IN THE LABOUR COURT OF SOUTH AFRICA
HELD AT JOHANNESBURG

CASE NO. JR 137/2003

REPORTABLE

In the matter between:

POPCRU o.b.o. JOSEPH SIFUBA	Applicant
and	
COMMISSIONER OF THE SOUTH AFRICAN POLICE SERVICES	1st Respondent
PLAATJIES, SAM N.O	2nd Respondent
THE PUBLIC SERVICE CO-ORDINATING BARGAINING COUNCIL	3rd Respondent
THE SAFETY AND SECURITY SECTORAL BARGAINING COUNCIL	4th Respondent

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JUDGMENT BY: C.J. MUSI, AJ

DELIVERED ON: 05 December 2008

Introduction

[1] This is an opposed application wherein the applicant seeks relief to the following effect:

1. That the review application instituted by the first respondent, the Commissioner of the South African Police Services (the commissioner) be dismissed;
2. that the arbitration award made, under the auspices of the Public Service Central Bargaining Council (PSCBC) case number PSCBC 53 dated 8 November 2002, in favour of the applicant, be made an order of court;
3. alternatively, directing the commissioner to comply with the direction in terms of rule 7A (2)(a) and / or (b) of the Rules of this Court within 14 days of the order;
4. directing the commissioner to pay the costs of this application.

CONDONATION

[2] The application was brought in terms of Rule 11 of this court's rules. It was delivered on 19 December 2007. The respondents were given 10 days within which to deliver a notice of opposition and an answering affidavit, if any of them intended opposing the matter. Only the commissioner opposed the application. The opposing affidavit was only delivered on 27 February 2008. The applicant opposed the commissioner's application for condonation in relation to the late filing of the opposing affidavit.

[3] In the application for condonation on behalf of the commissioner it was pointed out that the applicant's founding affidavit was signed and sworn to on 14 November 2007 (the date stamp of the commissioner of oaths is 14 December 2007). The Notice of Motion was only signed and delivered on 19 December 2007. The commissioner contended that the application was deliberately launched in the middle of the holiday period, when many people were on leave.

[4] Enquiries in relation to the matter had to wait until after the holiday season. The office of the State Attorney had to find out who is responsible for this matter. The person who initially dealt with this matter assistant commissioner L J Pienaar was transferred and no longer involved in the matter. Because the matter was old and forgotten, numerous enquiries had to be made. The necessary approval had to be obtained to appoint the same counsel who initially worked on this matter. A mandate to appoint counsel was only obtained at the end of January 2008. After counsel was appointed the first available date for a consultation with him and his junior was on 13 February 2008. On behalf of the commissioner it was pointed out that there was no prejudice to any party. It was also

pointed out that this matter is of great importance to the South African Police Services (SAPS), the applicant and Sifuba. There are a great number of police officials who were affected by the White Commission of Enquiry's ruling and they will be directly affected by and interested in the outcome of this matter. An order in the applicants favour will create a precedent with disastrous financial implications for the SAPS.

[5] Mr van der Riet (SC) on behalf of the applicant argued that condonation should not be granted because the first respondent briefed counsel at the end of January 2008 and it took one month to file the answering affidavit.

[6] Mr Tokota (SC) on behalf of the first respondent argued that there is no reply to the first respondent's contentions in relation to condonation. He also argued that Rule 11 does not prescribe a period in which papers should be filed and that the applicant has no right to prescribe the times in a Rule 11 application because it is not an urgent application.

[7] Rule 11 of this Court's rules reads as follows:

"(1) The following applications must be brought on notice,supported by affidavit:

(a) Interlocutory applications;

(b) other applications incidental to, or pending, proceedings referred to in these rules that are not specifically provided for in the rules; and

(c) any other applications for directions that may be sought from the court.

(2) The requirement in subrule (1) that affidavits must be filed does not apply to applications that deal only with procedural aspects.

(3) If a situation for which these rules do not provide arises in proceedings or contemplated proceedings, the court may adopt any procedure that it deems appropriate in the circumstances.

(4) In the exercise of its powers and in the performance of its functions, or in any incidental matter, the court may act in a manner that it considers expedient in the circumstances to achieve the objects of the Act."

