

SOUTH AFRICA / JUDGMENT

Mogaila v Coca Cola Fortune (Pty) Limited
(CCT76/16) [2017] ZACC 6; [2017] 5 BLLR 439
(CC); (2017) 38 ILJ 1273 (CC); 2017 (7) BCLR
839 (CC); 2018 (1) SA 82 (CC) (2 March 2017)
[2017] ZACC 6

COURT

Constitutional Court

BEFORE

Mogoeng, Nkabinde, Cameron, Froneman, Jafta,
Khampepe, Madlanga, Mhlantla, Mojaelo,
Pretorius, Zondo

CASE / FILE NUMBER

CCT76/16

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CONSTITUTIONAL
COURT OF SOUTH AFRICA
Case CCT 76/16
In the matter

between:

MARIA JANE
MOGAILA
Applicant
and
COCA COLA FORTUNE
(PTY)
LIMITED
Respondent

Neutral citation:

Mogaila v Coca Cola Fortune (Pty) Limited
[2017] ZACC 6

Coram:

Mogoeng CJ, Nkabinde ADCJ, Cameron J,
Froneman J, Jafta J, Khampepe J, Madlanga J, Mhlantla J, Mojaelo AJ,
Pretorius AJ and
Zondo J

Judgments:

The Court

Decided on:

2 March 2017

Summary:	Direct access — Labour Relations Act, 1995 — Prescription Act, 1969 — dismissal dispute — arbitration award — order of reinstatement — prescription of arbitration award Direct access granted — meaning of “debt” — Myathaza applicable — order of reinstatement did not prescribe ORDER Application
for direct access:	The
following order is made:	1. The application for direct access is granted. 2. It is declared that the order of reinstatement in favour of the applicant, Ms Maria Jane Mogaila, under arbitration award LP7202-07, has not prescribed in terms of the Prescription Act 68 of 1969. 3. Coca Cola Fortune (Pty) Limited is ordered to pay costs in this Court.

JUDGMENT

THE COURT (Mogoeng CJ, Nkabinde ADCJ, Cameron J, Froneman J, Jafta J, Khampepe J, Madlanga J, Mhlantla J, Mojapelo AJ, Pretorius AJ and Zondo J concurring):

Introduction

[1] This is an application for direct access. The applicant, Ms Maria Jane Mogaila, seeks in effect an order[1] that (a) the Prescription Act[2] (Prescription Act) is not consistent with the Labour Relations Act[3] (LRA); and (b) an order of reinstatement granted in her favour does not constitute a “debt” for the purposes of the

Prescription Act. In addition, Ms Mogaila seeks an order directing the respondent, Coca Cola Fortune (Pty) Limited (Coca Cola), to reinstate her to her previous employment position.

[2] The application was lodged in April 2016. At that stage, the Court had already set down for hearing on 1 September 2016 the application of Mr Sizwe Myathaza against the Johannesburg Metropolitan Bus Services (SOC) Limited t/a Metrobus and Others (Myathaza). [4] Since the issues in the two applications corresponded, the Court informed Ms Mogaila that her application would be held in abeyance until the determination of Myathaza. That has now happened. On 15 December 2016, this Court unanimously upheld Mr Myathaza’s appeal.[5]

[3] This Court has decided the application without written submissions or oral argument.[6]

Background

[4] From November 2001 to November 2007, Coca Cola employed Ms Mogaila as a stock controller. On 26 November 2007,[7] after a disciplinary enquiry had found her guilty of assault, Ms Mogaila was dismissed. Aggrieved, she approached the

Commission for Conciliation, Mediation and Arbitration (CCMA). An arbitration hearing took place on 26 March 2008.

It was finalised on 18 April 2008. On 29 April 2008, the Commissioner found Ms Mogaila's dismissal procedurally fair but substantively unfair. The award ordered Coca Cola to reinstate Ms Mogaila with effect from 2 June 2008.[8] Coca Cola was also ordered to pay Ms Mogaila six months' back pay of R27 899.40.[9]

[5] On 2 June 2008, Ms Mogaila applied to have the arbitration award formally certified in terms of section 143(3) of the LRA.[10] This was a precursor to enforcing it. It is unclear whether certification ever took place.[11] When she reported for work, Ms Mogaila was informed by the human resources department that Coca Cola intended taking the arbitration award on review.

