



CASE NO: LCA 87/2009

IN THE LABOUR COURT OF NAMIBIA

In the matter between:

NAMIBIA DEVELOPMENT CORPORATION

APPELLANT

and

**PHILLIP MWANDINGI
THE LABOUR COMMISSIONER N.O.
FELIX MUSUKUBILI N.O.**

**1ST RESPONDENT
2ND RESPONDENT
3RD RESPONDENT**

Neutral citation: Namibia Development Corporation v Mwandingi & Other (LCA 87/2009 [2012] NALCMD 12 (November 2012))

CORAM: SMUTS, J

Heard on: 23 November 2012

Delivered on: 3 December 2012

Flynote: Time period within which a claim for constructive dismissal which had arisen prior to the commencement of Act 11 of 2007 to be determined with reference to s24 of Act 6 of 1992 – referral more than 7 years after cause of action arose – s16 of Prescribed Act, 68 of 1969 applicable – claim prescribed

ORDER

The appeal against the finding of the arbitrator that the first respondent's claim of constructive dismissal had not prescribed is upheld. No order as to costs.

JUDGMENT

SMUTS, J [1] This is an appeal in terms of section s89 of the Labour Act, 11 of 2007 (the Act) against a ruling of an arbitrator rejecting the appellant's invocation of prescription against the first respondent's constructive dismissal complaint lodged more than seven years after the cause of action had arisen.

[2] The first respondent (whom I shall referred to as the respondent in this judgment) is himself a principal conciliator and arbitrator officer employed within the office of the Labour Commissioner. The latter is cited as the second respondent. The arbitrator is cited as the third respondent. The notice of appeal and record and some further matter have been served on the second and third respondents. They do not oppose the appeal and have not placed any material before this court.

[3] The respondent claims that he was constructively dismissed by the appellant in May 2001. He only referred the dispute to the Labour Commissioner on 11 September 2009. His referral was coupled with an application for condonation for the late filing of the referral/complaint. In it, he stated that he only realized that he had constructively dismissed in 2003 because, so he alleged, the appellant had kept facts secret from him. The appellant objected to the application for condonation and raised the issue of prescription before the arbitrator. The arbitrator however found that the Prescription Act, 68 of 1969 did not apply to labour matters. The appellant has appealed against that ruling made on 29 October 2009.

[3] This appeal was in July 2012 set down for hearing on 23 November 2012. The appellant served and filed its heads of argument timeously on 12 November 2012.

[4] The respondent had however at no stage filed a notice to oppose the appeal. Nor had he filed grounds of opposition, as is required by rule 17(16), despite having been alerted to the need to do so by the appellant in June 2012.

[5] On 21 November 2012 – and thus only one clear court day before the hearing of this appeal – the respondent filed an application seeking condonation for the late filing of a notice to oppose the appeal and seeking the postponement of the appeal itself. In this application, the respondent's legal practitioner, Mr Ntinda said that the two other practitioners within this firm who had previously had the conduct of the matter were no longer with that firm. He further said that he had inherited the matter only on 19 November 2012 following the departure on 16 November 2012 of his colleague from that firm. He further stated that he sought the agreement of the appellant's legal practitioner to file heads of argument on 21 November 2012. This had not been forthcoming. However, instead of filing heads of argument with an application for condonation, the application for postponement was filed together with an application to condone the late filing of the notice to oppose the appeal. There was no application to condone the failure to have filed a notice setting out the grounds of opposition to the appeal. No adequate reasons were contained in this postponement application. Nor is it explained why heads could not have been prepared at that late stage and condonation sought.

[6] The appellant opposed the postponement application and filed an answering affidavit in support of that opposition. The appellant rightly criticized the vague allegations made by Mr Ntinda as to the handover of the file to him by his predecessor. There was also reference to earlier correspondence in which it was expressly pointed out to the respondent's legal practitioners already in June of 2012 that a notice of the opposition to the appeal had not been filed and of the need to do so urgently.

[7] The appellant also squarely took issue with the respondent's assertion of strong prospect of success in opposing the appeal. Those aspects are dealt with more fully below in dealing with the merits of the appeal.