[8] Mr van der Riet argued that the 10 days is a reasonable period. In terms of rule 7 (4) (b) a notice of opposition and an answering affidavit must be delivered within 10 days from date of service of the application on the respondent. Although rule

11 does not provide for time periods the applicant was not remiss in giving the respondent 10 days within which to file an answering affidavit. It is common practice to require a respondent to file an answering affidavit within a specified time. Uncertainty will prevail if no time limits are given. The 10 days is, in any event, a reasonable period.

[9] That, however, is not the end of the matter. I must now consider whether condonation should be granted for the late filing of the answering affidavit. The answering affidavit was supposed to be delivered on 7 January 2008. It was only delivered on 27 February 2008. It is 37 days late. The notice of opposition was delivered on 18 January 2008 – 9 days late.

[10] The basic principles applicable in the exercise of a discretion to grant or refuse an application for condonation was enunciated in the well known and oft quoted case of **Melane v Santam Insurance Co. Ltd** 1962 (4) SA 531 (A) at 532 B – E. I do not deem it necessary to repeat it in this judgment.

[11] The 37 day delay is indeed significant. The applicants reminded the first respondent on 16 January 2008 that he had to deliver his notice of opposition and answering affidavit. The

first respondent gives an explanation for the delay which is in the circumstances of this matter reasonable. This matter was indeed an old and complex matter and it was a sensible thing to endeavour to appoint the same counsel who initially dealt with the matter. The delay was caused by the internal processes to get the necessary authorization rather than a deliberate or negligent disregard of the matter. Although the delay between 13 February 2008 and 27 February 2008 was not explained no prejudice to the applicant could be shown. The applicant only made a bold assertion that it is being prejudiced without pointing out how it is being prejudiced. The commissioner on the other hand pointed out that the SAPS would be prejudiced because there are numerous other similar matters awaiting the outcome of this case. This case will set a precedent. A decision not to grant condonation will have serious financial implications, running into millions of rands, for the SAPS. The matter is of considerable importance to the applicant, Sifuba and the SAPS. I am also of the view that the first respondent has excellent prospects of success in this matter. The application for condonation should in the circumstances be granted.

FACTS

[12] Joseph Sifuba (Sifuba) a member of the applicant and on whose behalf this application is brought is a member of the SAPS. Before being transferred to the SAPS he was a member of the Transkei Police Force.

[13] Prior to 1994, the police departments and forces of the former Transkei, Bophuthatswana, Venda and Ciskei Governments (TBVC states) functioned independently from the South African Police Force, as the SAPS was then called. The different police departments employed their own personnel and carried out their own responsibilities (financial and otherwise) under their respective laws and rules.

[14] Members of the Transkei Police Force were generally promoted in terms of Force Order General No 2 of 1992, but could also be promoted by way of special orders.

[15] On 1 May 1993 Sifuba was promoted from the rank of sergeant to the rank of warrant officer in terms of Special Force Order No 1B of 1993.

[16] After the amalgamation of the various police forces in South Africa in 1994, Force Order General No 2 of 1992 of the Transkei Police Force was rendered redundant by paragraph 3 of the Force Order General No 3 of 1995 of the new SAPS. Sifuba was promoted to the rank of Lieutenant on 1 May 1994, in terms of the latter Force Order.

[17] The amalgamation of the different police departments did not happen seamlessly. Due to irregularities and disparities in some of the remuneration packages of some police officers a review and re-evaluation of the remuneration packages of police officers of the former TBVC states was done. Parallel to this process a Commission of Enquiry under the chairmanship of the Honourable Mr Acting Justice Jules Browde was established. The Honourable Mr Justice White was later appointed as chairman of the Commission. The Commission became commonly known as the White Commission. This Commission was to investigate irregularities in the public services of the former TBVC states, including the promotion of police officers in the Transkei Police Force. Although the Commissions Act 8 of 1947 was made applicable to the above mentioned commission it was established in terms of section 236 (6) of the Interim Constitution of the Republic of South

Africa 200 of 1993 (the Interim Constitution). Section 236 (6) of the Interim Constitution reads as follows:

> "(6) Notwithstanding the provisions of this section, the conclusion or amendment of a contract, the appointment or promotion, or the award of a term or condition of service or other benefit, which occurred or may occur between 27 April 1993 and 30 September 1994 in respect of any person referred to in subsection (2), or any class of such persons, may, at the instance of a Minister or a member of the Executive Council of a province, within one year of the commencement of this Constitution be reviewed by a commission appointed by the President and presided over by a judge, and if not proper or justifiable in the circumstances of the case, the commission may reverse or alter the contract, appointment, promotion or award."