[6] On 9 June 2008, Ms Mogaila was served with a copy of the review application.[12] The Labour Court dismissed the review application. A petition to the Labour Appeal Court was dismissed on 2 October 2013.

[7] After leave to appeal was refused, Ms Mogaila's then attorney, Mr Lombard, informed her that she should report for duty on 4 November 2013. In addition, on 31 October 2013, Mr Lombard furnished a letter to Coca Cola stating that, since its petition for leave to appeal had failed, the arbitration award must be implemented and Ms Mogaila intended to resume her duties on 4 November 2013.

[8] Ms Mogaila did as indicated. But on arriving at work, she was told that a letter had been sent to Mr Lombard. This informed him that, since the arbitration award constituted a "debt" for the purposes of the Prescription Act and Ms Mogaila had failed to enforce it within three years after 29 April 2008, the award could no longer be implemented. It had prescribed.[13]

[9] She was well and truly snookered. Or so Coca Cola would have had it.

Direct access

[10] Ms Mogaila approached this Court directly in terms of section 167(6)(a) of the Constitution, read together with rule 18 of the Constitutional Court Rules.[14] Coca Cola opposed her application, supporting the Labour Courts' jurisprudence that was at issue in *Myathaza*. [15]

[11] The considerations relevant to direct access were first considered in *Bruce v Fleecytex*: [16]

“Whilst the prospects of success are clearly relevant to applications for direct access to this Court, there are other considerations which are at least of equal importance. This Court is the highest court on all constitutional matters. If, as a matter of course, constitutional matters could be brought directly to it, we could be called upon to deal with disputed facts on which evidence might be necessary, to decide constitutional issues which are not decisive of the litigation and which might prove to be purely academic, and to hear cases without the benefit of the views of other courts having constitutional jurisdiction.”[17]

[12] Since it is ordinarily not in the interests of justice for a court to sit as a court of first and last instance,[18] “compelling reasons are required to justify a different procedure and to persuade this Court that it should exercise its

discretion to grant direct access”.[19]

[13] On these principles, direct access is plainly warranted. Whether an arbitration award constitutes a “debt” for the purposes of the Prescription Act and whether the Prescription Act is consistent with the LRA were both at issue in Myathaza. In material respects, Ms Mogaila’s case corresponds with Mr Myathaza’s. It would be pointless and cruel to send her back on a quest through the Labour Court and potentially the Labour Appeal Court when the solution to her complaint lies right to hand, in the order recently issued in Myathaza. It is in the interests of justice that Ms Mogaila be allowed direct access.

Myathaza

[14] Metrobus employed Mr Myathaza as a bus driver.[20] Aggrieved by a dismissal, he referred a dispute to the relevant bargaining council, which appointed an arbitrator to adjudicate.

The arbitrator found that the dismissal was unfair and ordered reinstatement with retrospective effect.[21] Metrobus was also ordered to pay Mr Myathaza back pay.[22] But Metrobus failed to do so.

[15] When Mr Myathaza reported for work, Metrobus told him it intended to have the arbitration award reviewed. Mr Myathaza opposed the review proceedings. Those proceedings, at the time this Court heard oral argument, were still pending before the Labour Court.[23] Mr Myathaza then applied to have the arbitration award made an order of court.[24] Metrobus opposed the application on two grounds. First, it contended that the arbitration award could not be made an order of court whilst the review application was pending. Second, the arbitration award had, it said, in any event prescribed.[25]

[16] The Labour Court held that the arbitration award constituted a “debt” for the purposes of the Prescription Act.>[26] On this basis, the award had prescribed and the application was dismissed. On appeal, the Labour Appeal Court upheld the Labour Court’s findings.[27] That Court held that—

“any arbitration award that creates an obligation to pay or render to another, or to do something, or to refrain from doing something, does meet the definitional criteria of a ‘debt’ as contemplated in the Prescription Act.”[28]

