IN THE PRIVATE ARBITRATION
HELD IN JOHANNESBURG

IN THE MATTER BETWEEN:

PUBLIC SERVICE ASSOCIATION OBO MEMBERS **APPLICANT(S)**

AND

SARS **RESPONDENT**

ARBITRATION AWARD

INTRODUCTION

1. In the course of 1999 SARS, the *Respondent*, embarked on a job grading exercise, based on the Hay Grade Job Evaluation System.

2. Consequently jobs at the *Respondent* were graded and categorized based on their complexity into non-career ladder jobs (Category A) and career ladder jobs (Category B).

3. The Public Service Association a registered trade union, the *Union*, claims that the 'application' of this system was unsuitable because '*... the grades allocated to [its] members*' by the *Respondent* '*was incorrect*'. [1]

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[1]. See – Claimants' Affidavit at paragraph 8.

4. So in order to remedy the situation the *Union* approached private arbitration and claims that its members (the '*Claimants*') '*ought to be correctly graded*' and seek '*12 months' compensation*'. [2]

5. The *Respondent* contends that the *Claimants'* claim (relevant to i.e. concerning Category B employees, in particular) has prescribed – as contemplated by the Prescription Act of 68 of 1969 – and they are consequently not entitled to any relief.

ANALYSIS

6. I have considered the arguments, for and against the issue of prescription, and am firstly of the view that the *Claimants'* claim is indeed a 'debt' for purposes of the Prescription Act.

7. This conclusion cannot be out of order because (no matter how one looks at things) the *Claimants* ultimately seek the 'payment' of 'monies' – which they would have earned had it not been for the alleged 'incorrect grading', so to speak.

8. I pause to mention that '*compensation*' in paragraph 4 above (or in the context of this award and according to the demand they made and the relief they seek) means or include 'monies' allegedly 'owed' to the *Claimants*.

9. 'Compensation' therefore means monies the *Claimants* are purportedly entitled and it is not a remedy in the traditional sense and/or, for example, as contemplated by section 193 of the LRA. [3]

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2. See – Pre-Arbitration Minute at paragraph 10.

3. Section 193 of the Labour Relations Act provides for 'remedies' for unfair dismissals and labour practices.

10. This, according to my mental survey, is precisely what the *Electricity Supply Commission v Stewards and Lloyds of South Africa (Pty) Ltd 1981 (3) SA 340 (A)* court had in mind when it concluded that '*a debt is that which is owed or due ... as money ... to another ...*'

11. The *Claimants'* claim is consequently, or without doubt, a 'debt' because it is a demand which sounds in (the contemplated) money.

12. In the circumstances I conclude that the *Claimants'* claim is a 'debt' for purposes of the Prescription Act.

13. There is another reason on account of which I conclude that the *Claimants'* claim is a debt (under the Prescription Act) and this is because our law has well established that even an obligation to pay or to render something to another constitutes a debt, under the Prescription Act.

14. For instance the court in *Off-Beat Holiday Club and Another v Sanbonani Holiday Spa Shareblock Limited and Others 2017 (5) SA 9 (CC)* endorsing *Electricity Supply Commission v Stewards and Lloyds of South Africa (Pty) Ltd* held that a debt for purposes of the Prescription Act means:

> '*Something owed or due; something (as money, goods or services) which one person is under an obligation to pay or render to another. A liability or obligation to pay or render something the condition of being so obligated'.*

15. Therefore or the fact that the *Claimants* seek an order that they be graded correctly, in my view, intends something to occur and/or the fulfillment of an obligation – i.e. to be placed at, and 'paid' according to, the appropriate grade.

16. My view, having had regard to the recent legal developments, is that 'any' demand other than money, goods and service cannot prescribe. The *Claimants* are aiming at this consequence and this is what the court proposed in *Makate v Vodacom (Pty) Ltd 2016 (4)*

SA 121 (CC). In this case the court held that *Makate* 'essentially' sought the enforcement of an agreement to negotiate in good faith. This situation (according to the court) excludes or '*falls beyond the scope of the word as determined in cases like Escom which held that a debt is an obligation to pay money, deliver goods or render services*'. Put in a another way, the court found that *Makate's* claim had not prescribed as it fell beyond the scope of the word 'debt', as the relief sought was not an amount of money, goods or services – which *Vodacom* had to pay or render to *Makate*.

17. The *Claimants'* claim, however, does not form part of this intended 'exclusion' and the suggestion that their relief (sought) do not fall within the meaning of debt as meant by the Prescription Act is therefore incorrect.

18. After all (and unlike *Makate*) the *Claimants'* claim is that they be paid an amount of money (at least).

19. Surely a debt is the equivalent of a right of action, and when one is extinguished so is the other. This means the obligation can be discharged by the payment of money.

