance prescription would run for three years from the date the employee becomes aware of the award. The provisions of s13 (1) (f) would not apply because there is no impediment, the dispute concerning overtime is not the object of a dispute subjected to arbitration process.

[31] In the light of the above, I am of the view that the word *"arbitration"* in s13 (1) (f) envisages the arbitration process and not the outcome thereof. In other words what is envisaged therein is not the arbitration award. The prescription of an arbitration award is three years and not three plus one as argued by the applicant.

[32] It therefore seems to me to be stretching the meaning of the word *"arbitration"* in s13 (1) (f) too far to include in it the word "arbitration award". In my view therefore the arbitration award issued in favour of the applicant has become prescriped.

[33] I do not believe that it would be fair in the circumstance of this case to allow the costs to follow the results.

[34] In the premises, I make the following order:

1. The application to make the award an order of the Court is dismissed.
2. The debt has become prescriped
3. There is no order as to costs.

MOLAHLEHI J

DATE OF HEARING : 07 DECEMBER 2007

DATE OF JUDGMENT : 09 JANUARY 2008

APPEARANCES

For the Applicant : Adv B Dyke

Instructed by : Wikus Van Rensburg Attorneys

For the Respondent: Adv G Bloem

Instructed by : The State Attorney