Since an arbitration award constituted a “debt” in terms of the Prescription Act, the Labour Appeal Court found that the award prescribed three years from the date it was issued.[29] Mr Myathaza’s award had thus prescribed, and his appeal was dismissed.[30]

[17] Mr Myathaza sought leave to appeal from this Court. His appeal succeeded. Three judgments were delivered. The first, penned by Jafta J, with Nkabinde ADCJ, Khampepe J and Zondo J concurring, held that the Prescription Act was incompatible with the provisions of the LRA.[31] In interpreting section 16 of the Prescription Act,[32] the first judgment found that in the context of the Constitution, “inconsistency” was to be afforded a meaning wider than contradiction or conflict.[33] Relying on this Court’s decision in Mdeyide,[34] the first judgment held that “[i]t is enough if there are material differences between [the two pieces of legislation]”. [35]

[18] Based on the fundamental differences between the LRA and the Prescription Act,[36] the first judgment concluded that the latter did not apply to the LRA. The result was that Mr Myathaza’s arbitration award had not prescribed. In a statement that was additional to the judgment’s basis of decision (obiter), the first

judgment

further held that, even if the Prescription Act were to apply, Mr Myathaza’s reinstatement award could not prescribe because it did not constitute a “debt” for the purposes of the Prescription Act. [37] This was because the order of reinstatement was “not an obligation to pay money or deliver goods or render services by Metrobus to the applicant”. [38]

[19] In a judgment concurring with the approach of Jafta J, Zondo J wrote separately to underscore why the Labour Court and the Labour Appeal Court were mistaken in their approach (third judgment).[39] The third judgment buttressed the first judgment’s finding that the Prescription Act was not applicable to LRA matters.[40] It disagreed that a referral of a dismissal dispute to the CCMA interrupted prescription since that could occur only by the service on the debtor of the process contemplated in section 15(1) read with subsection (6) of the Prescription Act.[41]

[20] The third judgment in addition concluded that an arbitration award did not constitute a “debt” for the purposes of the Prescription Act.[42]

- [221] The second judgment in *Myathaza* was penned by Froneman J, with Madlanga J, Mbha AJ and Mhlantla J concurring. The second judgment held that the Prescription Act was not inconsistent with the LRA, but complementary to it. It found that the provisions of the two statutes are capable of complementing each other in a way that best protects the fundamental right of access to justice, whilst at the same time preserving the speedy resolution of disputes under the LRA.[43]
- [222] After finding the two statutes consistent, the second judgment examined the meaning of “process” and “debt” in section 15 of the Prescription Act.[44] It held that commencing proceedings before the CCMA interrupted prescription in accordance with section 15(1) of the Prescription Act.[45]
- [223] In determining whether a claim for unfair dismissal under the LRA constitutes a “debt”, the second judgment held that “only a claim for the enforcement of legal obligations should qualify as a ‘debt’ under the Prescription Act”.[46] An unfair dismissal claim sought to enforce three possible kinds of legal obligations, namely reinstatement, re-employment and compensation. This meant it was a “debt”, because each of those obligations “enjoins the employer to do something positive”:

“In the case of reinstatement, as was claimed and ordered here, it means the resuscitation of the employment agreement with all the attendant reciprocal rights and obligations. The employer must provide employment and pay remuneration. Both fall within the meaning of a ‘debt’ under the Prescription Act, however narrowly interpreted.”[47]

- [224] Since the service of process initiating the CCMA dispute resolution process interrupted prescription, prescription remained interrupted until any review proceedings seeking to nullify the CCMA outcome were finalised:

“The restriction to review only provides a cogent and compelling reason for re-interpreting the Prescription Act to include statutory reviews under section 145 of the LRA as included in the judicial process that interrupts prescription until finality is reached under section 15 of that Act. The restriction infringes the right of access to courts more severely than where a right of appeal is allowed.

