THE APPLICATION OF THE PRESCRIPTION ACT IN LABOUR DISPUTES

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THE APPLICATION OF THE PRESCRIPTION ACT IN LABOUR DISPUTES

By

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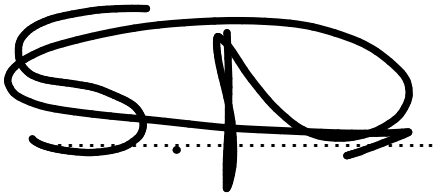

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TABLE OF CONTENTS

CHAPTER 1- INTRODUCTION

CHAPTER 2- THE LABOUR DISPUTE RESOLUTION SYSTEM UNDER THE LRA

CHAPTER 3- THE PRESCRIPTION ACT 68 OF 1969

CHAPTER 1

INTRODUCTION AND OVERVIEW

1.1 INTRODUCTION

It is inevitable that in an employment relationship grievances and conflicts may emerge.[1] This is attested to by the large volume of 193 732 disputes that were referred to the Commission for Conciliation, Mediation and Arbitration (CCMA) during the 2018/19 financial year.[2] In the event where an employee is dismissed from work and he decides to challenge the dismissal, section 191 of the Labour Relations Act (LRA) grants the employee a right to refer the matter to the CCMA for conciliation or arbitration.[3] The purpose of referring the disputes to the CCMA is to support an establishment of a voluntary, free of charge and expeditious mechanisms for labour disputes settlement and allow parties to resolve their disputes through a consensus based process before taking the route of a court process.[4]

There are time frames that are provided for the referral of disputes to the CCMA. Section 191 determines these time frames by stating that an employee must refer their alleged unfair dismissal to the CCMA within 30 days or 90 days when a dispute relates to an unfair labour practice in accordance with section 191(1)(b)(ii) of the LRA.[5] The rationale behind these time frames was outlined in the Constitutional Court (CC) judgement of *Toyota SA Motors (Pty) Ltd v CCMA,*[6] as a means to bring about the expeditious resolution of labour disputes which by their nature, require speedy resolution.[7] In terms of section 191(2) of the LRA, non-observance of these time

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[1] International Labour Organization "Labour dispute prevention and resolution" (undated) https://www.ilo.org/ifpdial/areas-of-work/labour-dispute/lang--en/index.htm (accessed on 25 April 2020).
[2] CCMA "Annual report 2018/19" (Undated) ccma.org.za/About-us/Reports-Plans/Annual-Reports accessed (04 May 2020).
[3] 66 of 1995.
[4] International Labour Organization "Labour dispute prevention and resolution" (undated) https://www.ilo.org/ifpdial/areas-of-work/labour-dispute/lang--en/index.htm (accessed on 25 April 2020).
[5] Roodt "Condonation Applications at the CCMA-What Employers should know" (8 February, 2019) https://www.schoemanlaw.co.za/condonation-applications-ccma-employers-should-know/ (accessed on 25 April 2020).
[6] 2016 (3) BCLR 374 (CC).
[7] *Ibid*, par 1.

frames may be condoned on good cause shown.[8] In this respect, the Labour Court in *Lempe v Distell Limited*[9] provided that when a court is assessing a reasonableness of a delay in bringing the matter within the prescribed period, it must not lose sight of the purpose outlined in *Toyota SA Motors (Pty) Ltd v CCMA.*[10]

According to section 133 (1)[11] read together with section 135 (5)[12] the CCMA is obligated to appoint a commissioner to conciliate or arbitrate the dispute within 30 days after its referral and must issue certificate of non-resolution when the matter remained unresolved.[13] In terms of section 191 (11) of the LRA, the dispute must be referred to the Labour Court (LC) within 90 days after the issuing of the certificate, however, the LC may condone non-observance of the time frame on good cause shown.[14]

Assume that the employee has correctly referred the matter but after conciliation the matter remained unresolved and the commissioner issues the certificate of non-resolution for the matter to go to the LC. Further assume that the employee referred its matter after 4 years, with hope to show good cause for condonation. Bear in mind that in excessive delays such as this one, the courts have endorsed as follows:

> "Condonation in labour disputes is not simply there for the taking and where the delay is without reasonable, satisfactory and acceptable explanation, condonation may be refused. The expeditious resolution of labour disputes is a fundamental consideration."[15]

Now based on this excessive delay the employer objects to the claim, contending that in terms of section 16 (1) of the Prescription Act (PA)[16], unfair dismissal claim is subject to prescription period of three years as envisaged in section 11 (d), as it constitutes a

[8] LRA 66 of 1995.
[9] (J 235/2014) [2019] ZALC 3 (30 April 2019).
[10] *Ibid*, par 10; *Toyota Motors SA v CCMA* 2016 (3) BCLR 374 (CC).
[11] S 133 (1) of the LRA states that (1) The Commission must appoint a commissioner to attempt to resolve through conciliation-
(a) any dispute referred to it in terms of section 134; and
(b) any other dispute that has been referred to it in terms of this Act.
[12] S 135 (5) provides that (5) When conciliation has failed, or at the end of the 30-day period or any further period agreed between the parties-
(a) the commissioner must issue a certificate stating whether or not the dispute has been resolved.
[13] LRA 66 of 1995.
[14] S 191 (11)(a)-(b) of the LRA 66 of 1995.
[15] *Lempe v Distelle* (J 235/2014) [2019] ZALC 3 (30 April 2019), par 11-12.
[16] 68 of 1969.

'debt' in terms of that Act.[17] Before determining the matter, the LC will have to pronounce on the issue of prescription that has been raised by the respondent in order to continue.

1.2 Problem Statement

This brings the discussion to the main question of this research of determining whether the PA applies to labour disputes.

> "When an employee has been dismissed and seeks to institute civil action for wrongful dismissal or unlawful dismissal in the civil courts to secure damages or reinstatement or for an order declaring that the dismissal is unlawful, invalid and of no legal force and effect, the Prescription Act may be applicable but it has no application if the employee seeks to refer a dismissal dispute to the CCMA or a bargaining council for conciliation.[18]

There has been an on-going debate and confusion around the relationship between the time frames that are set out in terms of the LRA and those set out in the PA regarding the issue of pursuing unfair dismissal claims.[19] In terms of the LRA an aggrieved party is expected to bring the dispute to the attention of the LC within 90 days after the CCMA has failed to resolve it[20], while the PA provides for the prescription of disputes or 'debts' after three, six, fifteen and thirty years[21], depending on their nature.

However, at the centre of the debate has been the correct interpretation of section 16 (1) of the PA.[22] This provision articulates that the provisions of the PA will apply to "any debt", unless the PA is "inconsistent" with any Act of parliament that prescribes a specified period within which an action is to be instituted or a claim is to be made.[23] In

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[17] Prescription Act 68 of 1969.
[18] *Myathaza v Johannesburg Metropolitan Bus Services (SOC) Ltd t/a Metrobus* (CCT232/15) [2016] ZACC 49, par 132.
[19] Malope "South Africa: Does The Prescription Act Apply To Unfair Dismissal Disputes In Terms Of The LRA?" (dated 13 April 2018) https://www.mondaq.com/southafrica/Employment-and-HR/691648/Does-The-Prescription-Act-Apply-To-Unfair-Dismissal-Disputes-In-Terms-Of-The-LRA accessed (04 May 2020).
[20] S 191 (11)(a)-(b) of the LRA 66 of 1995.
[21] S 11 of the Prescription Act 68 of 1969.
[22] 68 of 1969.
[23] S 16(1) of the PA 68 of 1969 provides that (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

order for this research to correctly answer the question of whether or not the PA applies to labour disputes, it has to first answer two preliminary questions; the first being whether the labour dispute claims constitute a "debt" under the PA and secondly, whether the time periods that are set out in the PA are inconsistent with provisions of the LRA.[24]

The answer to these questions lies in the Constitutional Court's interpretation of the relevant provisions of the PA in relation to the provisions of the LRA. An answer that favours the application of the PA to labour disputes, inevitably triggers the question of when prescription starts to run and when is it considered to be interrupted. It is proposed that all the above questions will be responded to, through the discussion of various cases from the LC, Labour Appeal Court (LAC) and the Constitutional Court (CC). These cases will include but not limited to the following cases:

The first one will be *Myathaza v Johannesburg Metropolitan Bus Services (SOC) Ltd t/a Metrobus*[25] *(Myathaza),* a case that dealt with the question of whether an arbitration award issued by the CCMA constitutes a 'debt' that prescripts after 3 years. The second one will be *Mogaila v Coca Cola Fortune (Pty) Limited*[26] *(Mogaila).* This one has analogous facts as *Myathaza*[27] and it deals with the same issue. A third case is that of *National Union of Metalworkers of South Africa v Hendor Mining Supplies (Pty) Ltd)*[28] *(Hendor Mining Supplies),* where the CC was asked to decide whether a 'reinstatement order' with an obligation of backpay constitutes a judgement debt that prescribes after 30 years or just a contractual debt that prescribes after 3 years. The last case to be discussed will be that of *Food and Allied Workers Union obo Gaushubelwe v Pieman's Pantry (Pty) Ltd*[29] *(FAWU).* In this matter the issue to be responded to was whether the PA is applicable to unfair dismissal disputes.

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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.

[24] Malope "South Africa: Does The Prescription Act Apply To Unfair Dismissal Disputes In Terms Of The LRA?" (dated 13 April 2018) https://www.mondaq.com/southafrica/Employment-and-HR/691648/Does-The-Prescription-Act-Apply-To-Unfair-Dismissal-Disputes-In-Terms-Of-The-LRA accessed (04 May 2020).

[24] 68 of 1969.

[25] (CCT232/15) [2016] ZACC 49.

[26] (CCT76/16) [2017] ZACC 6.

[27] *Myathaza v Johannesburg Metropolitan Bus Services (SOC) Ltd t/a Metrobus* (CCT232/15) [2016] ZACC 49.

[28] (2017) 38 ILJ 1560 (CC).

[29] (2018) 39 ILJ 1213 (CC).

1.3 RESEARCH AIMS AND OBJECTIVES

1.3.1 Primary objective

The main focus is to establish whether the PA[30] is applicable in labour disputes under the LRA. Resolution of this issue hinges on whether labour dispute claims qualify as 'debts' under the PA and secondly, whether the provisions of the PA that regulates the time periods for the submission of claims are inconsistent with the time periods set out in the LRA.[31]

1.3.2 Secondary objective

The secondary objective is depended upon the results of the primary objective. It is concerned with determining the exact time when prescription starts to run and when is it interrupted in labour disputes.

1.3.3 Tertiary objective

This too is depended on the findings from the primary objective. Once it is discovered that the PA applies in labour disputes, the question will be how to reconcile the two Acts with their different time periods.

1.4 SIGNIFICANCE OF THE STUDY

It is now common knowledge that labour disputes by their nature should be resolved expeditiously as undue delays may have a catastrophic effect on the business of the employer and the livelihood of the employee if long time lapses without a salary.[32] The catastrophe may be even greater where an employee who seeks to enforce his/her claim is told that it has expired due to non-adherence to limitation periods. On the expiry of a prescribed period as per the PA, the claim becomes extinguished by the operation of law and the debtor does no longer owe the creditor anything in terms of the law.[33] This research is intended to assist those employees who might be tempted to delay enforcing their rights based on a variety of reasons, with the hope to show

[30] Prescription Act 68 of 1969.
[31] 66 of 1995.
[32] *Myathaza* judgement para 33.
[33] Pillay-Shaik, Mkiva and Gilfillan "Litigation and enforcement in South Africa: Overview" dated (1 June 2015) https://uk.practicallaw.thomsonreuters.com/0-502-0205?transitionType=Default&contextData=(sc.Default)&firstpage=true&bhcp=1 accessed (09 May 2020).

'good cause' for condonation in terms of the LRA, unaware of the disadvantage they may face if the PA applies into their labour issues.

The results of this research will not only help employees but also junior attorneys who are not yet equipped with knowledge with regards to prescription periods that are applicable in labour dispute matters.

