THE NEW SECTION 145(9) OF THE LRA – UNIQUE, BUT WELCOME

DW de Villiers, Dept. of Mercantile Law, UP

1. INTRODUCTION

An application to review an arbitration award in terms of section 145(1) and 158(1)(g) of the Labour Relations Act is by nature an urgent application[1]. Unfortunately some parties, mainly employers, use numerous delaying tactics to frustrate the other party and/or to kill any further legal proceedings. In layman's terms: "Employers bleed the employees dry".

The Labour Relations Amendment Act, 6 of 2014, introduced a number of important changes and additions to curb this problem. One of these is the addition of subsections 9 and 10 to section 145[2] :

> "(9) An application to set aside an arbitration award in terms of this section *interrupts* the running of prescription in terms of the Prescription Act, 1969 (Act No. 68 of 1969), in respect of that award (my italics)."

---

[1] Practice Manual of the Labour Court 1 April 2013 par 11.2.7.

[2] Other changes in section 145 involve:
(5) Subject to the rules of the Labour Court, a party who brings an application under subsection (1) must apply for a date for the matter to be heard within six months of delivery of the application, and the Labour Court may, on good cause shown, condone a late application for a date for the matter to be heard.
(6) Judgment in an application brought under subsection (1) must be handed down as soon as reasonably possible.
(7) The institution of review proceedings does not suspend the operation of an arbitration award, unless the applicant furnishes security to the satisfaction of the Court in accordance with subsection (8).
(8) Unless the Court directs otherwise, the security must –
(a) in the case of an order of reinstatement or re-employment, be equivalent to 24 months remuneration;
(b) in the case of an order of compensation, be equivalent to the amount of compensation awarded.

Subsection 10 makes it clear that subsection applies only to an arbitration award issued after the commencement date of the Act (i.e. 1 January 2015).

This kind of stipulation is rare in international labour law, but is extremely welcomed in South Africa. It is common practice here for employers to bring reviews to prolong the legal battle and thereby frustrating the employee's rightful claim. The latter is denied the intended expedient relief given by an award in the CCMA or a Bargaining Council. Employers carry on long enough to prolong the review with the aim to have the award eventually prescribed, since they know that many employees do not know that an award containing a debt prescribes after three years.

This paper examines some court cases which might have influenced the eventual addition of section 145(9). Then it sets out the present position in labour resolution and how parties should go about in the Labour Court in the light of some other influential changes to the LRA.

2. THEN

In *CEPPWAWU obo Le Fleur v Rotolabel (a division of Bidpaper Plus (Pty)) Ltd* [2015] 2 BLLR 147 (LC) Judge A van Niekerk remarked that judges could not agree whether the Prescription Act 68 of 1969 ("Prescription Act") applies to the recovery of any claims under the LRA, or to some, or to all. The judge then divided the earlier judgments under this head into four groups, each reflecting a different approach to the issue[3].

The first, and the most popular in terms of frequency, is that the Act applies to all arbitration awards, whether they grant compensation or reinstatement with or without back pay. (See, for example, *Mpanza v Fidelity Guards Holdings (Pty) Ltd*

[3] In his article "The Sands of Time: Prescription and the LRA" Grogan *Employment Law* 2015 Feb discusses the case law pertaining to arbitration awards and prescription extensively. My article leans heavily on Grogan's work.

[2000] 12 BLLR 1459 (LC); *POPCRU obo Sifuba* v *Commissioner of the SAPS and others* [2009] 12 BLLR 1236 (LC); *Fredericks v Grobler NO & others* [2010] 6 BLLR 644 (LC); *Magengenene v PPC Cement (Pty) Ltd & others* (2011) 32 *ILJ* 2518 (LC); *SA Transport & Allied Workers Union obo Hani v Fidelity Cash Management Services* (2012) 33 *ILJ* 2452 (LC); *Sampla Belting SA (Pty) Ltd v Commission for Conciliation, Mediation & Arbitration & others* (2012) 33 *ILJ* 2465 (LC); *National Union of Metalworkers of SA & another v Espach Engineering* (2010) 31 *ILJ* 987 (LC)).

The second approach is that the Prescription Act applies to all awards, but that the filing of a review application by either party interrupts the running of prescription, meaning that the period after the review was filed till dismissal of the application thereof is left out of account when calculating the date on which the "debt" prescribes (see *Aon SA (Pty) Ltd v CCMA & others* (2012) 33 *ILJ* 1124 (LC)).

The third approach is to limit the application of the Prescription Act to awards granting compensation, but to exclude orders of reinstatement from the operation of that Act (*Circuit Breakers Industries Ltd v National Union of Metalworkers of SA obo Hadebe & others* (2014) 35 *ILJ* 1261 (LC)).

