

SOUTH AFRICA / JUDGMENT

Mutero v Pikitup Johannesburg (SOC) Ltd (J713/21) [2021] ZALCJHB 373 (22 October 2021) [2021] ZALCJHB 373

COURT

Labour Court Johannesburg

BEFORE

Graham Nasious Moshwana

CASE / FILE NUMBER

J713/21

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THE

LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not

Reportable

Case

no: J

713/21

In

the matter between:

NEIGHBOUR

EDWARD

MUTERO Applicant

and

PIKITUP

JOHANNESBURG (SOC)

LTD Respondent

Heard: 19

October 2021

Delivered: 22

October 2021 (This judgment was handed down electronically by emailing a copy to the parties. The 22nd

October 2021 is deemed to be the date of delivery of this judgment).

Summary: Special

Plea – Prescription – three years period expired.

Prescription not interrupted by a review application where

an

incompetent prayer was sought. Prescription began to run from the date of the breach – termination of the employment contract

–
and not the date on which the Labour Appeal Court dismissed an appeal against a section 158 (1) (c) of the LRA application.
Costs – the
referral is in terms of section 77 (3) of the BCEA and is not a labour matter but a civil matter – the costs
follow the
results. Held: (1) The special plea of prescription is upheld. Held:
(2) The applicant to pay the costs on a scale of
party and party.

JUDGMENT

MOSHOANA, J

Introduction

- [1] The applicant, Mr Neighbour Edward Mutero (Mutero) has been engrossed in litigation with the respondent, Pikitup Johannesburg SOC Ltd (Pikitup) since December 2012. It is almost a decade that this perennial litigation between this two parties has been in motion. The present interlocutory application involves a contractual claim which was launched by Mutero on or about 6 July 2021. In the contractual claim, Mutero is suing Pikitup for contractual damages in the tune of R17 700 901.70 together with interest. In the same claim, Mutero seeks an order for payment of cost of living adjustments and leave pay as permitted by an employment contract. Mutero approaches this Court under section 77 (3) of the Basic Conditions of Employment Act[1] (BCEA).
- [2] On or about 20 July 2021, Pikitup filed a statement of response. In the response, it raised a special plea couched in the following terms:
1. The Applicant contends that the Respondent breached his contract of employment by issuing him with a termination of employment on 31 July 2017.
 2. The Applicant instituted these proceedings for breach of contract on 6 July 2021.
 3. In terms of section 10 and 11 of the Prescription Act 68 of 1969, any claim which the Applicant may have arising out of, or pertaining to the termination of his employment has been extinguished by prescription.
 4. The Respondent accordingly prays that the special plea be upheld and further contends that the Applicant's claim falls to be dismissed (with costs) on the basis of the special plea.
- [3] The practice manual of this Court requires interlocutory applications to be enrolled separately for determination. As required, the Registrar of this Court enrolled the special plea before me. After listening to argument, the judgment of this Court was reserved.

Background

facts

- [4] This matter bears a tenacious and arduous chronicle. It owes its origin from the termination of a fixed term contract of employment on 31 December 2012. Mutero commenced his employment with Pikitup on 18 December 2006. His employment was governed by a series of limited duration contracts of employment. On or about 9 November 2012, Mutero was notified that the limited duration contract which was ending will not be extended. Aggrieved thereby, Mutero referred a dispute to private arbitration wherein he alleged unfair dismissal. The dispute was arbitrated by Mr K Mosime (Mosime).
- [5] On or about 11 November 2013, Mosime published an arbitration award. The terms of the arbitration award were that (a) the dismissal of Mutero was both procedurally and substantively unfair; (b) Pikitup was ordered to reinstate the contract of employment on the same terms and conditions that applied to him prior to his dismissal on 31 December 2012; and (c) Mutero's reinstatement was retrospective to the date of dismissal.
- [6] Pikitup was aggrieved by the outcome of the arbitration award and launched a review application in this Court. On 17 May 2016, Acting Justice Pienaar in a written judgment dismissed the review application with costs. Pikitup relented and reinstated Mutero in June 2016. Mutero took a view that Pikitup did not fully comply with the arbitration award of Mosime. Mutero then launched an application in terms of section 158 (1) (c) of the LRA seeking to make the arbitration award of Mosime an order of this Court. On or about 16 August 2017, my sister Whitcher J in a written judgment made the arbitration award of Mosime an order of this Court and also issued concomitant orders to the effect that (a) Mutero be reinstated in the post of Executive Director: Waste Minimization Strategy & Programmes or into a suitable and equivalent executive position (grade F salary level);
- (b) that his salary be adjusted to R1 4000.00 per annum effective from 1 January 2013; and (c) that he be paid the sum of R294 911.00 being average bonus for the years 2014 and 2015.
- [7] Pikitup was aggrieved by the judgment of Whitcher J and appealed it to the Labour Appeal Court (LAC). On 12 December 2018 in a written