1.5 List of Abbreviations

CC	Constitutional Court
CCMA	Commission for Conciliation, Mediation and Arbitration
LAC	Labour Appeal Court
LC	Labour Court
LRA	Labour Relations Act 66 of 1995
PA	Prescription Act 68 of 1969

1.6 Research Methodologies

The treatise will be based on and researched from a variety of sources. These sources include, but are not limited to, books, articles, papers, cases, legislation and internet sources. The books utilised will consist of a number of legal textbooks, treatises and dissertations by various academics and legal experts in the field of labour law.[34]

1.7 OVERVIEW OF THE CHAPTERS

Chapter 1 - Introduction

This chapter provides an overview of the research topic, a discussion of the research problem, and an outline of the significance and objectives of the study. The relative importance of the topic of this study will also be discussed in this chapter.

Chapter 2 – The dispute resolution system under the LRA

This chapter will outline the dispute resolution system under CCMA and LC as provided for in terms of the LRA. The main focus will be on procedure and time periods

[34] When necessary, the *Collins Shorter English Dictionary* (1993) published by Harper Collins Publishers will be used to assist with various definitions and terminology used throughout the dissertation.

that are provided for the referral of disputes by the employees to the CCMA and to the LC.

Chapter 3 – The provisions of the Prescription Act 68 of 1969

The chapter will discuss the relevant provisions of the PA that set out the different time periods in different types of debts. The chapter will also discuss the applicability of the PA in other areas of law that have specific statutes regulating them. Lastly it will analyse the concept of 'debt' and consider through case law whether labour issues such as arbitration awards, reinstatement order with backpay and unfair dismissal claim constitute a 'debt' as mentioned in the PA.

Chapter 4 – Case law

The discussion will now turn to consider the case law development on the issue of the application of the PA in labour matters. Relevant cases emanating from the LC, LAC and CC will be extensively discussed and analysed.

Chapter 5 – Running and interruption of prescription

This chapter will determine when the prescription period starts to run and when is it considered to be interrupted in labour dispute matters. It will also discuss how the effect of a review application in the running of prescription.

Chapter 6 - Conclusion

This chapter will provide a summary of the information presented in the previous chapters. Inferences are drawn from the results to formulate recommendations.

Chapter 2 - Labour dispute resolution system under the LRA

2.1 Introduction

In an employment relationship, disputes are inevitable. The causes of disputes are numerous, including *inter alia*, a situation where one party has made a demand and the other party has either rejected the demand or has allowed an unreasonable time to elapse without dealing with it properly.[35] A dispute is defined as a grievance that has reached a more formal stage to the extent that it must be referred outside of the organisation for resolution.[36] The Legislature has thus promulgated the LRA which its purpose is *inter alia* to establish organisations that will allow the referral of disputes for resolution.[37]

The preamble of this Act states that it has been tasked to provide simple procedures for the resolution of labour disputes through the CCMA and independent alternative dispute resolution services accredited for that purpose. It is also tasked to establish the Labour Court and Labour Appeal Court as superior courts, with exclusive jurisdiction to decide matters arising from the Act.[38] It has been held that the whole scheme of the LRA is directed at cheap and easy access to dispute resolution processes,[39] and it does this by providing remedies and facilitating access to courts and other *fora* for the settlement of disputes.[40] It is against this background that this chapter will discuss in depth the powers and functions of the different courts that are established by the LRA to resolve labour dispute matters.

2.2 Brief history of the 1995 LRA

Prior the promulgation of the 1995 LRA, labour relations were governed by the 1956 LRA which was severely criticised for its failures on various grounds. It was noted that using its conciliation procedures required sophistication and expertise, and there were many technicalities in the process.[41] Many of the problems encountered in the

[35] Barker and Holtzhausen *South African labour glossary* (1996) 18.
[36] Bendeman "Understanding conflict in labour dispute resolution" 2003 27 *South African Journal of Labour Relations* 81 90.
[37] 66 of 1995.
[38] The Preamble of the LRA 66 of 1995.
[39] *Shoprite Checkers (Pty) Ltd v CCMA* 2009 (3) SA 493 (SCA), par 34.
[40] *Gcaba v Minister of Safety and Security* 2010 (1) SA 238 (CC), par 1-2.
[41] Steenkamp and Bosch "Labour dispute resolution under the 1995 LRA: Problems, pitfalls and potential" 2012 2012.1 *Acta Juridica* 120 121.

