ARBITRATION AWARD

Panellist/s: Jonathan Gruss
Case No.: PSCB 803-18/19
Date of Award: 22 July 2019

In the ARBITRATION between:

PSA obo MOHLOUWA THOMAS MOTAPONYANE
(Applicant)

and

DEPARTMENT OF ROAD & TRANSPORT – GAUTENG & MPSA (DPSA)

(Respondent)

Applicant's representative: Mr Ntwampe
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Pretoria, 0007
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Respondent's representative: Mr Serobe
Respondent's address: P O Box 83
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DETAILS OF HEARING AND REPRESENTATION

1. This dispute was referred for arbitration in terms of Section 24(5) of the Labour Relations Act 66 of 1995 as amended ("the LRA"). The hearing was held at the offices of the Public Service Co-ordinating Bargaining Council, 260 Basden Road, Lyttelton Village Office, Centurion on 18 July 2019 at 09h00. The proceedings were electronically recorded. The Applicant, PSA obo Mohlouwa Thomas Motaponyane was represented by Ms Ntwampe, an official from PSA. The Respondent, the Department of Road & Transport – Gauteng was represented by Mr Serobe, Director of Labour Relations. The joined third party, Minister of Public Service and Administration (DPSA) was represented by Ms Maile, from the DPSA.

ISSUE TO BE DECIDED

2. The issue to be determined is whether the Respondent (Department of Road & Transport – Gauteng Department of Labour) correctly interpreted or applied PSCBC Resolution 3/2009 in not affording the Applicant a grade progression with from salary level 5 to salary level 6 with retrospective from 1 July 2014.

3. I am also required to determine whether or not the Applicant's entitlement claim had prescribed.

BACKGROUND TO THE ISSUES

4. The following were agreed as common cause when narrowing the issues :

4.1 The Applicant initially commenced employment with the former Bophuthatswana on 1 May 1983 as a road worker assistant.

4.2 In 1994 after amalgamation, the Applicant became an employee of the Department of Roads and Community Safety of the Province of the North West. The Applicant claims that he was employed at that stage as a foreman.

4.3 On or about 1 April 2007, the Applicant was transferred from the North West to Gauteng Province. After his transfer he was remunerated at salary level 4.

4.4 On 1 April 2010 the Applicant was granted a grade progression to salary level 5 in terms of PSCBC Resolution 3 of 2009.

5. In terms of Clause 3.6.2.2 of PSCBC Resolution 3 of 2009 with effect from 1 April 2010 (salary adjusted with effect from 1 July annually), an employee on salary level 4, 5, 6 or 7 who has completed 15 years of continuous service on a salary level, irrespective of the notch, and has obtained at least satisfactory rating in his/ her performance assessment (the average assessment over the last 2 years period will determine the performance rating), shall grade (salary level) progress to a salary level 5, 6, 8 or 8 respectively. This is not subject to the availability of posts.

6. The current referral (PSCB803-18/19), the subject matter of this arbitration was only referred for conciliation on 11 March 2019. The Applicant previously under case number PSCB134-18/18 referred the same dispute to the Bargaining Council on 4 July 2018 and that dispute was withdrawn on 1 September 2018.

7. The Applicant claims that when he was transferred from North West to Gauteng Province on 1 April 2007, he was already on salary level 5 and he had been at that salary level since 1 July 1999 when he was appointed, although he was not remunerated at that salary level. The Applicant further claims that the grade progression from salary level 4 to salary level 5 on 1 July 2010 was done erroneously in that he was already at salary level 5 and he only qualified for a grade progression to salary level 6 in 2014 in that in 2014 he had completed 15 years of continuous service at salary level 5.

8. The Respondent claims that when the Applicant was transferred from the North West to Gauteng Province on 1 April 2007 he was already at salary level 4 and this is confirmed by persal that shows that as early as 1 July 1996, the Applicant was remunerated at salary level 4. Any reference in the transfer letter dated 5 March 2007 indicating that the Applicant's current appointment level as of date of transfer was at salary level 5 was an error.

