

SOUTH AFRICA / JUDGMENT

Combrink v Doves Funerals (Pty) Ltd and Others (JR3083/06) [2016] ZALCJHB 188 (20 May 2016)

[2016] ZALCJHB 188

COURT

Labour Court Johannesburg

BEFORE

Rabkin-Naicker

CASE / FILE NUMBER

JR3083/06

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THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

JUDGMENT

Case no: JR3083/06

Not Reportable

In the matter between:

ACC COMBRINK

Applicant

and

DOVES FUNERALS (PTY) LTD

First Respondent

CCMA

COMMISSIONER RA DIBDEN

Third Respondent

Heard: 4 February 2016

Delivered: 20 May 2016

RABKIN-NAICKER, J

- [1] This applicant applies to make an arbitration award under case number MP808/06 an order of court, and to dismiss an application to review that award which was launched in 2007.
- [2] The first respondent was ordered to pay an amount of R173 035, 92 to the applicant in terms of the said award which was handed down on 21 November 2006. On 3 October 2007, the first respondent obtained an interim order staying the enforcement of the arbitration award under case number MP808/06 pending the outcome of its review under case number JR3083/06. This was done in response to steps taken by the applicant to certify the award.
- [3] The first respondent submits that the award in question has prescribed and that the stay of the enforcement of the award had no effect on the running of prescription. It relies on the following paragraphs of *Myathaza v Johannesburg Metropolitan Bus Service (SOC) Ltd t/a Metrobus Mazibuko v Concor Plant Cellucity (Pty) Ltd v Communication Workers Union* on behalf of Peters[1]

“[61] The question that immediately arises, with particular reference to the appeals before us, is whether the certification, contemplated in s 143(3) of the LRA, affects the inception of prescription in respect of the award, or more particularly, whether the lack of certification of an award means that the award, or more specifically the 'debt' embodied in the award, is not due.

- [62] The certification is merely required to enforce arbitration awards as if they were orders of the Labour Court. But compliance with the award is not delayed pending certification. Performance by the debtor of the obligation(s) embodied in the award is not dependent upon, or subject to, the certification contemplated in s 143 of the LRA.
- [63] Certification therefore has nothing to do with whether the award is due or not, but is part of the process of executing an award as if it is an order of the Labour Court.”
- [4] The applicant did not oppose the urgent application staying enforcement of the award which included the following relief:

“2.2 The 3rd respondent is and is hereby interdicted from taking further steps, in contemplation and furtherance of enforcing the arbitration award under case MP808/06

pending the outcome of the Applicant’s application for review of the arbitration award under case number JR3038/06.”

- [5] Unfortunately for the applicant, an application to make the Award an order of court was not served on the respondent before the expiration of the three year period subsequent to the handing down of the Award. I am bound by the authority as set out in *Myathaza v Johannesburg Metropolitan Bus Service (SOC) Ltd t/a Metrobus Mazibuko v Concor Plant Cellucity (Pty) Ltd v Communication Workers Union* on behalf of Peters in which the LAC in particular held that:

“[71] It is thus clear what the position is in relation to reviews for the setting aside of awards issued after 1 January 2015, because the LRA in s 145(9) now specifically provides that such reviews interrupt the running of prescription in terms of the Prescription Act. However, the issue to be decided pertains to the position regarding awards issued prior to 1 January 2015 (ie prior to the amendment or the commencement of the amendment), when there was no operative provision in the LRA to the effect that an application to set aside an arbitration award interrupts the running of prescription.

- [72] I agree with the argument that it is not correct to utilise the amendment as justification or fortification for the view that the position in the amendment was always the legislative intent or purpose. The legislature may simply have had nothing to say on the matter before that or may have been content with the strict position under s 15 of the Prescription Act, or may since have changed its mind on the matter, hence the amendment. It is noteworthy that the amendment is expressly not retrospective.
- [73] Section 15(1) of the Prescription Act is unambiguous and it is plain that a review to set aside an award is not 'process whereby the creditor claims payment of the debt'. On the contrary, it is a process whereby the debtor seeks to set aside the debt. Such a review, therefore, does not interrupt prescription.
- [74] But for the amendment contained in s 145(9), the same principle would have pertained to reviews in respect of awards made after January 2015. Section 145(9) makes, or introduces, a special exception, but it is not retrospective and cannot be applied to reviews in respect of awards issued before 1 January 2015.
- [75] In any event, it has long been recognised in our law that a creditor cannot 'by his conduct postpone the commencement of prescription'. Thus a creditor cannot by his own conduct in bringing a review application, interrupt or postpone the running of prescription in respect of the award, unless the law provides otherwise, as is the case under the amendment.
- [76] An application to make an arbitration award an order of court could however be construed as a 'process whereby the creditor claims payment of the debt'. It is the substance rather than the form of the application that matters. By bringing such an application, the creditor is in effect asking the court to order the debtor to pay the debt (represented by the award).
- [77] The application to make an award a court order will interrupt prescription by its mere service on the debtor. But for it actually and effectively to interrupt prescription, the creditor will have to prosecute his claim under that process to final judgment.
- [78] In argument, counsel pointed to the fact that where a review is pending, the Labour Court is not likely to make the award an order of court. That may be the case, as was discussed by the Labour Court in Rotolabel and POPCRU obo Sifuba, amongst others, but there is nothing preventing a debtor, at any time after the issue of the arbitration award, and before its prescription, from bringing an application to make such an award an order of court.

[79] The review is not a bar to the bringing of an application to make the award an order of court. In addition, it is also important to note that it is not the granting of the order in such an application that will trigger the deemed interruption of prescription, but the mere service of the application for such an order, although the final granting of the order is necessary for the interruption to be successful in the end.”

[6] Given the above authority, the Award under case number MP808/06 has prescribed. I therefore make the following order:

Order

1. The applications are dismissed.

H. Rabkin-Naicker

Judge of the Labour Court of South Africa

Appearances:

Applicant:

Adv Y. van Aartsten

Instructed by: Drijkus Lombard Attorneys

First Respondent: Farrell Inc. Attorneys c/o Webber Wentzel

[1] (2016) 37 ILJ 413 (LAC)

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