conciliation process was a result of the lack of resources and properly trained personnel.[42] In *Pep Stores (Pty) Ltd v Lala NO*, it was commented that the Industrial court, was only a court in name but it did not possess the status of the High court nor it formed part of the judicial hierarchy.[43] The situation was exacerbated further by the fact that its personnel lacked security of tenure and their remuneration packages were relatively low.[44] These challenges posed an impediment on the successful and expeditious resolution of disputes.

A legal task team was initiated to draft a bill that will would open for public discussion, which was aimed at eliminating the problems that were caused by the 1956 Act.[45] The draft Bill was termed the "Labour Relations Bill of 1995"and it was published for comments on 10 February 1995.[46] The State, organized labour, and businesses negotiated the Bill in the National Economic Development and Labour Council ('Nedlac') and the task team drafted changes to the Bill to give effect to the agreements reached. During September of 1995, the Bill was signed into law as the Labour Relations Act 66 of 1995 but its operation was suspended for a future date that was to be fixed by the President.[47]

The main objectives of the 1995 LRA was to address the problems that were faced under the 1956, by making provisions for simple procedures to be followed when one wants to access the dispute resolution system.[48] Section 1 of the new Act provides that one of the primary objectives is to promote effective dispute resolution and section 3 urges all courts to interpret the provisions of this Act in furtherance of the primary objective.[49] The courts have stated that when the LRA talks of 'effective dispute resolution', it means there must be a system that is properly structured, functioning and that can resolve disputes quickly and put the issue to finality.[50] The CC in *Toyota SA Motors (Pty) Ltd v CCMA,*[51] presented the new Act as follows:

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[42] *Ibid.*
[43] (1998) 19 *ILJ* 1534 (LC).
[44] Steenkamp and Bosch 2012 *Acta Juridica* 147.
[45] Basson and Strydom "The Labour Relations Act 66 of 1995: the Resolution of Disputes about Alleged Unfair Dismissals" 1996 8 *South African Mercantile LJ* 1 1.
[46] *Ibid.*
[47] *Ibid.*
[48] Steenkamp and Bosch 2012 *Acta Juridica* 121.
[49] LRA 66 of 1995.
[50] *Pep Stores (Pty) Ltd v Laka NO* (1998) 19 ILJ 1534 (LC), par 39.
[51] 2016 (3) BCLR 374 (CC).

> "The dispute resolution dispensation of the old Labour Relations Act was uncertain, costly, inefficient and ineffective. The new Labour Relations Act (LRA) introduced a new approach to the adjudication of labour disputes. This alternative process was intended to bring about the expeditious resolution of labour disputes which, by their nature, require speedy resolution."[52]

The LRA has thus created institutions that will be only responsible for hearing labour dispute matters: the CCMA and a specialist Labour Court that holds an exclusive jurisdiction in labour matters emanating from the CCMA. It has also allowed some matters to be left to the jurisdiction of the sectoral bargaining councils that will perform collective bargaining and dispute resolution functions in many economic sectors.[53]

2.3 The CCMA and the Labour Courts

2.3.1 The CCMA

The CCMA is an independent statutory body with jurisdiction in all the nine provinces in South Africa.[54] Its powers are derived from statute and it cannot therefore perform any function other than those conferred upon it by the LRA.[55] The CCMA has been granted powers to conciliate and arbitrate any dispute referred to it in terms of any provision of the LRA and disputes in terms of section 134.[56] This is provided for in section 133, which reads as follows:

> "(1) The Commission must appoint a commissioner to attempt to resolve through conciliation-
>
> (a) any dispute referred to it in terms of section 134; and
>
> (b) any other dispute that has been referred to it in terms of this Act.
>
> (2) If a dispute remains unresolved after conciliation, the Commission must arbitrate the dispute if -
>
> (a) this Act requires the dispute to be arbitrated and any party to the dispute has requested that the dispute be resolved through arbitration; or