9. The Respondent claims based on the Applicant claiming that he qualified as from 1 July 2014 to be grade progressed to salary level 6, means that the Applicant's cause of action occurred more than 5 years ago. Therefore, the Applicant's claim has prescribed should you consider the first referral date of 4 July 2018 under case number PSCB134-18/18 that was withdrawn on 1 September 2018 and re-referred on 11 March 2019.

10. The Applicant argued that prescription does not apply to LRA referrals and only arbitration awards. The Applicant has in support of their arguments have referred me to the LAC judgement in the matter SA Broadcasting Corporation Ltd v Commission for Conciliation, Mediation & Arbitration & Others (2010) ILJ 592 (L AC) .

11. This is a brief summary of arguments considered as provided for in terms of Section 138(7)(a) of the Act relevant to the dispute at hand and does not reflect all the arguments heard and considered in deciding this matter.

ANALYSIS OF ARGUMENTS

12. In the matter of ***POPCRU obo Sifuba v Commissioner of SAPS & Others (2009) 30 ILJ 1309 (LC)*** at [44] the Labour Court held: "The Prescription Act does not give the court a discretion. If the requirements for a plea prescription have been established by a party taking a point then the party is entitled as a matter of right to have that plea upheld. Although the 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 prescription are established. Extinctive prescription renders unenforceable a right by lapse of time."

13. Although the issue of prescription was raised as an in limine point in these proceedings, prescription has nothing to do with jurisdiction but more to do with a special plea, a special defence to a claim that extinguishes a claim.

14. In ***Fredericks v Grobler NO and Others [2010] 6 BLLR 644 (LC)*** Molahlehi J held at (22), (23) and (25):

> "22. It is now well established that extinctive prescription as envisaged Prescription Act applies to employment issues. See in this regard 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.
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> 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. ……..
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> 25. In Truter v Deysel [2006] ZASCA 16; 2006 (4) SA 168 (SCA), the court had the following to say in respect of s 12(1) of the Prescription Act:
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> > "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." "

15. However, in the matter of **SA Broadcasting Corporation Ltd v Commission for Conciliation, Mediation & Arbitration & Others (2010)** on ILJ 592 (L AC) it was held at [27] and [28] :

> "While an unfair labour practice/unfair discrimination may consist of a single act it may also be continuous, continuing or repetitive. For example where an employer selects an employee on the basis of race to be awarded a once off bonus this could possibly constitute a single act of unfair labour practice or unfair discrimination because like a dismissal, the unfair labour practice commences and ends at a given time. But, where an employer decides to pay its employees who are similarly qualified with a similar experience performing similar duties different wages based on race or any other arbitrary ground then notwithstanding the fact that the employer implemented the differential on a particular date, the discrimination is continual and repetitive. The discrimination the latter case has no end and it is therefore ongoing and will only terminate when the employer stops implementing the different wages. Each time the employer pays one of its employees more than other he is evincing continued discrimination.
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> Hence, in the present matter the date of dispute does not have to coincide with the date upon which the unfair Labour practice/unfair discrimination commenced because it is not a single act of discrimination but one which is repeated monthly. In the circumstances of the dispute being labelled as ongoing was an accurate description of the "dispute date" and the decision arrived at by the Commissioner that there was no need for the respondent to seek condonation was correct."

16. In the matter **National Union of Metalworkers of SA on behalf of Masana v Gili Pipe Irrigation (Pty Ltd (2019) 40 ILJ 813 (LAC),** the Labour Appeal Court observed that this litigation had been conducted in an era of great uncertainty about the application of the principles encapsulated in the Prescription Act 68 of 1969 to labour relations litigation. However, this controversy had been resolved by the Constitutional Court in *Food & Allied Workers Union on behalf of Gaoshubelwe v Pieman's Pantry (Pty) Ltd* (2018) 39 *ILJ* 1213 (CC) where the majority found that the Prescription Act was compatible with the LRA and that an alleged unfair dismissal was a debt as contemplated in the Prescription Act. The court was therefore of the view that, once it was accepted that the Prescription Act applied to all litigation under the aegis of the LRA, there could be no A rational basis to conclude that any aspect or stage of such litigation, including an award, was not subject to prescription.