judgment

the LAC unanimously dismissed an appeal against the orders set out in

- (a) and (b) above as well as making the arbitration award an order but upheld an appeal against (c) above.
- [8] In the meanwhile, in June 2017, Pikitup commenced a process seeking to dismiss Mutero for reasons related to its operational requirements.

Ultimately on 31 July 2017 Mutero was dismissed for reasons related to operational requirements. Aggrieved thereby, Mutero referred a dispute to the bargaining council and alleged unfair dismissal. Panelist Mr T Boyce (Boyce) was appointed to arbitrate the dispute.

On 7 November 2018, Boyce published an arbitration award. In the award, he found that the dismissal of Mutero was substantively

unfair. He ordered Pikitup to pay to Mutero a limited compensation as well as severance pay.

[9] Mutero was discomfited with the arbitration award and launched review proceedings against it. Ultimately, the review application featured before my brother Tlhotlhamaje J. On 10 January 2021, Tlhotlhamaje J in a written judgment reviewed the arbitration award of Boyce with regard to compensation and awarded Mutero maximum compensation. As indicated above, on 6 July 2021, Mutero instituted the present contractual claim.

Evaluation

[10] In resisting the special plea, Mutero argued that the contractual claim had not prescribed because the launching of the review proceedings

interrupted the running of prescription and that prescription began to run from the date of the judgment of the LAC in December 2018. Mutero is not legally represented and he appeared in person before me. Although the issues in this matter are crisp, I afforded Mutero ample leeway for him to make his submissions. This Court pointed out to him that his current claim is unrelated to the review application. In the review application, he sought reinstatement and in the alternative, compensation beyond the section 194 of the LRA limit. He conveniently labelled the alternative claim for an increased compensation beyond the section 194 limit as a “contractual claim”. Whilst the review application was pending, Mutero attempted to introduce a claim for damages under the rubric of a section 145 of the LRA review. As expected, Pikitup objected to this perspicaciousness on the part of Mutero.

[11] Mutero did not obtain any leave from this Court to astutely tuck the damages claim under the review application. On the version of Pikitup, he abandoned this path. However, he was unable to inform this Court that he was granted leave and if not what ultimately happened to that claim. Withal, it is clear to this Court that the damages claim did not feature in the review matter. It was only instituted on 6 July

2021. I do mention that if it featured before my brother Tlhotlhamaje J, then he refused to grant it and the course open to Mutero is to appeal and not reignite the claim as he did in the statement of claim.

[12] Section 15 (1) of the Prescription Act (the Act) perspicuously stipulates that the running of prescription shall be interrupted by the service on the debtor of any process whereby the creditor claims payment of the debt. The debt that Mutero seeks to claim against Pikitup is set out in the relief sought in the statement of claim. Prior to that nowhere did Mutero serve any process on Pikitup claiming the relief as set out in the present statement of claim. What he sought in the review process was compensation falling outside the limit in section

194. This was an alternative to a primary claim for reinstatement. The reliefs in the LRA are for an unfair dismissal or unfair labour

practice. Those are (a) reinstatement; (b) re-employment or (c) compensation. Compensation is limited and does not require quantification as it is not a damages claim. Boyce denied Mutero the primary remedy of reinstatement. Instead he awarded him a much limited compensation. This Court using its review powers increased the compensation to the maximum limit.

[13] Even if this Court were to accept that the alternative claim of increased compensation beyond what the LRA permits is a claim for contractual damages, section 15 (4) of the Act requires successful prosecution of the claim under the process – in this case, the review process – to avoid the lapse of the interruption. Section 15 (2) of the Act provides that the interruption shall lapse if there is no successful prosecution under the process and the running of prescription shall not be deemed to have been interrupted. It is beyond question in this matter that the process of review terminated

when Tlhotlhemaje J issued a written judgment. There is no evidence of success on the alternative “contractual” claim. On the basis of that such “interruption” has lapsed and the running of prescription is deemed not to have been interrupted.

Accordingly, the contention of Mutero that prescription was interrupted by the review process falls to be rejected. There was an

attempt by Mutero to suggest that when he sought to amend the alternative claim that independently interrupted prescription. There

is no merit in this suggestion.