An interpretation that best protects the right of access should be preferred. That can be achieved by allowing the right of review to play the same role of finality as the right of appeal does in ordinary matters.”[48]

- [225] The referral of the dispute to the CCMA interrupted prescription, which remained interrupted until the finalisation of the review proceedings.[49] Hence the second judgment found that Mr *Myathaza*’s arbitration award had not prescribed and, like the first and third judgments, that the appeal should succeed.

- [226] The order the Court in *Myathaza* unanimously granted read thus:

“1. Leave to appeal is granted.

2. The appeal is upheld.
3. The orders of the Labour Court and the Labour Appeal Court are set aside and that of the Labour Court is replaced with the following:

‘The arbitration award issued on 17 September 2009 in favour of Mr Sizwe Myathaza is made an order of the Labour Court.’

4. Johannesburg Metropolitan Bus Services (SOC) Ltd t/a Metrobus is ordered to pay costs in the Labour Court, Labour Appeal Court and this Court, including costs of two counsel where applicable.”[50]

Analysis

[27] Because of the parity of votes in Myathaza, in which none of the judgments secured a majority, no binding basis of decision (ratio) emerges from the Court’s decision.

But, on either approach, that of Jafta J and Zondo J, or that of Froneman J, Ms Mogaila is entitled to an order declaring that the arbitration award ordering her reinstatement has not prescribed. She is entitled to secure its certification under section 143(3) of the LRA, and its enforcement under section 143(1).

[28] Whether the arbitration award in her favour could not have prescribed because the Prescription Act does not apply at all to LRA matters, as the first and third judgments held (or because, even if that statute were applicable, the reinstatement

order was “not an obligation to pay money, deliver goods or render services”),[51] or because, as the second judgment held, the CCMA referral interrupted prescription, persisting until the finalisation of the review proceedings in October 2013, Ms Mogaila must succeed.

[29] On the second judgment’s approach, the arbitration award would have prescribed only in October 2016. Ms Mogaila filed her application in this Court timeously, in April

2016. Prescription was therefore interrupted, again, pending the finalisation of these proceedings. On either approach, Ms Mogaila is entitled now to proceed with the certification of the award under section 143 of the LRA.[52]

[30] Ms Mogaila has been successful before this Court and there is no reason why costs should not follow.

Order

[31] The following order is made:

2. It is declared that the order of reinstatement in favour of the applicant, Ms Maria Jane Mogaila, under arbitration award LP7202-07, has not prescribed in terms of the Prescription Act 68 of 1969.

- [1] The applicant's notice of motion asked for an order "[t]o decide whether or not" prescription applied and her reinstatement award was a "debt".
- [2] 68 of 1969.
- [3] 66 of 1995.
- [4] CCT 232/15.
- [5] *Myathaza v Johannesburg Metropolitan Bus Services (SOC) Limited t/a Metrobus* [2016] ZACC 49 (*Myathaza*).
- [6] Rule 18(5) of the Constitutional Court Rules provides that: "Applications for direct access may be dealt with summarily, without hearing oral or written argument other than that contained in the application itself: Provided that where the respondent has indicated his or her intention to oppose in terms of subrule (3), an application for direct access shall be granted only after the provisions of subrule (4)(a) have been complied with."
- [6] Rule 18(5) of the Constitutional Court Rules provides that:
- "Applications for direct access may be dealt with summarily, without hearing oral or written argument other than that contained in the application itself: Provided that where the respondent has indicated his or her intention to oppose in terms of subrule (3), an application for direct access shall be granted only after the provisions of subrule (4)(a) have been complied with."*
- [7] This date, which squares with the relief Ms Mogaila later obtained, is taken from the arbitration award and from the applicant's founding affidavit, though in the confirmatory affidavit of Ms Mogaila's attorney, he says, apparently mistakenly, that she was dismissed on 26 November 2008. Coca Cola also states Ms Mogaila was dismissed in 2008.
- [8] This judgment deals only with the reinstatement award and not the back pay. This is because the relief sought makes no mention of back pay, but relates only to the reinstatement award.
- [9] Ms Mogaila's monthly salary was R4 649.90.
- [10] Section 143 of the LRA provides: "(1) An arbitration award issued by a commissioner is final and binding and it may be enforced as if it were an order of the Labour Court in respect of which a writ has been issued, unless it is an advisory