[8] The legal principles governing applications for postponements were, with respect, lucidly summarized by the Supreme Court in *Myburgh Transport v Botha t/a SA Truck Bodies*¹. In applying those principles to the respondent's application for postponement, it becomes clear that the explanation provided in support of the application for postponement is hopelessly inadequate and falls markedly short of the standards for applications of this nature. When the matter was argued, Mr Ntinda submitted that there was no prejudice to the appellant if the appeal were to be opposed. I then enquired from him on no less than three occasions as to whether the respondent tendered the appellant's wasted costs of the hearing on 23 November 2012. On each occasion, he declined to make such a tender on behalf of the respondent. Not only is that form of prejudice thus self evident in view of the provisions of s118 of the Labour Act in respect of costs, (by reason of the fact that a court would only award costs if parties acted frivolously or vexaciously) but Mr Maasdorp also pointed out the prejudice to the respondent of a further delay in the finalization of the matter, as set out in the appellant's opposing affidavit. This relates to the declining health of the appellant's principal witness, being its former Managing Director who is resident in Mauritius. Mr Maasdorp also rightly referred to the considerable passage of time since the ruling appealed against had been made, namely more than three years and eleven and a half years after cause of action had arisen. He also referred to the need identified in the Act and the rules promulgated under the Act of expeditiously finalizing proceedings.

[9] Taking into account the entirely inadequate explanation for the late bringing of the application together with the prejudice to be sustained by the appellant, in the exercise of my discretion I refused the application for postponement and directed that the appeal should proceed. Given the fact that Mr Ntinda had in his affidavit made submissions concerning the prospect of success and the merits of the appeal, I granted leave to him to address oral argument in opposition to the appeal, which he did, even though neither heads nor the grounds of opposition had been provided.

¹ 1991 NR 170 SC at 174-175

[10] The issue raised in the appeal concerns whether the Prescription Act, 68 of 1969 applies to the claim made by the respondent which had arisen when the erstwhile Labour Act, 6 of 1992 (the 1992 Act) applied, read with the transitional provisions of the Act. The question thus raised in this appeal is whether the respondent's dismissal complaint or referral had become prescribed under the Prescription Act.

[11] Before this issue is dealt with, it would be appropriate first to address a preliminary point raised by Mr Ntinda. He contended that an award as contemplated by s89 of the Act had not as yet been made by the arbitrator and that the ruling appealed against occurred in the course of conciliation.

[12] Mr Maasdorp however countered with reference to the record that the arbitrator had made a decision on prescription, by ruling against the appellant which had raised prescription and by directing that the arbitration should proceed on the merits. In order to address this point and the other statutory and legal questions which arise relating to prescription, it is necessary first to refer to the background facts of the matter.

[13] The respondent had resigned his employment position with the appellant in May 2001. He had been appointed as Manager: Human Resources by Amalgamated Commercial Holding (Pty) Ltd (AMCOM) on 1 July 2000. According to the respondent's affidavit in support of condonation, he had acted as company secretary and (head of) legal services of AMCOM from August 2000. But in December 2000 AMCOM became integrated with the appellant and the respondent and other staff members were given the option of being transferred to the appellant on an uninterrupted basis whilst retaining their employment benefits which they had previously enjoyed with AMCOM or to receive a voluntarily retrenchment package. He had at the time accepted the transfer to the appellant.

[14] The respondent stated that he continued with his work as acting company secretary and legal services after the transfer in dealing with outstanding AMCOM matters. The respondent further states that he was offered the opportunity to purchase one of the erstwhile businesses of AMCOM which was being sold, with employees

apparently being given preference in those sales. The respondent then exercised the option to purchase that business in northern Namibia. He stated that when he did so he was informed that he could not retain his employment position and acquire the business at the same time and that he had to choose between the two. He then in May 2001 resigned from the services of the appellant. He claims that in doing so he was ordered to resign. In September 2009, more than eight years later, he referred the dispute for conciliation or arbitration to the Labour Commissioner (his current employer). The respondent complained that he had been constructively dismissed by the appellant and claimed re-instatement to his previous position or an equivalent position and claimed compensation in the sum of N\$1 648 744 made up of his salary and benefits from June 2001 to August 2009. The compensation also included a claim of N\$100 000 in respect of legal fees and an acting allowance of N\$12 744.

[15] In this referral to the Labour Commissioner, the respondent simultaneously sought condonation for the late filing of this dispute. He claims that he only “realized what had happened in May 2003”, alleging that facts had been kept secret from him. It is not explained how he came to that realization in 2003, although he referred to a Presidential Commission of Enquiry into AMCOM, NDC (the appellant) and DBC which he however said became revealed towards the end of 2004. The respondent sought the referral of the matter for conciliation and/or arbitration in terms of the Act. The form in which this was set out was delivered on the appellant on 11 September 2009. On 30 September 2009, the appellant set out its grounds upon which it opposed the application for condonation and it also applied for condonation to file that notice at that time. A conciliation meeting was then scheduled for 29 October 2009 before the arbitrator who was appointed to the dispute. After conciliation of the matter did not bear fruit, the arbitrator directed that the matter then proceed to arbitration in November 2009.