The commission had the power to reverse or alter an employment contract, an appointment, a promotion or an award made in respect of, *inter alia*, any police officer in the former Transkei, including Sifuba.

[18] The White Commission held various hearings, each of which was identified by a specific number. In respect of Sifuba the Commission found that his promotion was regular. The Commission however found, during hearing 100 that some benefits that Sifuba received were irregular and that it should be set aside. The findings of hearing 100 held at Umtata on 28 and 29 October 1997 and 24 to 26 March 1998 were sent to Sifuba by letter dated 27 July 1998. In the letter, the White Commission informed Sifuba that, with regard to his position, it found as follows:

> "In all the circumstances it is our finding that:
>
> (a) any benefit which any of the Respondents received pursuant to the implementation of the 1 : 1 Rule, is an irregular benefit and fall to be set aside.
>
> (b) any benefit which any of the Respondents received in consequent of the non implementation of Regulation 18 (13) of the Transkei Police Regulations, is an irregular benefit and fall to be set aside.
>
> Respondent No 20 : S.J. Sifuba."

[19] On 15 March 2000 Sifuba was informed by the commissioner that the findings of the White Commission means that he was

overpaid for the period 1 May 1993 to 29 February 2000. Sifuba was informed that he owed the SAPS R25 668.00 and that the money will be recovered in monthly instalments of R1070.00. He was also given 21 days, within which to make representations before the debt was deducted from his salary. His salary scale was also reduced. Sifuba was dissatisfied with the state of affairs.

[20] He referred the dispute to the Safety and Security Sectoral Bargaining Council (the SSSBC). The SSSBC ruled that it lacked jurisdiction to adjudicate the dispute. Sifuba then referred the dispute to the Public Service Co-ordinating Bargaining Council (the PSCBC). On 8 November 2002 the second respondent acting under the auspices of the PSCBC issued an award:

> "1. that the non – payment of the applicant Mr JS Sifuba on salary scale constituted an unfair labour practice.
>
> 2. that the applicant Mr JS Sifuba be granted the relief sought as per terms of the request i.e. payment of salary arrears for ± 21 months as stated supra."

[21] On 31 January 2003 the commissioner filed an application to review and set aside the award of the second respondent.

[22] From 28 May 2003 Sifuba lodged grievances with the commissioner with regard to this matter, to no avail. On 11 October 2007, following a number of correspondences between the parties the commissioner informed Sifuba that the grievance has been finalised because the matter was arbitrated and an award issued. Sifuba was advised to seek external remedies because the internal remedies were exhausted.

[23] Meanwhile, in relation to the review application the commissioner informed the applicant on 12 March 2007 that they have not yet received the record of the arbitration proceedings and that they intend launching an application to compel the PSCBC to file the said record.

[24] On 14 May 2007 the applicant wrote to the commissioner pointing out that the review application was launched more than four years ago. The commissioner was requested to inform the applicants of any steps that were taken to further prosecute the review application. On 15 June 2007 the

commissioner informed the applicant that they are battling to get the record of proceedings and that the PSCBC advised that they have filed it on 10 February 2003. On 10 September 2007 the applicant again enquired what steps, if any, have been taken to prosecute the review application. The commissioner did not respond to this letter. It appears that the record has been irretrievably lost.

[25] The applicant alleges that the review application was brought solely to prejudice the applicant. The commissioner denies that the application was brought with an ulterior motive. He points out that because of a high turnover of staff in the office of the State Attorney as well as in the SAPS and also the restructuring of the SAPS the review application did not receive attention. He also points out that the applicant and/or Sifuba did not act with any alacrity and allowed the matter to prescribe.