20. Even if I am wrong with my aforementioned conclusions, there is an entirely different or third reason as to why I conclude that the *Claimants'* claim is a debt.

21. This reason is based upon the fact that the *Claimants'* alleged that their claim is founded on an 'unfair labour practice' and specifically section 186(2)(a) of the LRA. This, issue of section 186(2)(a), is common cause.

22. The true nature of the *Claimants'* claim is because specific salary scales were applied to specific grades and if an employee was graded incorrectly, it will have the effect that they have been receiving the incorrect salary – from the date of implementation of the allocated or incorrect grade – and all subsequent payments, increases and annual bonuses were incorrectly measured and effected.

23. Grading is akin to an unfair labour practice, referred to in section 186(2)(a) of the LRA. [4]

24. I came to this conclusion based on the fact that the CCMA and Labour Court (including the LAC) have made it clear that issues of grading constitutes an unfair labour practice dispute. To illustrate my point; in *NTEU obo Mahonana and Another v University of Fort Hare (2019) 10 BALR 1102 (CCMA)* the CCMA concluded that the University's failure to conduct job grading deprived the employee of benefits and this amounted to an unfair labour practice. The Commissioner accordingly awarded the employees six months' remuneration and ordered the University to upgrade and evaluate them. The Labour and Labour Appeal Court did so too in cases such as *Andile Zokufa v National Bargaining Council for the Chemical Industry (C617/16)* 8 December 2017, *Mathibeli v Minister of Labour (2015) 3 BLLR 267 (LAC)*, *Apollo Tyres South Africa (Pty) Ltd v CCMA and Others (2013) 34 ILJ 1120 (LAC)*, and the like.

25. Therein lies the further or third reason for my conclusion that the *Claimants'* claim is a debt, because the LAC in *Motsoaledi and Others v Mabuza (JA 47 of 2016) [2018] ZALAC 74 (06 September 2018)* made it clear that '*a claim to remedy an unfair labour practice clearly gives rise to a debt as contemplated by the Prescription Act*'.

26. The next question which needs to be considered/answered is whether (or not) the said debt has 'expired'.

27. In order to comprehend the answer it is necessary to appreciate the following material facts. These facts are:

    27.1 In an attempt to overcome their grading dispute (i.e. concerning Category A and B employees) parties entered into private arbitration agreement(s) and subsequently got involved in the said proceedings.

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4. This section provides that an unfair labour practice means '*any unfair act or omission that arises between an employer and an employee involving – (a) unfair conduct by the employer relating to the promotion ... or relating to the provision of benefits to an employee*'.

27.2 The dispute concerning the Category A employees was resolved (by way of arbitration award) on 05 April 2003 – which found no fault with the *Respondent's* conduct or allocation of the disputed grades.

27.3 This (Category A) arbitration came before or was constituted before Arbitrator Cohen – on 17 to 20 March 2003 – according to paragraph 14 of the arbitration award of Arbitrator Sirkhot.

27.4 The papers do not expressly illustrate what gave rise to the split, if any – i.e. between the Category A and B arbitrations.

27.5 The papers, nevertheless, clearly establish that parties seem to be at loggerheads regarding the status of the separation – i.e. with the *Respondent* holding the view that the Categories A and B disputes combined into the same or a single arbitration. [5]

27.6 Be that as it may, parties required the Arbitrator (Mr. Sirkhot) to determine:

27.6.1 Whether or not the arbitration agreement of 20 June 2002 (with its 21 February 2003 addendum) was extended beyond 30 May 2003.

27.6.2 If it was extended, whether or not the *Claimants* have waived their right to enforce the arbitration agreement, or is *estopped* from doing so as a result of:

27.6.2.1 Their failure to enforce the arbitration agreement – i.e. by way of competent legal proceedings.

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5. See – Paragraph 73.

27.6.2.2 The delay in enforcing any rights that it may have to request arbitration had become unenforceable (i.e. as a result of the parties' inability to agree on the terms of reference for the individual arbitrations).

27.6.2.3 The delay in enforcing any rights that it may have to request arbitration, concerning the *Respondent's* refusal to submit to arbitration on 02 July 2008 and the withdrawal thereof on 10 November 2008.

27.7 The appointed Arbitrator, Sirkhot, (analyzed the evidence and argument and on 16 January 2015) in his award found that:

27.7.1 The agreement does not contain '*some type of time bar*'.

27.7.2 The agreement '*is for an indefinite period*'.

27.7.3 There is no '*cut of point beyond which the parties could not proceed*'.

27.7.4 There are '*no impediments to the resolution of the Category B disputes, by arbitration*'.

27.7.5 There was no need for the 20 June 2002 agreement (together with its addendum) to be extended, beyond 30 May 2003, in order to remain valid.

