IN THE LABOUR COURT OF SOUTH AFRICA

HELD AT CAPE TOWN

Reportable

Case No: C590/2007

In the matter between:

P FREDERICKS	Applicant
and	
HILDA GROBLER N.O	First Respondent
GENERAL PUBLIC SERVICE SECTORAL BARGAINING COUNCIL	Second Respondent
DEPARTMENT OF CORRECTIONAL SERVICES	Third Respondent

JUDGMENT

Molahlehi J

Introduction

[1]The applicant in this matter seeks to have the ruling issued by the first respondent reviewed and set aside in terms of section 158(1) (g) of the Labour Relations Act 66 of 1995 (LRA). In terms of the ruling which

was issued under case number PSGA 463-0708 and dated 8 October 2007, the third responded dismissed the applicant's application for condonation for the late referral of his unfair labour practice dispute.

The factual background

[2]The dispute which the applicant sought to have considered by the first respondent concerned the alleged failure by the third respondent to promote him following a recommendation in that regard by one of his supervisors. According to the applicant he discovered during 1997, after having access to his personnel records that he met the required criteria for promotion during 1986, 1987 and 1988 and was in fact recommended for promotion by his supervisor but that the third respondent nevertheless failed to effect such recommendations.

[3]As a result of this discovery the applicant addressed a letter on the 23rd December 1997, to the third respondent wherein he complained about failure to promote him. The applicant's complaint received attention during December 1997 and those in charge recommended that *"the situation regarding his promotion be rectified."*

[4]The situation remained the same but the applicant continued to insist that his complaint be addressed.

[5]The applicant did not give up in his endeavor to have what he regarded as unfair treatment address by the third respondent and this continued

into 1998. The third respondent responded to the complaint again on the 24th April 1998, in a letter to the third respondent stating that the situation will not be dealt with any further and that the applicant should consider the situation as finalized.

[6] The applicant again did not accept what he was told by the third respondent and pursued the matter further by addressing a letter to the respondent on 5th March 1999, to which the third respondent replied on the 19th April 1999 and stated that they consider the matter finalized as an objective investigation was not possible and that in terms of the Prescription Act 68 of 1969, the matter has prescribed.

[7] Thereafter, the applicant seems to have done nothing regarding his complaint for a period of about six months. It was only on 1st November 1999, that the applicant made representations to the Minister of Correctional Services ("the Minister"). The Minister replied on the 28th January 2002 and in essence confirmed the decision of the third respondent.

[8] The applicant addressed a further letter to the Minister on the 3rd December 2002 and made further representation. The Minister having not responded to this letter the applicant addressed several more letters thereafter.

[9]The third respondent further to the letter of the applicant of the 14th May 2004, responded by reiterating its position that it regarded the matter as finalized.

[10]Three months thereafter and on the 23rd August 2004, the applicant referred an unfair labour practice dispute to the Public Service Commission (PSC). The PSC in turn and only on the 24 May 2005 referred the matter to the third respondent for their resolution.

[11]In response to the dispute as referred to it by the PSC, the third respondent indicated in a letter to the PSC dated 9th October 2006, that there was no basis for the claim by the applicant that he was entitled to have been promoted during 1986 to 1989.

[12]The intervention of the PSC having not produced the desired result from the perspective of the applicant, he then addressed a letter on the 6th December 2006 to the Human Rights Commission and requested assistance.

[13]The assistance of the Human Rights Commission having also not yielded the desired results the applicant referred his dispute to the bargaining council with an application for condonation for the late referral of the dispute. The referral was done on the 27th July 2007. As indicated earlier the condonation application was dismissed by the commissioner resulting in the applicant instituting these proceedings.

The grounds for review

[14]The essence of the applicant's attack on the commissioner's ruling is that the commissioner failed to take into account in arriving at her conclusion, that the applicant is a lay person who filled in the standard form provided by the bargaining council for the purposes of condonation application unassisted by a lawyer. The applicant further contended that the delay of 10 (ten) years was not excessive because as soon as he became aware of the unfair labour practice he *"started to lodge complaints and grievances*."

[15]As concerning failure to attach the supporting documentation the applicant attributes this to the fact that he is a lay person and that he was unaware that the annexure had to be attached and further that he was never contacted to furnish the same.

[16]The essence of the applicant's case in as far as prospects of success were concerned in motivating for the granting of condonation for his late referral of his dispute concerns inconsistent application of promotion policy by the third respondent in that another employee who had found himself in a similar situation like him was promoted. The applicant also attacked the ruling with regard to the approach adopted by the commissioner in dealing with issues of prejudice, the importance of the matter and balance of convenience.