ISSUES

[26] The commissioner opposes this application on various grounds. Firstly, he argued that Sifuba's right to enforce the arbitration award has prescribed. Secondly, that the arbitration award is so flawed that it is incapable of implementation and

should therefore not be made an order of court. Thirdly, that it is void or voidable and should therefore not be made an order of court. Lastly if the arbitration award is made an order of court the SAPS would be faced with a dilemma in that there would be two final and binding, but irreconcilable, orders viz this court's order and the White Commission's order.

[27] The applicant argued that a review application practically stays the enforcement of an arbitration award. They further argued that prescription was interrupted by the subjection of the dispute to arbitration and pending finalization of the review application, such interruption did not cease. In relation to the award itself, the applicant argued that the arbitral award should stand even if it is vague or wrong. It was pointed out that the court has the power to vary an arbitral award in order to make it enforceable.

LAW

[28] Before dealing with the specific sections of the Prescription Act 68 of 1969 (the Prescription Act), I pause to mention the philosophy and policy considerations underlying extinctive prescription. Prescription legislation is primarily passed for the benefit of debtors or defendants. In our common law prescription was a way to punish a negligent plaintiff.

Meintjies NO v Administrasieraad van Sentraal – TVL 1980 (1) SA 283 (T) at 293 F – G. In **Oliff v Minnie** 1953 (1) SA 1 (AD) at 4 G – H van den Heever JA described the common law legislative motives as follows:

> "Since the Emperors began to legislate in regard to prescription they repeatedly stressed two legislative motives: the supinity (desidea) of a plaintiff who does not enforce his rights, who should therefore blame himself and the difficulty felt by the defendants who have to repel ancient claims."

[29] The aim is therefore to compel a plaintiff to prosecute a claim expeditiously within a specific time failing which to run the risk of having the claim declared unenforceable. Prescription therefore operates in favour of a defendant and protects a defendant from stale claims. Prescription also creates legal certainty and finality in the relationship between creditor and debtor after the lapse of a period of time. See **Loubser MM: Extinctive Prescription Juta & Co. LTD** 1996 at 22.

[30] One of the objectives of the Labour Relations Act 66 of 1995 (the Act) is to promote the effective resolution of labour disputes. See section 1(d)(iv) of the Act. This entails the

expeditious resolution of labour disputes. In **National Education Health and Allied Workers Union v UCT** 2003 (3) SA 1 (CC) at paragraph 31 the Constitutional Court recognised this principle and said the following in this regard:

"By their nature labour disputes must be resolved expeditiously and be brought to finality so that the parties can organise their affairs accordingly. They affect our economy and labour peace. It is in the public interest that labour disputes be resolved speedily…"

31.1. The relevant provisions of the Prescription Act are as follows. Section 10 (1) provides that:

"(i) Subject to the provisions of this Chapter and of Chapter iv, a debt shall be extinguished by prescription after the lapse of the period which in terms of the relevant law applies in respect of the prescription of such debt…"

31.2 In terms of section 11 (d) of the Prescription Act this kind of debt's prescription period is three years.

31.3 In terms of section 12 (1) prescription shall commence to run as soon as the debt is due.

31.4 Section 12(3) provides that:

"A debt shall not be deemed to be due until the creditor has knowledge of the identity of the debtor and of the facts from which the debt arises: Provided that a creditor shall be deemed to have such knowledge if he could have acquired it by exercising reasonable care."

31.5 Section 15(1) provides that:

"The running of prescription shall, subject to the provisions of subsection (2), be interrupted by the service on the debtor of any process whereby the creditor claims payment of the debt…"

31.6 Section 15(b) provides that:

"For the purposes of this section, "process" includes a petition, an notice of motion, a rule nisi, a pleading in reconvention, a third party notice referred to in any rule of court, and any document whereby legal proceedings are commenced."

31.7 Section 17 provides that:

31.8 "(1) A court shall no of its own motion take notice of prescription. (2) A party to litigation who involves prescription shall do so in the relevant document filed of record in the proceedings: Provided that a court may allow prescription to be raised at any stage of the proceedings."

APPLICATION OF LAW

[31] In this matter it is not in dispute that the applicant and / or Sifuba had knowledge of the fact that they could enforce the arbitral award against the commissioner by making it an order of court. It is also clear that the commissioner took the prescription point timeously in his answering affidavit in this matter as well as in his founding papers in the review application.