27.7.6 There are no impediments to the resolution of the Category B disputes – by way of arbitration as provided for in the said agreement.

27.7.7 The points *in limine* (as raised) by the *Respondent* are accordingly dismissed.

28. These are important considerations because it confronts the *Claimants'* contention *'that the issue of prescription has [already] been decided and comprehensively dealt with by Arbitrator Sirkhot in his award ...'*

29. Arbitrator Sirkhot's terms of reference unmistakably indicate that he was not called upon to consider, nor did he determine, the issue of prescription.

30. Importantly, Arbitrator Sirkhot's terms of reference were a by-product of an agreement/contract.

31. This ('agreement or contractual terms of reference') aspect is significant because it is legally binding not only on the parties, it becomes binding on the subsequent arbitration(s). I cannot read terms of reference into an agreement which were never intended or agreed to by the parties.

32. Further support for this conclusion can be found in the contextual conclusions reached by Arbitrator Sirkhot.

33. His determinations essentially addressed the issue of whether the agreement remained valid and contain a deadline, within which referral to arbitration could be made – i.e. relevant to clause 7 of the addendum to the arbitration agreement.

34. This, in my view and with respect, has nothing to do with prescription. The Arbitrator Sirkhot award contemplates how long the *Claimants* had to refer the matter to arbitration and/or its soundness beyond a certain date. This means the said award concerned itself with the beginning (validity) rather than the end (prescription) of the arbitration.

35. By parity of reason: statutory time frames do not undermine prescription. It runs concurrently/parallel to each other. The same applies to the present case.

36. The difference is that lateness or non-compliance with the predetermined time frame is condonable but prescription (if successfully claimed) terminates a claim by operation of law. By condonable I mean that action continues beyond the default, whereas prescription proper brings the matter to a dead end.

37. Furthermore (and given the aforementioned factual reality) it is my view that prescription commenced to run from 18 January 2002.

38. This (18 January 2002) date completes the *Claimants'* cause of action, as on this date their claim is capable of being made. Put differently, this (18 January 2002) is the date when the *Respondent* allegedly undermined the *Claimants'* rights.

39. This is so because on 18 January 2002 a final decision was made by the *Respondent* – concerning the *Claimants'* grading. This is the date when the *Claimants* (together with other employees of the *Respondent*) received final outcome letters of their respective job grades following the National Grading Review.

40. In fact the period of prescription begins to run against a creditor when the creditor has the minimum facts which are necessary to institute action. [6]

41. I am mindful that certain pre-requisites must be met for prescription to begin to run and/or that certain factors may interrupt the running of prescription.

42. This means the mere fact that I have concluded that the *Claimants'* claim constitutes a debt, and that Arbitrator Sirkhot's award did not deal with the issue of prescription, does not end my enquiry.

43. The next item which demands determination is whether (or not) the *Claimants'* claim was interrupted.

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6. See – McMillan v Bate Chubb and Dickson Incorporated [2021] ZASCA (SCA), paragraphs 38-39.

44. I, amongst others, need to test the correctness (or not) of the *Claimants'* contention that their claim is not yet capable of prescription because the understanding between the parties, is that a '*particular event (such as the present arbitration) must first occur*' before the prescription '*begin to run*'.

45. I disagree.

46. The law is clear: a contract, at its basics, arises by agreement (*ad idem*) between two or more contracting parties.

47. This by implication means, in order to succeed with this proposition the *Claimants* have to establish, in the paperwork, it was the joint understanding of the parties that a '*particular event (such as the present arbitration) must first occur*' before the prescription '*begin to run*'.

48. The *Claimants*, in this regard, contends that for arbitration to proceed the *Respondent* must comply with the agreement and provide all the documentation (i.e. considered by the Appeals Committee) to enable them to prepare the papers for the dispute. Only then will the *Claimants* be able to proceed to arbitration.

49. I am not able to endorse this contention because none of the documents handed up as evidence expressly or impliedly conveys this message or agreement – articulated by the *Applicants* – that arbitration must first take place before prescription begin to run.

50. I consequently agree with the *Respondent* that obtaining an arbitration award and/or obtaining the said documentation, for that matter, it is not a prerequisite that has to be met before prescription commences.

51. To say the least the *Claimants* has had multiple legal recourse to cure the *Respondent's* alleged failure to surrender the documents concerned – i.e. by acquiring a subpoena, obtaining the documents through discovery procedure, securing a directive from the

appointed arbitrator, application to compel, the use of the Promotion of Access to Information Act 2 of 2000, and so and so on.

52. I therefore fail to accept this 'documentation first' approach/contention.

53. I do so for the reason that the agreement(s) quite openly permits a referral to arbitration without the *Claimants* first obtaining documents from the *Respondent*.