[52] *Ibid*, par 1.
[53] Benjamin "Assessing South Africa's Commission for Conciliation, Mediation and Arbitration (CCMA)" 2013 Working Paper No. 47 *ILO DIALOGUE* 1 5.
[54] Ss 113 and 114 of the LRA 66 of 1995.
[55] Section 115.
[56] Bensch *The Application of the Prescription Act 68 of 1969 to Unfair Dismissal Disputes under the Labour Relations Act 66 of 1995* (Master of law mini-dissertation) 2019 1 3.

(b) all the parties to the dispute in respect of which the Labour Court has jurisdiction consent in writing to arbitration under the auspices of the Commission."[57]

What ought to be noted from this section is that the CCMA has jurisdiction over any dispute of mutual interest.[58] Dispute of mutual interests always involve the disagreement between the employees and an employer regarding the conditions of employment, such as health and safety issues, the dismissal of workers and the negotiation of disciplinary grievances.[59] This categorization of disputes is often referred to as "disputes of right" and "disputes of interest".[60] It has been argued that albeit the labour disputes are generally accepted to be categorized this way, "matters of mutual interest" are wide enough to include both these types of disputes.[61] The court in *De Beers Consolidated Mines Ltd v CCMA,*[62] made it clear that the term "matter of mutual interest" is not defined in the Act and that it must be literally interpreted to mean "any issue concerning employment". The dispute of rights has been interpreted in *Gauteng Provinsiale Administrasie v Scheepers,*[63] as concerning the application or interpretation of existing rights, which emanate from a statute, a collective agreement or a contract of employment.[64]

The dispute of interest was interpreted in *SACCAWU v Bredasdorp Spar,*[65] as including any matter that fairly and reasonably could be regarded as affecting the common interests of the parties concerned. In *Rand Tyres, Accessories (Pty) Ltd and Appel v Industrial Council for the Motor Industry (Transvaal)*,[66] it was interpreted as

[57] S 133 of the LRA 66 of 1995.
[58] Du Toit, Conradie, Giles, Godfrey, Cooper, Cohen and Steenkamp *Labour Relations Law: A Comprehensive Guide* 6th ed (2015) 122.
[59] Manamela ""Matters of mutual interest" for purposes of a strike: Vanachem Vanadium Products (Pty) Ltd v National Union of Metalworkers of South Africa [2014] 9 BLLR 923 (LC)" 2015 36.3 *Obiter* 791 795.
[60] Botha "Is a demand for a higher percentage of share equity a mutual interest in respect of which employees may embark on a strike?" 2011 1 *TSAR* 174 176.
[61] Botha "Revisiting an old friend: what constitutes "a matter of mutual interest" in relation to a strike? A tale of two recent cases*: Pikitup (SOC) Ltd v SA Municipal Workers Union on behalf of Members* (2014) 35 ILJ 983 (LAC); and *Vanachem Vanadium Products (Pty) Ltd v National Union of Metal Workers of SA* Case No J 658/14" 2015 *Obiter* 194 199.
[62] (JA68/99) [2000] ZALAC 10, par 16.
[63] (2000) *ILJ* 1305 (LAC).
[64] *Ibid*, par 1309j - 1310a.
[65] (1998) *ILJ* 947 (CCMA).
[66] (1941) TPD 108.

referring to proposals for the creation of new rights or the diminution of existing rights which are ordinarily to be resolved by collective bargaining.[67]

In all the disputes of mutual interest, the LRA set out steps to be followed when one attempts to resolve the dispute through the auspices of the CCMA. The first step is that the dispute must be referred to the CCMA for conciliation.[68] All disputes about unfair dismissals, trade union organizational rights, the interpretation of collective agreements and certain individual unfair labour practices, as well as interest disputes arising from collective bargaining, must be referred to conciliation.[69] There are prescribed time frames within which to refer the dispute and they are provided for in section 191 of the LRA provides as follows:

> "(1) (a) If there is a dispute about the fairness of a dismissal or a dispute about an unfair labour practice, the dismissed employee or the employee alleging the unfair labour practice may refer the dispute in writing within to-
>
> (i) a council, if the parties to the dispute fall within the registered scope of that council; or
>
> (ii) the Commission, if no council has jurisdiction.
>
> (b) A referral in terms of paragraph (a) must be made within –
>
> (i) 30 days of the date of a dismissal or, if it is a later date, within 30 days of the employer making a final decision to dismiss or uphold the dismissal;
>
> (ii) 90 days of the date of the act or omission which allegedly constitutes the unfair labour practice or, if it is a later date, within 90 days of the date on which the employee became aware of the act or occurrence.
>
> (2) If the employee shows good cause at any time, the council or the Commission may permit the employee to refer the dispute after the relevant time limit in subsection (1) has expired."[70]

Accordingly, based on this section, an employee is expected to refer the dispute within 30 days of the dismissal or 90 days of the alleged unfair labour practice by completing the 7.11 form and serve it to the employer and to the CCMA.[71] However, if the

[67] *Ibid*, par 115.
[68] Du Toit *et al Labour Relations Law: A Comprehensive Guide* 122.
[69] Benjamin 2013 *ILO DIALOGUE* 6.
[70] S 191 of the LRA 66 of 1995.
[71] Van Niekerk, Christianson, McGregor, Van Eck and Smit *Law@Work* 5th ed (2017) 478.

employee has failed to refer the matter within the prescribed period, the CCMA may condone the late referral on good cause shown. It has been submitted that condonations are only applied for in less than 10 percent of the cases and only 75 percent of them are successful.[72] This means 25 percent is rejected due to non-compliance with a prescribed period. This denotes the importance of adhering to the time frames provided for in the LRA as they are meant to promote the speedy resolution of disputes. [73]

The court in *Toyota SA Motors (Pty) Ltd v CCMA,*[74] emphasised the importance of respecting the time periods by holding thus;

> "Time periods in the context of labour disputes are generally essential to bring about timely resolution of the disputes. Any delay in the resolution of labour disputes undermines the primary object of the LRA. It is detrimental not only to the workers who may be without a source of income pending the resolution of the dispute but, ultimately, also to an employer who may have to reinstate workers after many years."[75]

Expeditious resolution of dispute is also ensured by the refusal of legal representatives in the conciliation process, which arguably curb the delays that may be caused by technicalities and legalism.[76] When a matter has been successfully referred, section 135 of the LRA requires that the CCMA appoint a commissioner to conciliate the matter within 30 days of its referral or within the time agreed upon by the parties.[77] The Commissioner must attempt to resolve the dispute by mediating the dispute; conducting a fact-finding exercise; and making of a recommendation to the parties, which may be in the form of an advisory arbitration award.[78] In the conciliation, if the parties reach an agreement, it is made a settlement agreement.[79] However, if the dispute remained unresolved or 30 days lapsed without the conciliation of the dispute, the commissioner must issue a certificate of non-resolution to allow the employee to proceed to the arbitration stage or adjudication by the LC.[80]

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[72] Benjamin 2013 *ILO DIALOGUE* 15.
[73] Basson and Strydom 1996 *South African Mercantile LJ* 4.
[74] 2016 (3) BCLR 374 (CC).
[75] *Ibid*, par 1.
[76] Benjamin 2013 *ILO DIALOGUE* 2; Steenkamp and Bosch 2012 *Acta Juridica* 120.
[77] S 135 of the LRA 66 of 1995.
[78] S 135(3) of the LRA 66 of 1995.
[79] Van Niekerk *et al Law@Work* 497.
[80] Basson and Strydom 1996 *South African Mercantile LJ* 5.