[16] The appellant raised the question of prescription in opposing condonation, claiming that the respondent’s claim had become prescribed under the Prescription Act. The arbitrator would then appear to have rejected the appellant’s point of prescription. Condonation was also granted to the respondent for the late filing of his referral.

[17] The arbitrator did not however set this out in any ruling or award but merely directed that the arbitration commence and proceed on dates during the following month after the issue of prescription had been pertinently raised. The appellant requested reasons from the arbitrator for his decision to reject the plea of prescription and for reasons why the matter would further proceed to arbitration and for reasons for the granting of the application for condonation. Unfortunately the arbitrator failed to provide any reasons for his decision. Reasons were sought from him in writing through the Labour Commissioner and directly. That approach did not even receive the courtesy of an acknowledgment of its receipt.

[18] At the appellant's instance, the arbitration scheduled for November 2009 was then postponed and the appellant thereafter filed a notice of appeal against the prescription ruling which was served on both the Labour Commissioner and the arbitrator, cited as second and third respondents as I have already indicated. Even after the notice of appeal had been served upon the arbitrator, no reasons for his decision were provided. This is unfortunate and not what one would expect of a decision maker under the Act and indeed within public administration, given the provisions of Article 18 of the Constitution and the entitlement to reasons in respect of decisions of this nature, particularly when requested by a party affected by the decision.

[19] Mr Ntinda contended in this context that the decision appealed against had been taken at the conciliation stage and would thus not be an award for the purposes of s89 of the Act. Mr Maasdorp however submitted that arbitrator had been appointed in that capacity to deal with this dispute. He submitted that the decision would have been made in the course of arbitration even if the arbitration had been preceded by conciliation, as is contemplated in the Act.

[20] Mr Maasdorp further contended that a decision on prescription would be appealable forthwith² and that this decision had been made as part of the arbitration.

² With reliance upon *Thiro v M&Z Motors NLLP* 2002(2) 370 (NLC) with which J respectfully agree

This approach is in my view sound, despite the fact that the arbitrator has not favoured the parties with any reasons or the proper articulation of his decision in that regard, even after being called upon to do so. Nor did he even favour this court with any reasons for the decision after a notice of appeal had been served upon him. In the circumstances, and by reason of the conduct of the arbitrator to postpone the arbitration for a hearing on the merits to the following month after condonation had been raised and granted, and having ruled that the Prescription Act did not apply, it is clear that a decision on prescription had been made and that the plea of prescription had been thus rejected. This is clear from the record and the unchallenged facts upon that issue

[21] According to the unchallenged testimony on behalf of the appellant, the issue of prescription was raised at the meeting on 29 October 2009. On that occasion, the arbitrator stated that he had assumed that the Labour Commissioner had granted the application for condonation as the appellant's opposing affidavit was filed out time. The arbitrator further ruled that the Prescription Act was not applicable to labour matters and that prescription will thus not bar the matter from proceeding to arbitration and that, in so far as may be necessary, he would grant condonation. It follows that the preliminary point raised by Mr Ntinda is not to be upheld.

[22] Mr Maasdorp submitted that the Prescription Act applies to labour claims which arose under the erstwhile Labour, 6 of 1992 as well under the Act. In support of this contention, he referred to the position in South Africa. The time periods under the South African Labour Relations Act, 66 of 1995 (LRA) are different to those provided under the 1992 Act and those which currently apply under the Act. In the LRA, an unfair dismissal dispute must be referred within thirty days of the dismissal and one concerning an alleged unfair labour practice within 90 days of the date of the act or omission complained of. The South African Commission for Conciliation, Mediation and Arbitration (CCMA) may at any time on good cause shown grant permission to refer a dispute outside those periods. The courts in South Africa have consistently found that the Prescription Act and the three year period of prescription would apply to employment claims and thus provide an upper limit to the period within which referrals

could occur. Mr Maasdorp also referred to a recent matter in the Labour Court of South Africa where it was held with reference to a number of prior reported decisions:

“It is now well established that extinctive prescription as envisaged in the Prescription Act applies to employment issues”³

That court further held that a “debt” would in the context of a dismissal claim mean that a respondent had an obligation not to unfairly dismiss the applicant⁴. In that matter, an employee had filed an unfair labour practice claim ten years after learning that he had been recommended for promotion which had not been effected. The CCMA had granted an application for condonation for the late filling of the claim. The court however ruled that the matter had prescribed under the Prescription Act, 68 of 1969.