54. I base this conclusion on the fact that the 30 May 2001 agreement specifically provides that the arbitrator will decide whether to determine cases on the basis of documentation "or" hear viva voce evidence.

55. It is, in addition to the above, important to note that the interruption of prescription happens by express acknowledgement in writing of liability (on the part of the debtor) or by the service of legal process (for the enforcement of the claim).

56. I could not detect any or such acknowledgement of the debt on the part of the *Respondent.*

57. I also did not come across a referral or any other indicator or action/legal process that supports a referral – i.e. during the period under consideration.

58. The implication hereof, and/or my view, is that the instrument (i.e. the 'referral', so-to-speak) gives rise to the Category B arbitration and a legal procedure which had begun.

59. I am mindful that the term legal process is not defined in the Prescription Act, but section 15(b) provides, however, that a 'legal process' could at the very least be seen to include a petition, a rule *nisi*, a pleading in convention, a third party notice and 'any document' by which legal proceedings are commenced.

60. My view is that the referral form (i.e. by way of example and/or which gave birth to this Category B arbitration) is akin to a summons or application and is a legal process or the document contemplated by section 15(b), referred to above.

61. I hold this view because the instrument which set the arbitration in motion is the legal process by which action was instituted – i.e. to enforce the *Claimants'* right – and which could otherwise be rendered unenforceable by prescription.

62. The 'referral' would have been the action/legal process to enforce the *Claimants'* right – i.e. for payment of the alleged debt – and in turn could have 'interrupted' the running of prescription.

63. The referral issue cannot be overlooked because the (collective) agreement contemplates same when it, for instance, at paragraph 2 of the 21 February 2003 agreement stipulates that the parties agree that disputes referred to arbitration will be dealt with. This sentiment is echoed by other agreements. For example by paragraph (e) of the 30 May 2001 agreement – this requires that a dissatisfied employee to refer the matter to arbitration.

64. This issue is significant because at the very least the running of prescription shall be interrupted by service of legal process.

65. Presently there was no service on the *Respondent* of legal process and it can for this reason not be suggested that prescription was interrupted.

66. I can also not conclude that the arbitration agreements (itself) constitute legal process/service because it anticipates future legal proceedings. The Arbitrator Sirkhot award was at any rate or merely intermediate proceedings.

67. I have also considered the *Claimants* proposition that their claim at any rate did not prescribe by virtue of the LAC's decision in *Mngadi v Garth Jenkins NO and Others (2021) 3 BLLR 240 (LAC)*.

68. I cannot approve because this (*Mngadi*) matter concerned condonation and is thus distinguishable from prescription.

69. In fact accepting the *Claimants'* proposition (in the *Mngadi* context) would mean unfair labour practice disputes cannot prescribe.

70. Such interpretation would not only undermine the legislature's intention with the Prescription Act but also undercut *Motsoaledi v Mabuza* (referred to above).

71. No wonder Tlhotlhalemaje, J in the *Parliament of the Republic of South Africa v CCMA and Others (C 646/16) [24 April 2018]* matter held that:

> '*There is nothing called a 'continuing unfair labour practice' for the purposes of compliance with applicable time limits. The provisions of section 191 (1) (b) (ii) of the LRA requires a dispute to be referred within 90 days of the date of the act or omission which allegedly constitute the unfair labour practice, or if it is a later date, within 90 days of the date on which the employee became aware of the act or occurrence. Thus, even if conduct or a dispute is on-going, it must have some form of conception from which the 90 days can be calculated. A dispute cannot simply be on-going from nowhere*'.

72. All things considered – the claim was a debt, was not interrupted and has thus prescribed.

REMARKS

73. Another issue which strains me is the fact that the *Respondent* has previously notified the *Union* that the '*Category A and B arbitrations were concluded on a clustered basis and*

this means that there will be no arbitration hearings for Category B ... making the agreement unenforceable'.-Does this mean the *Respondent* has given the *Union* notice as contemplated by section 23(4) of the LRA ? Taking into account that the agreements have no time bar.

74. Another issue is the fact that the Category A employees met the deadline. The Category B employees ?

COSTS

75. Turning to the issue of costs. I appreciate that I have a wide discretion to award costs but I do not believe that a cost order is warranted.

76. I have, in this regard, particularly considered the fact that there is an ongoing relationship between the litigants and would not want a cost order to undercut the relationship.

77. Taking further into account that the *Union's* present endeavor was not frivolous in nature.

78. In light of the above, the following order is issued:

ORDER

79. The special plea of prescription is upheld and the *Claimant's* claim is dismissed.

80. There is no order as to costs.

Signature: _____

Private Arbitrator: **Mark Thys**

(07 July 2022)