arbitration award. (2) If an arbitration award orders a party to pay a sum of money, the amount earns interest from the date of the award at the same rate as the rate prescribed from time to time in respect of a judgment debt in terms of section 2 of the Prescribed Rate of Interest Act, 1975 (Act No. 55 of 1975), unless the award provides otherwise. (3) An arbitration award may only be enforced in terms of subsection (1) if the director has certified that the arbitration award is an award contemplated in subsection (1). (4) If a party fails to comply with an arbitration award certified in

terms of subsection (3) that orders the performance of an act, other than the payment of an amount of money, any other party to the award may, without further order, enforce it by way of contempt proceedings instituted in the Labour Court. (5) Despite subsection (1), an arbitration award in terms of which a

party is required to pay an amount of money must be treated for the purpose of enforcing or executing that award as if it were an order of the Magistrate's Court. (6) Subsections (1), (4) and (5), as amended by the Labour Relations

Amendment Act, 2014, takes effect on the date of commencement of the Labour Relations Amendment Act, 2014, and applies to an arbitration award issued after such commencement date."

[10] Section 143 of the LRA provides:

"(1) An arbitration award issued by a commissioner is final and binding and it may be enforced as if it were an order of the Labour Court in respect of which a writ has been issued, unless it is an advisory

arbitration award.

(2) If an arbitration award orders a party to pay a sum of money, the amount earns interest from the date of the award at the same rate as the rate prescribed from time to time in respect of a judgment debt in terms of section 2 of the Prescribed Rate of Interest Act, 1975 (Act No. 55 of 1975), unless the award provides otherwise.

(3) An arbitration award may only be enforced in terms of subsection (1) if the director has certified that the arbitration award is an award contemplated in subsection (1).

(4) If a party fails to comply with an arbitration award certified in terms of subsection (3) that orders the performance of an act, other than the payment of an amount of money, any other party to the award may, without further order, enforce it by way of contempt proceedings instituted in the Labour Court.

(5) Despite subsection (1), an arbitration award in terms of which a party is required to pay an amount of money must be treated for the purpose of enforcing or executing that award as if it were an order of the Magistrate's Court.

(6) Subsections (1), (4) and (5), as amended by the Labour Relations

Amendment Act, 2014, takes effect on the date of commencement of the Labour Relations Amendment Act, 2014, and applies to an arbitration award issued after such commencement date."

[11] From the papers before us, it is not clear whether certification of the arbitration award has taken place. In the confirmatory affidavit of Mr Lombard, Ms Mogaila's then attorney, he states that a new application to certify the award was instituted in June 2014, which was opposed. No further details are provided.

[12] Section 145(1) of the LRA provides: "Any party to a dispute who alleges a defect in any arbitration proceedings under the auspices of the Commission may apply to the

Labour Court for an order setting aside the arbitration award— (a) within six weeks of the date that the award was served on the

applicant, unless the alleged defect involves the commission of an offence referred to in Part 1 to 4 or section 17, 20 or 21 (in so far as it relates to the aforementioned offences) of Chapter 2 of the Prevention and Combating of Corrupt Activities Act, 2004; or (b) if the alleged defect involves an offence referred to in paragraph

(a), within six weeks of the date that the applicant discovers such offence."

[12] Section 145(1) of the LRA provides:

"Any party to a dispute who alleges a defect in any arbitration proceedings under the auspices of the Commission may apply to the

Labour Court for an order setting aside the arbitration award—

(a) within six weeks of the date that the award was served on the

applicant, unless the alleged defect involves the commission of an offence referred to in Part 1 to 4 or section 17, 20 or 21 (in so far as it relates to the aforementioned offences) of Chapter 2 of the Prevention and Combating of Corrupt Activities Act, 2004; or

(b) if the alleged defect involves an offence referred to in paragraph

(a), within six weeks of the date that the applicant discovers such offence."