[32] The debt in issue in this matter is the debt that flows from the arbitration award. A valid arbitration award, like a court judgment in certain circumstances, is regarded as a novation of the former debt on which the award was granted and the arbitration award itself constitutes the new debt. The former debt is converted in a debt that is due by virtue of the valid arbitration award. New rights, duties and obligations are created by a valid arbitration award. If an arbitrator's award is not made an order of Court it will prescribe after four years. See section 13 (f) and (i) read with section 11 (d) of the Prescription Act. On the other hand, a party's right to enforce the award by way of application to have it made an order of court prescribes within three years of the publication of the award. **Cape Town Municipality v Allie NO** 1981 (2) SA 1 (C) at 4 F – H. **Trust Bank of Africa Ltd v Dhooma** 1970 (3) SA 304 (N) at 308, **Swadif (Pty) Ltd v Dyke NO** 1978 (1) SA 928 at 944 E – F. **Primavera Construction SA v Government; North West province** 2003 (3) SA 579 (BPD) at paragraphs 13 and 14. If the arbitration agreement provides between the parties that the arbitrator's award shall have the status of a judgment of a court the prescription period applicable to a judgment debt shall apply in such a case. See **Blaas v Athanassion** 1991 (1) SA 723 (W) at 725 H –J.

[33] There is no agreement in this matter that the arbitrator's award should have the status of a judgment of a court. Until the arbitrator's award is made an order of court the applicant's right to enforce the award therefore prescribes within three years of the publication of the award.

[34] The applicant however contents that a review application practically suspends the legal force of an arbitration award. This is a practice of convenience. The court will in most cases for reasons of convenience and expedience postpone an application to make an arbitration award an order of court if there is a pending review application. This practice should not however be exalted to a rule or a legal impediment to prescription. In recognising this practice, Grogan AJ said the following in **Professional Security Enforcement v Namusi** [1999] 6 BLLR 610 (LC) at paragraph 10:

> "Neither the Act not the common law lays down a hard-and-fast rule that an application to have an award (or any judicial order) made an order of court must be dismissed or conditionally postponed if the person against whom it is to be made has applied for its rescission or review. This Court has, however, adopted the practice of postponing

> applications brought under section 158 (1)(c) if the respondent has filed an application for review."

[35] There is no legal provision that provides for the automatic suspension of the enforceability of an arbitration award by an application for review. Both section 145 (3) of the Act and section 33 (3) of the Arbitration Act 42 of 1965 provides that a court may, if it considers that the circumstances so require, stay the enforcement of the award pending its decision on the review of an award. The mere fact that a review application is pending is not a bar to making an award an order of Court. See **National Education Health & Allied Workers Union on behalf of Vermeulen v Director-General: Department of Labour** (2005) 26 ILJ 911 (LC) at paragraph [23]; **Ntshangase v Speciality Metals CC** (1998) 19 ILJ 584 (LC) paragraph [14].

[36] In exercising its discretion under section 145 (3) of the Act the court must do so judicially after taking into consideration all the relevant factors. A stay of the enforcement of the award or a postponement of the application does not follow as of right. The court will look at factors such as the tardiness, if any, of the party applying for the postponement of the enforcement,

the balance of convenience, the prospects of success of the review application, the policy of the Act, the interest of the administration of justice and the general tenets of fairness. See **National Education Health & Allied Workers Union on behalf of Vermeulen** *supra* at page 919 I to J. In practice the court would then look at *inter alia,* the factors mentioned above before it exercises its discretion in favour of postponing the enforceability of an award until the finalisation of a review application. As said above the practice is not a legal rule and no impediment to an application to make an award an order of court. The applicants' contention is without substance.

[37] Mr van der Riet also argued that Sifuba's answering affidavit, in the review application, dated 20 February 2003 interrupted prescription because it contained an application to make the award and order of court. The relevant portion of the answering affidavit that Mr van der Riet referred me to reads as follows:

> "The second respondent apply from the honourable court to endorse the award.
>
> The award by the first respondent should be implemented with effect from 2000-03-01 up to 2001-11-01."