[17]The commissioner in refusing to grant condonation reasoned that the applicant failed to comply with the requirements set out in the standard form which he filed in his application for condonation. The commissioner further found that the applicant in his application failed to satisfied the guidelines set out in *Melane v Santam Insurance Co Ltd 1962 (4) SA 531 (A)*. The commissioner also says in her award that the delay of 10 (ten) years was excessive.

[18]The respondent contended that the applicants' claim became due at the very latest on 3rd September 2001 when the CCMA issued the certificate that it had not been able to settle the dispute. To this extent the respondent argued that the debt which was due to the individual applicants had become prescribed, as prescription began to run as soon as they acquired the right to institute the proceedings against the respondent in terms of section 191(11) of the Labour Relations Act 66 of 1995 (the LRA).

[19]As concerning the process envisaged in section 15(1) of the Prescription Act 68 of 1969 (the Act), the applicant argued that the running of prescription would only have been interrupted if the applicants had filed their statement of claim in terms of rule 6 of the rules of the Labour Court. The applicant relied on the cases of: *Peak v Global Technology Ltd (2003) 24 ILJ 1580 (LC)* at *1584, Embling and*

Another v Two Oceans Aquarium 2000 (3) SA 691 (C), Standard Bank of South Africa Ltd v Oneate Investment (PTY) Ltd (In Liquidation) 1998 (1) SA 811 (SCA) at 826 and Waveley Blankets Ltd v Shoprite Checkers (PTY) Ltd and Another 2002(4) SA 166 (C).

[20]The above authorities do not support the case of the applicant. The facts in *Peak v Global Technology* are distinguishable from the present case in that the Court in that case dealt with an amendment to a statement of claim. Francis J held that even if the statement of claim was excipiable on the basis that it did not disclose the cause of action, it can nonetheless interrupt prescription. It was on this basis that the Learned Judge granted the application to amend the statement of claim which amendment he saw as clarifying the cause of action.

[21]In *Waveley Blankets Ltd v Shoprite Checkers,* the court dealt with the issue of whether a joinder application would interrupt prescription. The Court held that where the defendant is joined in its own application, there would be no "process whereby the creditor claims payment of the debt" from the debtor. However, the important principle enunciated by the Court (at page 174H), taken from the *Cape Town Municipality and Another v Allianz Insurance Co Ltd 1990 (1) SA 311(C) at 334H*, which is apposite to the present case and is discussed later in this judgement is that: *"It is sufficient for the purposes of interrupting prescription if the*

process to be served is one whereby the proceedings begun there under are instituted as a step in the enforcement of a claim for payment of the debt." It should be noted in this regard that the notion of a "debt" in the Act has been described as referring to an obligation to something either by way of payment or by delivery of goods and services or not to do something. See *HMD Properties (PTY) Ltd v King 1981 (1) SA 906 (N) at 909A-B***.** In *Electricity Supply Commission v Stewarts and Lloyds of SA (Pty) Ltd 1981 (3) SA 340(A) at 344F-G***,** the Court held that a debt is:

> "*that which is owed or due; anything (as money, goods or services) which one person is under an obligation to pay or render to another."*

[22]It is now well established that extinctive prescription as envisaged Prescription Act applies to employment issues. See in this regards *Mpanzama v Fidelity Guards Holding (Pty) Ltd [2000] 12 BLLR 1459 (LC), Cape Town Municipality v Allie NO 1981 (2) SA 1 (C)* and *Uitenhage Municipality v Mooley 1998 (19) ILJ 757 (SCA)*. A "debt" would in the context of the present case mean that the respondent had an obligation not to unfairly dismiss the applicant.

[23]Sections 10(1), 11(d) and 12(1) of the Act provide that a debt shall be extinguished by prescription after the lapse of a period of three years from the

date upon which the debt becomes due. Section 15(1) provides that the running of prescription shall be interrupted by the service of any process whereby the creditor claims payment of the debt.

[24]Section 12 of the Prescription Act provides that:

> '*(1) Subject to the provision of subsections (2) and (3), prescription shall commence to run as soon as the debt is due. . . .*
>
> *(2) . . . .*
>
> *(3) A debt shall not be deemed to be due until the creditor has knowledge of the identity of the debtor and of the facts from which the debt arises: Provided that a creditor shall be deemed to have such knowledge if he could have acquired it by exercising reasonable care.'*

[25]In *Solidarity v Eskom Holdings (Pty)Ltd 2008 ILJ 4150 (LAC)* the Labour Appeal Court per Khampepe A J A held that :

> *"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."

[26]In *Truter v Deysel 2006 (4) SA 168 (SCA)*, the court had the following to say in respect of s 12(1) of the Prescription Act:

"The term 'debt due' means a debt, including a delictual debt, which is owing and payable. 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."