[13] Section 11 of the Prescription Act provides: "The periods of prescription of debts shall be the following: (a) thirty years in respect of— (i) any debt secured by mortgage bond; (ii) any judgment debt; (iii) any debt in respect of any taxation imposed or levied by or under any law; (iv) any debt owed to the State in respect of any share of the profits, royalties or any similar consideration payable in respect of the right to mine minerals or other substances; (b) fifteen years in respect of any debt owed to the State and arising out of an advance or loan of money or a sale or lease of land by the State to the debtor, unless a longer period applies in respect of the debt in question in terms of paragraph (a); (c) six years in respect of a debt arising from a bill of exchange or other negotiable instrument or from a notarial contract, unless a longer period applies in respect of the debt in question in terms of paragraph (a) or (b); (d) save where an Act of Parliament provides otherwise, three years in respect of any other debt." Following correspondence between Mr Lombard and Coca Cola, Ms Mogaila was instructed to consult with Mr Lombard in January

2014. She was informed that he was waiting for the Labour Court. The delay continued. Mr Lombard allegedly suffered a personal tragedy in April 2014 following which he was unable to attend to Ms Mogaila's matter.

[13] Section 11 of the Prescription Act provides:

"The periods of prescription of debts shall be the following:

(a) thirty years in respect of—

(i) any debt secured by mortgage bond;

(ii) any judgment debt;

(iii) any debt in respect of any taxation imposed or levied by or under any law;

(iv) any debt owed to the State in respect of any share of the profits, royalties or any similar consideration payable in respect of the right to mine minerals or other substances;

(b) fifteen years in respect of any debt owed to the State and arising out of an advance or loan of money or a sale or lease of land by the State to the debtor, unless a longer period applies in respect of the debt in question in terms of paragraph (a);

(c) six years in respect of a debt arising from a bill of exchange or other negotiable instrument or from a notarial contract, unless a longer period applies in respect of the debt in question in terms of paragraph (a) or (b);

(d) save where an Act of Parliament provides otherwise, three years in respect of any other debt."

Following correspondence between Mr Lombard and Coca Cola, Ms Mogaila was instructed to consult with Mr Lombard in January

2014. She was informed that he was waiting for the Labour Court. The delay continued. Mr Lombard allegedly suffered a personal tragedy in April 2014 following which he was unable to attend to Ms Mogaila's matter.

[14] Section 167(6) of the Constitution provides: "National legislation or the rules of the Constitutional Court must allow a person, when it is in the interests of justice and with leave of the Constitutional Court— (a) to bring a matter directly to the Constitutional Court; or (b) to appeal directly to the Constitutional Court from any other court." Rule 18 of the Constitutional Court Rules governs the procedure for direct access applications.

[14] Section 167(6) of the Constitution provides:

"National legislation or the rules of the Constitutional Court must allow a person, when it is in the interests of justice and with leave of the Constitutional Court—

(a) to bring a matter directly to the Constitutional Court; or

(b) to appeal directly to the Constitutional Court from any other court.”

Rule 18 of the Constitutional Court Rules governs the procedure for direct access applications.

[15] See *Myathaza* above n 5 at para 15.

[16] *Bruce v Fleecytex Johannesburg CC*

[1998] ZACC 3; 1998 (2) SA 1143 (CC); 1998 (4) BCLR 415 (CC).

[17] *Id* at para 7. The Constitutional Court was “the highest court on all constitutional matters” before the enactment of the Constitution Seventeenth Amendment Act 72 of 2012, which gave this Court final appellate jurisdiction in all cases.

[18] *Id* at para 8.

[19] *AParty v Minister of Home Affairs; Moloko v Minister of Home Affairs* [2009] ZACC 4; 2009 (3) SA 649 (CC); 2009 (6) BCLR 611 (CC) at para 30.

[20] *Myathaza* above n 5 at para 2.

[21] *Id* at para 5.

[22] *Id* at para 6.

[23] *Id* at para 7.

[24] Section 158(1)(c) of the LRA provides: “The Labour Court may— . . . (c) make any arbitration award or any settlement agreement an order of the Court”.