[23] In a more recent judgment, the (South African) Labour Court had in a different context also held that the Prescription Act, 1969 applies to disputes arising from the LRA. The court stressed that the LRA compels the effective resolution of disputes, implying that labour disputes must be resolved or finalized expeditiously and applied the Prescription Act to the relevant provisions of the LRA⁵.

[24] The wording of s16(1) of the Prescription Act is identical in both Namibia and South Africa. It 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.”

[25] Mr Maasdorp submitted on the strength of the South African authority that the provisions of the Prescription Act and the three year prescription period should also apply to employment related claims which had arisen under the Labour Act of 1992 and the current Act.

³ Fredericks v Grobler NO and Others [2010] 6 BLLR 644 (LC);

⁴ Supra at par 22

⁵ Food and Allied Worker Union and Others v Country Bird (2012) 33 ILJ 856 (LC)

[26] The reasoning employed by the courts in South Africa with reference to the application of the Prescription Act would in my view apply with equal force to claims arising from the erstwhile Labour Act of 1992 and the Act. The objective of both acts as well as the Prescription Act is bring certainty and finality to disputes within a reasonable time. The courts in South Africa have accorded a wide meaning to the term “debt” used in the Prescription Act which the Labour Court in South Africa has found would include a respondent having an obligation not to unfairly dismiss an applicant or complainant. I agree with that approach.

[27] As to the position in Namibia, the courts in considering the provisions of s24 of the 1992 Act, have not uniformly determined whether the Prescription Act applied to labour matters. Mr Maasdorp referred to *Kahurahe-Martin v Telecom Namibia*⁶ where Manyarara AJ found that the Prescription Act applied to labour matters. In another matter, *Silungwe, P* on the other hand, although it is not clear that the issue was fully argued, indirectly appeared to find that the Prescribed Act did not apply, in holding that the question is not whether the appellant’s action had prescribed but rather whether the chairperson exercised her discretion properly when she granted condonation of the appellant’s late filing of the complaint⁷. Mr Maasdorp pointed out that it was not clear from that decision whether a special plea raising prescription had been taken in the district labour court and that it was not the dismissal of the special plea and prescription which served before court but rather whether condonation should have been granted. However he submitted that in so far as the approach of *Silungwe, P* conflicted with the decision of Manyarara AJ, the approach of the latter should be preferred. I am inclined to agree with that submission.

[28] Mr Maasdorp also referred to more recent decisions under the current Act. In *Nedbank v Louw*⁸, Henning, AJ expressed the obiter view that the referral of a dispute outside the time period of s86(2)(a) rendered an award based on that referral a nullity by reason of the arbitrator acting ultra vires his or her authority in considering the

⁶ MLLP 2002 (267) NLC at 270-271

⁷ *Thiro v M&Z Motors NLLP 2002 (2) 370 (NLC)* at 378

⁸ Unreported, case LC 68/2010, 30 November 2010

dispute. I respectfully agree with that approach as I indicate below. In *Standard Bank v Mouton*⁹, Hoff J found that the referral in question was out of time and beyond the period in s86(2) and had in fact prescribed in terms of s86(2). Both of these decisions make it plain that the provisions of s86(2)(a) are peremptory. I agree with that conclusion. This subsection does not provide for any power of amelioration by means of a power to condone the late filing of any referral. It provides:

“(2) A party may refer a dispute in terms of subsection (1) only-

(a) within six months after the date of dismissal, if the dispute concerns a dismissal; or”

[29] Rule 10 of the rules relating to the conduct of conciliation and arbitration which purports to grant the power to arbitrators or conciliators to condone the delivery of a referral of a dispute outside the time periods contained in s86(2)(a) would, to the extent that it seeks to do so, appear to me to be ultra vires the power of the rule maker. This point was raised on behalf of the appellant but not persisted with because the Minister, as rulemaker, had not been joined to these proceedings. It would also not appear to be necessary to determine this issue by virtue of the transitional provisions contained in the Act which apply to this matter. The view I express in this regard is accordingly obiter.