[27]As to when can it be said that prescription commences to run, the Court in *Deloitte Haskins & Sells Consultants (Pty) Ltd v Bowthorpe Hellerman Deutsch (Pty) Ltd 1991 (1) SA 525 (A)* said the following:

'Section 12(1) of the Prescription Act 68 of 1969 provides 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.'

[28]The issue of what happens to the running of prescription in a case of a creditor who takes no steps to enforce his or her claim was answered in the case of *Uitenhage Municipality v Malloy (1998) 19 ILJ 757 (SCA),* in the following manner:

> *"As was stated by Van den Heever J in Basson & another v W alters and others 1981 (4) SA 42 (C) at 49 G-Y*
>
> *Our courts have constantly held that a creditor is not able by his own conduct to postpone the commencement of prescription. This approach was confirmed by the court in the case on The Master v I L Back & Co Ltd at 1005G when Galgut AJA endorsed the following assertion:*
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> *If all that is required to be done to render the debt payable is a unilateral act by the creditor, the creditor cannot avoid the incidence of prescription by studiously refraining from performing that act."*

[29]In the present instance there are two issues arising from the contentions of the parties. The first issue for determination relates to prescription and the second concerns refusal to grant condonation for the late referral of the dispute to the CCMA by the commissioner.

[30]It needs to be pointed out that because the issue of condonation concerns the jurisdiction of the CCMA, the decision of the

commissioner is peripheral because it is the Court that has to determine whether or not the facts before it support the view that the CCMA has jurisdiction. This means that the party that challenges the decision of the commissioner for refusing to grant condonation for the late referral of a dispute is entitled to treat the matter as if the application is made *de novo.* It also means a party that challenges the decision refusing the granting of condonation is entitled to put forward other materials which were not before the commissioner.

[31]At the level of review in a condonation application for the late filing of the referral of the dispute an applicant may expand on its reasons for the lateness and other factors required to convince the Court that condonation need to be granted in order to find jurisdiction for the CCMA. This includes making further and additional averments about prospects of success.

[32]I do not intend dwelling into the issue of condonation and the issue of the decision of the commissioner except to say that the applicant has not made out a case against the decision of the commissioner, neither has he made out a case before this Court that there are good and valid reasons for the excessive delay. He has also not made out a case about the prospects of success.

[33]The issue, upon which this matter turns, is in my view, prescription. The question is whether the claim of the applicant has already prescribed. For the reasons set out below, the claim has prescribed.

[34]Initially, Ms Ferreira for the applicant argued that the claim that the applicant made could not have prescribed because it was a claim based in labour law and not common law. When invited by the Court to explain the distinction that she had made, Ms Ferreira correctly conceded that a claim under labour law prescribes in the same way as it would in other fields of law.

[35]However, having made the above concession, Ms Ferreira argued that as a general principle before prescription to commence running, the claimant should have been aware of his or her right to claim or be expected to have been ware of such a right. In this respect Ms Ferreira contended that the applicant was not aware of his right to claim because he was from the very beginning of this matter told by the respondent that he had no claim for promotion under the Labour Relations Act. This argument in my view has no merit as it is not supported by the objective facts and evidence.

[36]The letter which the applicant wrote to several institutions and the Minister do not support the argument that he was not aware that he had a claim against the respondent. The reading of those letters indicates

very clearly that even though the applicant was a lay person in terms of the specific technicalities of the law he was not illiterate. He asserted and articulated very clearly what he believed was he right and wrote to the highest authorities, although not legal relevant for the purposes of dealing with his claim. In his own words the applicant states in the letter he wrote in August 2004, that:

> *"This has left me with an untenable situation in the sense that I have a clear right to assert that there is no forum that I can approach due to the lapse of time . . . ."*

[37]The argument that the applicant was not aware about prescription cannot sustain because the issue of prescription was specifically raised with by the respondent during 1999.

[38]It is clear in applying the legal principles discussed earlier that the applicant had a claim which he was aware of or at most ought reasonably to have been aware off, which he failed to institute within the period prescribed by the Prescription Act. The letters he addressed to the various authorities did not constitute a process as envisaged in the Prescription Act which could be said to have interrupted the running of prescription.

[39]I find for the above reasons that the applicant's claim has prescribed. I do not however belief that it would be fair to order the applicant to pay the costs of the proceedings.

[40]In the premises I make the following order:

1. The applicant's claim has prescribed.
2. The applicant's case is accordingly dismissed.
3. There is no order as to costs.

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Molahlehi J

Date of Hearing : 30th September 2009

Date of Judgment : 3rd February 2010

Appearances

For the Applicant : Adv Louise Ferreira

Instructed by : Raymond McCreath Inc

For the Respondent: Adv T Madima

Instructed by : The State Attorney