[24] Section 158(1)(c) of the LRA provides:

“*The Labour Court may—*

. . .

(c) make any arbitration award or any settlement agreement an order of the Court”.

[25] *Myathaza* above n 5 at para 8. Mr *Myathaza* applied to have the arbitration award made an order of court in 2013, more than three years after the award was issued.

[26] *Myathaza v Johannesburg Metropolitan Bus Services (SOC) Limited t/a Metrobus*, unreported judgment of the Labour Court, Case No J1901/13 (17 October 2014) at para 3.

[27] *Myathaza v Johannesburg Metropolitan Bus Service (SOC) Limited t/a Metrobus; Mazibuko v Concor Plant; Cellucity (Pty) Ltd v Communication Workers Union on behalf of Peters* [2015] ZALAC 45; (2016) 37 ILJ 413 (LAC); 2016 (3) SA 74 (LAC) (LAC judgment) at para 44. The Labour Appeal Court considered the appeal together with two matters which concerned the same issue, but which had reached different conclusions. In *Concor Holdings (Pty) Ltd v Mazibuko* [2013] ZALCJHB 141; (2014) 35 ILJ 477 (LC), at para 29, the Labour Court held that the Prescription Act was applicable and that the award made in favour of the employee had

prescribed after three years. In *Cellucity (Pty) Ltd v Communication Workers Union on behalf of Peters*

[2013] ZALCCT 43; [2014] 2 BLLR 172 (LC), at para 21, the Labour Court held that the Prescription Act was inconsistent with the LRA. The Court stated that: “Its application to LRA claims would create inequalities between litigants using different routes for their disputes and furthermore

will be unworkable where disputes move between tribunal and court and vice versa.”

[27] *Myathaza v Johannesburg Metropolitan Bus Service (SOC) Limited t/a Metrobus; Mazibuko v Concor Plant; Cellucity (Pty) Ltd v Communication Workers Union on behalf of Peters* [2015] ZALAC 45; (2016) 37 ILJ 413 (LAC); 2016 (3) SA 74 (LAC) (LAC judgment) at para 44. The Labour Appeal Court considered the appeal together with two matters which concerned the same issue, but which had reached different conclusions. In *Concor Holdings (Pty) Ltd v Mazibuko* [2013] ZALCJHB 141; (2014) 35 ILJ 477 (LC), at para 29, the Labour Court held that the Prescription Act was applicable and that the award made in favour of the employee had prescribed after three years. In *Cellucity (Pty) Ltd v Communication Workers Union on behalf of Peters*

[2013] ZALCCT 43; [2014] 2 BLLR 172 (LC), at para 21, the Labour Court held that the Prescription Act was inconsistent with the LRA. The Court stated that:

“Its application to LRA claims would create inequalities between litigants using different routes for their disputes and furthermore

will be unworkable where disputes move between tribunal and court and vice versa.”

[28] LAC judgment id at para 41.

[29] Id at para 55.

[30] Id at para 94.

[31] *Myathaza* above n 5 at paras 43-58.

[32] Section 16 of the Prescription Act provides: “(1) Subject to the provisions of subsection (2) (b), the provisions of this chapter shall, save in so far as they are inconsistent with the provisions of any Act of Parliament which prescribes a specified period within which a claim is to be made or an action is to be instituted in respect of a debt or imposes conditions on the institution of an action for the recovery of a debt, apply to any debt arising after the commencement of this Act. (2) The provisions of any law— (a) which immediately before the commencement of this Act applied to the prescription of a debt which arose before such commencement; or (b) which, if this Act had not come into operation, would have applied

to the prescription of a debt which arose or arises out of an advance or loan of money by an insurer to any person in respect of an insurance policy issued by such insurer before 1 January 1974, shall continue to apply to the prescription of the debt in question in all respects as if this Act had not come into operation.”

[32] Section 16 of the Prescription Act provides:

“(1) Subject to the provisions of subsection (2)(b), the provisions of this chapter shall, save in so far as they are inconsistent with the provisions of any Act of Parliament which prescribes a specified period within which a claim is to be made or an action is to be instituted in respect of a debt or imposes conditions on the institution of an action for the recovery of a debt, apply to any debt arising after the commencement of this Act.