The fourth approach, initiated by one judge and supported by some others, regards the Prescription Act as inapplicable to all awards made under the LRA, whether they grant reinstatement, with or without back pay, or compensation (*Coetzee & others v Member of the Executive Council of the Provincial Government of the Western Cape & others* (2013) 34 *ILJ* 2865 (LC); *Cellucity (Pty) Ltd v CWU obo Peters* [2014] 2 BLLR 172 (LC); *NUMSA obo Welcome Masipa v Go Suspensions and Axles (Pty) Ltd & others*, Labour Court, case no. JR3349 dated 26 March 2014, unreported).

After restating Judge Van Niekerk's divisions, Grogan[4], again refers to *Coetzee and Others v MEC of the Provincial Government of the Western Cape and Others* (2013) 34

[4] See "The Sands of Time: Prescription and the LRA", footnote 3 above.

ILJ 2871 (LC) in which Rabkin-Naicker J found that the Prescription Act is inconsistent with the LRA (par 21). She felt her not bound by decisions of the LAC, since those dealt with prescription with regard to contractual claims, and not with unfair dismissal claims under the LRA (par 13). The learned Judge argues as follows:

> "[15] Instead of any reference to prescription or the inclusion of a prescription clause, the LRA includes specific time periods for the referral of claims and underscores the use of the tool of condonation by this court when such periods are exceeded in the text of the statute, rather than in the court's rules.
>
> [16] Further, if the Prescription Act did apply, there should be no distinction as regards its application between the different routes required by the LRA i.e. those that go to conciliation and then to arbitration, and/or those which are adjudicated in the Labour Court after conciliation. This lack of distinction would accord with our constitutional values, particularly the right to equality and of access to justice. The LRA does not proscribe a hierarchy of dismissal claims litigants may bring.
>
> [17] The question of the interruption of prescription is also problematic if one accepts that the Prescription Act applies to all LRA claims and that claims which are arbitrated are only hit by prescription three years after an award is certified or made an order of court. There are various outcomes possible when a referral is made to a bargaining council or the CCMA. One of these occurs when the debtor raises the issue of jurisdiction at conciliation, as happened in this matter, and a ruling ensues in the debtors favour. Should such a finding negate the interruption of prescription by the original referral? First respondent (in the Coetzee-case – *my insert*) argues that it must even though a referral does provide the creditor with knowledge of the debt and of the facts from which the debt arises.
>
> [18] Under the design of the LRA the same problem may arise for a litigant in the following circumstances: a referral is made to conciliation by the creditor and subsequently is referred to arbitration. At the arbitration, a jurisdictional point is raised by the debtor and it is found that the CCMA had no jurisdiction to conciliate or arbitrate the dispute and the matter must go to the Labour Court. Is the statement of claim subsequently filed in this court the only process that can interrupt prescription of the claim despite the fact that the parties have already appeared at two tribunals together.
>
> [19] Another obstacle to the proposition that the Prescription Act applies to all claims under the LRA is the following: a litigant who has to go the arbitration route and gets an

> award in her favour will not be able to enforce that award after three years. Another litigant who must go the adjudication route in terms of the LRA will obtain a "judgment debt" in this court which in terms of the Prescription Act prescribes only 30 years after it is handed down.
>
> [20] Further, the LRA, in its design, does not establish an impenetrable wall between proceedings in the CCMA and / or Bargaining Councils and the Labour Court. Indeed proceedings can move across the divide between court and tribunal in both directions."

Judge Rabkin-Naicker stressed the potential unfairness of prescription to illustrate that the Prescription Act was in conflict with the LRA, since the former Act was not equity based and could lead to unfair results. The central aim of the LRA is to uphold the constitutional right to fair labour practices, including the statutory right not to be unfairly dismissed (section 185(a)). She had to show that the Prescription Act was incompatible with the LRA because the latter Act prevails over all statutes that are in conflict with it (section 210).

A possible fifth approach or support was suggested by the union in *Rotolabel*, apparently relying on *Circuit Breakers Industries*, *supra*. This is that arbitration awards are not subject to the Prescription Act, because they are a form of administrative action subject to the constitutional right to fair administrative action.

In the case of *Circuit Breakers Industries Ltd v NUMSA obo Hadebe and Others* (JR 1958/08) [2013] ZALCJHB 286 (1 November 2013) the employee had obtained an award for reinstatement with back pay in August 2008. In September 2008 the employer filed an application to review the award, which the employee opposed. In July 2012 the employer filed an application in which it sought an order that the award had prescribed. Its main argument was that the employee had failed to take any steps to enforce the award or to claim payment of a 'debt' in terms of the Prescription Act.

The Labour Court here confirmed that extinctive prescription was applicable to employment law. It was held that the filing of a review application does not interrupt

prescription. The Court noted that this would often result in unfair consequences for employees when employers delayed review proceedings to the extent that an employee's award would prescribe if it had not been made a court order. It was noted that the imminent amendments to the Labour Relations Act 66 of 1995 ("LRA") would rectify this unfairness.