[30] Mr Maasdorp very properly referred me to the approach of the Supreme Court as well as that of the High Court in the matter of *Majiedt and 2 Others v Minister of Home Affairs and Another*¹⁰. Although the two courts reached different conclusions on the ultimate question before them concerning the constitutionality of the time limitation for the institution of legal proceedings under the Police Act, 19 of 1990, both courts appeared to accept that the limitation provision in question excluded the operation of the Prescription Act. Mr Maasdorp correctly pointed out that neither court dealt with the time limitation embodied in s24 under the Labour Act of 1992. The approach of both courts in that matter would in my view be distinguishable, given the difference in the nature of the time limitation provisions in question. In the Police Act, the provision is more along the lines of a forfeiture of the right to sue the defendant if notice had not been given and the claim instituted within the period provided for. The provisions of s24 of the 1992 Act are

⁹ Unreported, case no. LCA 74/2011 of 29 July 2011

¹⁰ 2007(2) NR 475 (SC) and the High Court judgment, unreported, Case no. A 190/2003, 16 May 2005

quite different. Section 24 required parties to exercise the remedies provided for in the 1992 Act within the period of twelve months or such further period with the Labour Court or a district labour court would permit on good cause shown. This section provides as follows:

“Notwithstanding the provisions of any other law to the contrary, no proceedings shall be instituted in the Labour Court or any complaint lodged with any district labour court after the expiration of a period of 12 months as from the date on which the cause of action has arisen or the contravention or failure in question has taken place or from the date on which the party instituting such proceedings or lodging such complaint has become or could reasonably have become aware of such cause of action or contravention or failure, as the case may be, except with the approval of the Labour Court or district labour court, as the case may be, on good cause shown”.

[31] There is thus not an automatic forfeiture of a right following the expiration of the period in question but rather the barring of the exercise of remedies brought after the period unless good cause could be shown in a condonation application to the court having jurisdiction in respect of the matter. It would seem to me that s24 reflects a legislative intention for labour matters and remedies brought under that Act to be effected expeditiously and within twelve months unless good cause could be shown in respect of a further period. The legislature did not exclude the Prescription Act from applying to claims which arise under the provisions of the 1992 Act. Nor is this by implication in the 1992 Act. It would also not be inconsistent with the Prescription Act for it to apply to such claims. Indeed, the statutory purpose of s24 and the 1992 Act (and s86(2) in the current Act) is to ensure that disputes under the respective Acts are to be dealt with and finalized expeditiously. This also accords with the general spirit and legislative purpose of those Acts. This approach also accords with the approach adopted by the Labour Court in South Africa in respect of claims arising under the LRA.

[32] The transitional provisions in the Act – embodied in items 15(2) and (3) of Schedule 1 – although not well formulated, effectively provide that the dispute referred by the respondent is to be proceeded with in terms of the machinery provided in the Act

but that s24 of the 1992 Act would determine whether the dispute is barred due to passage of time, or not as if it had not been repealed.

[33] I cannot accept the submission by Mr Ntinda, which would be necessary to support the approach of the arbitrator, that a labour related debt under the 1992 Act is never extinguished by the passage of time as good cause could be shown after the period of one year has expired without any cut off. I have found nothing in the 1992 Act to support this approach. On the contrary, the need to exercise a remedy within a year by s24 in the context of the 1992 Act and the rules promulgated pursuant to it and the nature of the disputes to be determined under the Act clearly show statutory intention for disputes of that nature to be resolved and determined expeditiously. This approach is even more emphatically reflected in the current Act with the shorter periods referred to in s86(2) without this section vesting arbitrators or the courts with the power to condone the failure to refer the dispute in question within the shorter periods provided for – six months in the case of a dismissal. These considerations would indicate a statutory intention that the Prescription Act should apply to labour related debts and that they should be extinguished by the prescriptive period of 3 years and certainly in the case of s24. This is also the approach of the South African courts.

[34] I agree with the submission by Mr Maasdorp that the provisions of s24 of the 1992 Act read with the transitional provisions in the current Act are procedural provisions (and not substantive) which do not affect application of prescription under Chapter III of the Prescription Act in respect of labour matters¹¹. I accordingly conclude that the provisions of the Prescription Act would apply to labour matters and debts arising from the 1992 Act.

[35] There were no allegations of prescription being interrupted by the respondent. It would clearly follow that the respondent's claim for constructive dismissal would, even on the assumption that prescription only commenced to run in 2003, which would need to be established, had become prescribed prior to its referral in September 2009.

¹¹ See generally Loubser Extinctive Prescription (1996) at p20. See also Joubert The law of South Africa 2nd ed . vol 21 at p116-118

[36] It further follows that the appeal against the finding by the arbitrator that the first respondent complaint had not prescribed is to be upheld as the first respondent's claim had become prescribed. Given the provisions of s118 of the Act, there is no order as to costs.

DF SMUTS
Judge

APPEARANCES

APPLICANT: R Maasdorp
Instructed by G.F Köpplinger Legal Practitioners

RESPONDENT: M Ntinda
Instructed by Sisa Namandje & Co. Inc.