(2) The provisions of any law—

- (a) which immediately before the commencement of this Act applied to the prescription of a debt which arose before such commencement; or
- (b) which, if this Act had not come into operation, would have applied

to the prescription of a debt which arose or arises out of an advance or loan of money by an insurer to any person in respect of an insurance policy issued by such insurer before 1 January 1974, shall continue to apply to the prescription of the debt in question in all respects as if this Act had not come into operation.”

[33] Myathaza above n 5 at para 39.

[34] Road Accident Fund v Mdeyide

[2010] ZACC 18; 2011 (2) SA 26 (CC); 2011 (1) BCLR 1 (CC).

[35] Myathaza above n 5 at para 42.

[36] Id at paras 43-58 sets out the differences between the LRA and the Prescription Act.

[38] Id.

[39] Id at para 104.

[40] Id at paras 131-9.

[41] Id at paras 140-1.

[42] Id at para 119.

[43] Id at para 66. Whilst Froneman J concurred in the order of the first judgment and with the first judgment’s finding that the Prescription Act must be re-interpreted in order to give proper constitutional effect to the right to justice, he disagreed that this necessitated a finding that the provisions of the Prescription Act were inconsistent with those of the LRA, thereby excluding the application of the former.

[44] Section 15 of the Prescription Act provides: “(1) 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. (2) Unless the debtor acknowledges liability, the interruption of

prescription in terms of subsection (1) shall lapse, and the running of prescription shall not be deemed to have been interrupted, if the creditor does not successfully prosecute his claim under the process in question to final judgment or if he does so prosecute his claim but abandons the judgment or the judgment is set aside. (3) If the running of prescription is interrupted as contemplated in

subsection (1) and the debtor acknowledges liability, and the creditor does not prosecute his claim to final judgment, prescription shall commence to run afresh from the day on which the debtor acknowledges liability or, if at the time when the debtor acknowledges liability or at any time thereafter the parties postpone the due date of the debt, from the day upon which the debt again becomes due. (4) If the running of prescription is interrupted as contemplated in

subsection (1) and the creditor successfully prosecutes his claim under the process in question to final judgment and the interruption

does not lapse in terms of subsection (2), prescription shall commence to run afresh on the day on which the judgment of the court becomes executable. (5) If any person is joined as a defendant on his own application, the

process whereby the creditor claims payment of the debt shall be deemed to have been served on such person on the date of such

joinder. (6) For the purposes of this section, “process” includes a petition, a 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.”

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[45] Myathaza above n 5 at paras 75 and 82.

[46] Id at para 78. The second judgment, at para 80, noted that this approach in no way contradicted that of the majority in *Makate v Vodacom Ltd*

[2016] ZACC 13; 2016 (4) SA 121 (CC); 2016 (6) BCLR 709 (CC): “In that case the Court did not take issue with the idea that there may be debts beyond a claim for payment”.

[47] Myathaza above n 5 at para 79.

[48] Id at para 86.

[49] Id at para 88.

[50] Id at para 65.

[51] Id at para 59.

[52] See LAC judgment above n 27 at para 62 where the Court, in discussing the certification in terms of section 143(3) of the LRA, stated that: “The certificate is merely required to enforce arbitration awards as if they were orders of the Labour Court.” The Court, at para 63, continued: “Certification . . . is part of the process of executing an award as if it is an order of the Labour Court.” Myathaza above n 5 at paras 25-6 discusses the two methods of enforcing an arbitration award in terms of the LRA: “This means that, once the award is certified [in terms of section 143(3)] by the relevant functionary, it may be enforced without

the need to obtain a writ. However, an arbitration award in terms of which a party is required to pay an amount of money is treated as an order of the Magistrate's Court for purposes of enforcing or executing it. The other route through which an award may be enforced is having it made an order of the Labour Court in terms of section 158(1)(c) of the LRA. Once the award is made a court order, then it becomes enforceable as a court order."

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