17. In the appeal to the Constructional Court in the matter between **Food & Allied Workers Union on behalf of Gaoshubelwe v Pieman's Pantry (Pty) Ltd (2018) 39 ILJ 1213 (CC)**, the Constitutional Court dealt with amongst other issues the question whether the referral of a dispute to conciliation interrupted prescription. To answer this question it had to determine whether a referral to conciliation constituted a 'document whereby legal proceedings are commenced' as provided for in the definition of 'process' in s 15(6) of the Prescription Act. The court adopted a broad interpretation of the term 'any document', finding that the scheme of the LRA made a referral to conciliation a mandatory first step in the process that might ultimately lead to adjudication. It noted that, while conciliation might not be E adjudicative in nature, it was

a necessary and mandatory part of the dispute-resolution process that the LRA created and it occurred within the operations of the CCMA, which was an independent and impartial forum of the kind contemplated in s 34 of the Constitution. The court believed that it would do an injustice to the architecture of the LRA and the CCMA to characterise conciliation as anything other than the commencement of legal proceedings in an independent and impartial forum. It therefore concluded that the referral of disputes to the CCMA for conciliation constituted the service of a process commencing legal proceedings.

18. The Applicant argued that they lodged a grievance with the Respondent in October 2018 seeks for the Respondent to rectify the Applicant's salary level and by 1 March 1999 the Respondent had not dealt with the grievance. Unfortunately, a lodging of a grievance does not interrupt prescription in that it is not like a referral to conciliation, a document where legal proceedings commences.

19. The Applicant's referral, an entitlement claim concerns the Applicant claiming an entitlement in term of PSCBC Resolution 3 of 2009, to receive a pay progression from salary level 5 to salary level 6 as from 1 July 2014. What the Applicant is claiming that the Respondent is indebted to him as from 1 July 2014. However, the real; cause of action as I understand stems back to when the Applicant was transferred from North West to Gauteng Province on 1 April 2007. The Applicant claims that when he was transferred, the Respondent his current employer remunerated him at salary level 4 instead of salary level 5. Although, the persal print out presented by the Respondent shows that as early as 1996, the Applicant was at salary level 4.

20. Section 12(2) and (3) of the Prescription Act, Act 68 of 1969 as provides that if the debtor wilfully prevents the creditor from coming to know of the existence of the debt, prescription shall not commence to run until the creditor becomes aware of the existence of the debt. 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.

21. Section 14 (1) and (2) of the Prescription Act further provides that the running of prescription shall be interrupted by an express or tacit acknowledgement of liability by the debtor. If the running of prescription is interrupted by an express or tacit acknowledgement of liability by the debtor, prescription shall commence to run afresh from the day on which the interruption takes place or, if at the time of the interruption or at any time thereafter the parties postpone the due date of the debt from the date upon which the debt again becomes due.

22. Accordingly, the Respondent has not at any time express or tacit acknowledged their indebtedness to the Applicant. Therefore the debit has not been interrupted. Section 11(d) of the Prescription Act provides that the period of the prescription of debt shall be three years. Considering the fact that the Applicant cause of action dates back to 1 July 2014 or even earlier, this period is in excess of 3 years should I accept 4 July 2018 as the date in which legal proceedings commenced.

AWARD

23. The Applicant, Mohlouwa Thomas Motaponyane claim to be grade (salary) progressed from salary level 5 to salary level 6 has prescribed.

24. The Applicant's disputes as referred is therefore dismissed.

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Name: Jonathan Gruss
(PSCBC) Arbitrator