However, it had to be established whether prescription had started to run in the first place. Prescription can only run against a 'debt' as defined in the Prescription Act. Hence it had to be determined whether a reinstatement award constituted a debt for the purposes of the Prescription Act. It was held that an award for reinstatement (with or without back pay) creates a right in favour of the employee that stems from the right to fair labour practice. The court confirmed this as the primary remedy in the case of an unfair dismissal. Accordingly, it was held that the legislature could not have intended that a reinstatement award could be undermined by prescription. The court distinguished such an award from an award for compensation. It was held that a compensation award would be considered a debt in terms of the Prescription Act.

This case draws a clear distinction between arbitration awards for reinstatement and awards for compensation. The Judge contended that the former type of award should never prescribe. As such, the longer an employer takes in prosecuting the review timeously the more potential exposure to risk for such employer. This is the case because an order for reinstatement will often be coupled with full back pay from the time of dismissal until the time of the reinstatement.

In contrast, when a compensation award has been granted then the claim to compensation will prescribe if the employee has taken no steps to enforce the debt within three years, e.g. by filing a section 158(1)(c) application. This case also reconfirms the view that the filing of a review application does not interrupt prescription.

3. NOW

Section 145(9) of the amended LRA (2014) reads:

> "(9) An application to set aside an arbitration award in terms of this section *interrupts* the running of prescription in terms of the Prescription Act, 1969 (Act No. 68 of 1969), in respect of that award (my italics)."

How should we interpret the new subsection in the light of the cases and debate up till its inclusion in the Act?

3.1. Interruption is now possible. An arbitration award handed down after 1 January 2015[5] in any CCMA or registered Bargaining will qualify. It seems that section 10 of the Prescription Act, 8 of 1969, is applicable to these awards for which interruption can take place:

> **"10. Extinction of debts by prescription.**
> (1) Subject to the provisions of this Chapter and of Chapter IV, a debt shall be extinguished by prescription after the lapse of the period which in terms of the relevant law applies in respect of the prescription of such debt.
> (2) By the prescription of a principal debt a subsidiary debt which arose from such principal debt shall also be extinguished by prescription.
> (3) Notwithstanding the provisions of subsections (1) and (2), payment by the debtor of a debt after it has been extinguished by prescription in terms of either of the said subsections, shall be regarded as payment of a debt."

3.2 The debtor's application to review and set aside an award does the interruption.

> **"15. Judicial interruption of prescription.**—(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.

[5] Section 145(10) of the amended Act.

(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.

Interruption in section 15 above takes place when "the creditor serves process on the debtor claiming payment". Under the new subsection 145(9) of the LRA the review application of the debtor starts the interruption. This is a strange turnabout and it is not clear that the Prescription Act can be applied in such a way that an action from the debtor can carry this weight. If so, it is submitted that a review application of an award can be seen as a variant form of appeal (though not the same), which attempts to have an original ruling set aside. With appeals execution is interrupted, till the appeal has been dealt with.

3.3 No distinction was made between an award sounding in money and action awards. While this distinction received much attention in the *Circuit Breakers-case*[6], in which a difference was held between an award not primarily sounding in money and an award for reinstatement and full back pay, Judge Van Niekerk remarked in the *Rotabel-case*[7] that an order in favour of an employee in an arbitration award constitutes a "debt" as contemplated in the Prescription Act, since it creates an obligation. The Prescription Act must accordingly apply. Van Niekerk J followed the majority of judgments handed down by the Labour Court on this issue, and dismissed the application to have the award made an order of court.

In common use "debt" is mostly understood to refer to money to be paid in legal tender and in the Prescription Act the words "payment of debt (money)" pervade. However the Oxford Dictionary[8] defines "debt" as "money or services owed or due". Other definitions speak of "goods" and "an obligation" owed or due. A wider definition of "debt" may therefore include reinstatement that is ordered by the CCMA or Bargaining Council on an employer.

Rotolabel is the latest judgment issued under the LRA on the application of prescription to debts and is certainly the judgment most likely to be followed, at least in respect of cases arising before 1 January 2015, unless and until it is overturned by a higher court[9]. *Rotolabel* confirms not only that the Prescription Act applies to all debts arising from arbitration awards under the LRA, but also that prescription applies whether the relief granted by the award is compensation, reinstatement, with or without back pay, or re-employment. *Rotolabel* also confirms that the Prescription Act applies to any other claims arising under the LRA, even if not confirmed by arbitration awards.

---

[6] *Circuit Breakers Industries Ltd v NUMSA obo Hadebe* (JR 1958/08) [2013] ZALCJHB 286.
[7] *CEPPWAWU obo Le Fleur v Rotolabel (division of Bidpaper Plus (Pty)) Ltd* [2015] 2 BLLR 147 (LC).
[8] 2009 300.
[9] I have heard on 18 June 2015 that the legal issues in these matters is set down for clarity in the Labour Appeal Court in August/September 2015.

4. CONCLUSION

This paper charted a journey through many conflicting case law judgments on prescription and debt. Presently we now experience the fruits of this struggle which culminated into the addition of subsection 9 to section 145 of the LRA. Despite some critical views one may have, for example whether the Prescription Act is indeed consistent with the LRA, it is a step in the right direction, namely to curb exploitation of employees by their employers.

16/06/2015