[14] As to when prescription begins to run, section 12 of the Act is lucid and perspicuous. It begins to run as soon as the debt is due. A debt becomes due when it is ready and claimable. Accepting the version of Mutero that the alternative claim in the review process amounts to the debt owed to him, it follows axiomatically that on his version the debt was due already then. That debt was claimed unsuccessfully. Of course this Court does not accept the version that the debt only became due at the time of review process. As at 31 July 2017 the claim for contractual damages reached its fullness and due. At that time, Mutero had knowledge of the debtor, Pikitup and the facts upon which the claim arise. Pikitup had breached the employment contract by terminating it prematurely. Accordingly the conclusion this Court reaches is that prescription began to run on 31 July 2017.

[15] Mutero suggested that prescription began to run after the LAC judgment. This suggestion is bereft of merit. The LAC judgment had everything to do with the Mosime award, which dealt with the fairness of the dismissal. The LAC judgment is entirely decoupled from the contractual claim for damages. A similar argument was rejected by Moseneke J, as he then was in the matter of Eskom v Bojanala District Municipality and another[2]. Similarly, Wepener J in Mpato v Hlatswayo-Mhaise Inc[3] relying on Eskom rejected a similar argument.

[16] This Court has no reason not to reject the argument that prescription began to run after December 2018. In Mpato, Wepener J concluded thus:

“I respectfully agree with this (Eskom) conclusion and the date when the court upheld the question of prescription of the claim is irrelevant to the plaintiff’s claim

[17] This Court plentifully agree and conclude that the LAC judgment is irrelevant to the material facts which existed to enable Mutero to institute a claim against Pikitup based on the breach of the employment contract.

[18] Therefore in terms of section 11 (d), read with section 10 (1) of the Prescription Act, the contractual claim for damages is extinct. Thus the special plea of prescription must be upheld in respect of that claim. Before I conclude and turn to the issue of costs, I need to mention that another apparent claim of Mutero is that of claiming the annual costs of living adjustment and leave pays. It is apparent that Mutero based these claims on an employment contract. This Court is

unable to understand when this annual living adjustment became due and payable to Mutero. However, in terms of section 40 (b) of the BCEA, leave pay is due on termination and termination happened on 31 July 2017. Therefore, leave pay claim prescribed after three years. This Court must assume that living adjustments mean increments. Normally, increments are linked to an extant contract. Mutero’s employment contract ended on 31 July 2017. There seem to be no basis for the adjustment after the termination of the employment contract. However, if the living adjustment mean something else that accrues even after termination of the employment contract, then such a claim is not affected by prescription.

[19] I now turn to the issue of costs. This is a section 77 (3) of the BCEA matter and a civil claim. The rule of costs following the results apply with vigour in civil matters. The principle adopted in Zungu and other matters finds no application in civil matters but applies to labour matters. In its very recent judgment, the majority judgment of the Constitutional Court penned by Khampepe ADCJ in Booi v Amathole District Municipality and others[4], stated the following:

“[50] ...Labour litigation, as envisaged by the LRA, is distinct from any other civil litigation...It follows that labour disputes must not be perceived as ordinary civil disputes...

[20] Accordingly, a section 77 (3) of the BCEA contractual claim is not a labour dispute that requires the Labour Court as a specialist Court[5]. In these matters, the Labour Court does not exercise exclusive jurisdiction but a concurrent jurisdiction with the civil Courts. In short the Labour Court sits as a civil Court.

[21] Pikitup achieved success in this special plea. The fact that Mutero is a lay litigant who chose to oppose the special plea unrepresented is of no relevance on the issue of costs as a sequel of the success achieved by Pikitup.

[22] In the result the following order is made:

Order

1. The special plea of prescription is upheld. The claims for contractual damages are extinguished by prescription.
2. The applicant (Mutero) must pay the costs of the opposition of the special plea.

Graham Nasious Moshona

Judge of the Labour Court of South Africa

Appearances:

For the Special Pleader: Mr C Orr SC

Instructed by: Bowmans,

Sandton.

The respondent: In

Person.

[1] Act 75 of 1997 as amended.

[2] 2003 JDR 498 (T) at pages 15-16 of the judgment.

[3] (2010/28156) dated 14 October 2011.

[4] (CCT119/20) [2021] ZACC 36 dated 19 October 2021.

[5] See UPSCO v SACM (Pty) Ltd

[2021] ZACC 26.

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