[38] Mr Tokota argued that the answering affidavit was never served on the commissioner. Mr van der Riet sought and was granted leave to prove, if prove could be found, that the answering affidavit was indeed served on the commissioner during 2003. On 14 July 2008 Sifuba filed an affidavit wherein he states that he faxed the answering affidavit to the State attorney on 24 February 2003. The fax transmission report has faded and is illegible. In addition he states that he sent his answering affidavit by courier to the State Attorney. On the other hand Mr Mpyane, from the State Attorney's offices also deposed to an affidavit wherein he states that all processes that are served on the State Attorney's office are entered into a register. He has perused the registers and records kept in the office of the State Attorney and could find no record of service of Sifuba's answering affidavit.

[39] In terms of section 6 (1)(b) extinctive prescription shall be interrupted by service on the debtor of any process whereby action is instituted. Action is defined in the Prescription Act as any legal proceedings of a civil nature brought in a competent court in the Union for the enforcement of a right.

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

[41] The applicant could in any event also not prove that the answering affidavit was served on the commissioner. None of the required ways of proving service in terms of rule 4 (2) (a) – (e) of this court's rules were proved.

[42] Loubsher *supra* at 124 states that:

> "Service of process on the debtor must constitute a procedural step whereby action is instituted to enforce a claim or right. The underlying reason why such service of process interrupts prescription is that the creditor has formally and in a legally valid manner involved the debtor in court proceedings for the enforcement of the claim."

I agree. It is clear that Mr van der Riet's argument falls to be rejected.

[43] It was also argued that it would be inequitable to punish the applicant by upholding a plea of prescription. It is not only an issue of punishment but also an issue of substantive law, finality, certainty, protection of the debtor and the expeditious prosecution and resolution of disputes. The Prescription Act does not give the Court discretion. If the requirements for a plea of prescription has been established by the party taking the point then that party is entitled as a matter of right to have that plea upheld. Although this court is a court of equity, in my view considerations of equity do not come into play when all the requirements for a successful plea of prescription are established. Extinctive prescription renders unenforceable a right by the lapse of time. See section 3(1) of the **Prescription Act**.

[44] In any event, should my view of the matter be incorrect, Pillay J correctly pointed out in **Mpanzama v Fidelity Guards Holdings (Pty) Ltd** [2000] 12 BLLR 1459 (LC) at paragraphs

[13] to [15] that equity is a double edged sword. Pillay J puts it thus:

> "[13] It was submitted that as a court of equity, the Prescription Act should not be applied to oust the jurisdiction of the court and thereby deny the applicant's claim.
>
> [14] Equity must be applied even-handedly to both employer and employees. The employee had three years to execute his claim. The respondent had persistently denied liability for the debt. The respondent did not obstruct the applicant in instituting proceedings.
>
> [15] In the circumstances, the Court cannot come to assistance of a sloppy litigant. It would be inequitable to the respondent if the applicant is allowed to profit from his own inaction."

RULING

[45] The applicant in this matter did nothing to enforce the award between October 2002 and 2007. There is no reason why the plea of prescription should not be upheld. This conclusion renders it unnecessary to consider the alternative defences raised by the commissioner.

COSTS

[46] The commissioner requested me to dismiss this application with costs, including the costs occasioned by the employ of two counsel. The applicant was also represented by senior counsel. Although the commissioner is successful in his defence, considerations of equity militate against a costs order in the commissioner's favour. It is as a direct result of the commissioner's delay in prosecuting the review application that the applicant endeavoured to enforce its rights. The commissioner is actually benefiting from his tardiness. On the other hand, the applicant is unsuccessful because of its tardiness. In my view, it would only be fair not to make any costs order in this matter.

ORDER

[47] **I accordingly make the following order:**

1. **The late filing of the first respondent's answering affidavit is condoned.**
2. **The application is dismissed.**
3. **No order as to cost is made.**

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C.J. MUSI, AJ

On behalf of the Applicant:	Adv. J.G. van der Riet (SC) Instructed by: Cheadle Thompson & Haysom BRAAMFONTEIN
On behalf of the third Respondent:	Adv. R. Tokota (SC) with Adv. F.M.M. Snyman Instructed by: The State Attorney PRETORIA