Once the certificate of non-resolution has been issued, the time limits start to count for the next stage in the dispute resolution process.[81] In terms of section 136 of the LRA, the next step is to have the dispute arbitrated within the period of 90 days from the day of the issuing of the certificate of non-resolution and the dispute is referred to arbitration using the 7.13 form, as opposed to 7.11 form.[82] Arbitration can be defined as a route for adjudicating disputes about dismissals that are related to the employee's conduct or capacity, disputes concerning trade union organizational rights, the interpretation of collective agreements and certain individual unfair labour practices.[83] There are some disputes that cannot be subject to arbitration, but that must be referred for adjudication by the LC. Examples of such disputes would be dismissals concerning operational requirements, strikes and cases in which discrimination is alleged.[84]

41 per cent of cases in which arbitration is required are dealt with in "con-arb" process in which the arbitration commences as soon as the conciliation has failed. However, any party has a right to object to the con-arb, in which case the employee has 90 days after the issue of the certificate of non-resolution to refer the dispute to arbitration.[85] The detailed contents of how the arbitration process is to be conducted are contained in section 138 of the LRA, which provides that a commission may arbitrate the dispute in any manner that he/she considers appropriate in order to determine the dispute fairly and quickly, but must deal with the substantial merits of the dispute with the minimum of legal formalities.[86]

It is argued that this provision provides wide discretion to the arbitrator on how to conduct the process, but he/she must ensure that the proceedings do not imitate the court proceedings.[87] The court in *Standard Bank of SA Ltd v CCMA*,[88] warned the commissioners that when exercising this discretion, they must be careful to apply their minds to ensure a proper balance between the cost-effective use of the CCMA's

[81] Bensch *The Application of the Prescription Act 68 of 1969 to Unfair Dismissal Disputes under the Labour Relations Act 66 of 1995* (Master of law mini-dissertation) 2019 1 5.
[82] *Ibid.*
[83] Benjamin 2013 *ILO DIALOGUE* 6.
[84] *Ibid.*
[85] *Ibid*, 19.
[86] S 138(1) of the LRA 66 of 1995.
[87] Steenkamp and Bosch 2012 *Acta Juridica* 127.
[88] (1998) 19 *ILJ* 903 (LC).

resources and the need to have disputes determined in a manner that is fair to both parties. A failure to do so is likely to prompt intervention by the LC.[89]

The parties to the dispute are allowed to present evidence, call witnesses, address concluding arguments to the commissioner and have legal representations.[90] However, in dismissal arbitrations, legal representation is generally not permitted unless the parties consent or the arbitrator sees a need due to the complexity of the matter.[91] Instead of an absolute bar to legal representation, the LRA clothe the arbitrator with a discretion to allow legal representation.**[92]** Once the arbitrator has pronounced a decision, there is no appeal that may be referred against the decision but only reviews by the LC are permitted.**[93]** In terms of section 191 (11) of the LRA, the dispute must be referred to the LC within 90 days after the issuing of the certificate, however, the LC may condone non-observance of the time frame on good cause shown.[94]

The allowance of the employee to show good cause for condonation after failing to adhere to the prescribed referral period could create problems when the provisions of the PA are to be applicable. The PA would not allow the employee to refer a dispute after the lapse of three years even if a good cause is shown because the action would have prescribed. In the ensuing chapters, it would be clear how to reconcile these two Act.

2.3.2 The Labour Court

The LC is established by section 151 of the LRA as a court of law and equity, with a status of a superior court that is equivalent to that of the High Court.[95] Unlike the CCMA, it does not have offices in all nine provinces of South Africa but it can perform its functions in any province.[96] The drafter of the LRA intended the LC to be

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[89] *Ibid*, 904 – 905.
[90] S 138(2) and (4).
[91] Rule 25(1)(c) of CCMA Rules.
[92] Benjamin 2013 *ILO DIALOGUE* 23.
[93] *Ibid,* 6.
[94] S 191 (11)(a)-(b) of the LRA 66 of 1995.
[95] S 151 of the LRA "**Establishment and status of Labour Court**
(1) The Labour Court is hereby established as a court of law and equity.
(2) The Labour Court is a superior court that has authority, inherent powers and standing, in relation to matters under its jurisdiction, equal to that which a court of a provincial division of the High Court has in relation to the matters under its jurisdiction."
[96] Du Toit *et al Labour Relations Law: A Comprehensive Guide* 183.

responsible for the interpretation and application of the LRA provisions and to have exclusive national jurisdiction over labour matters.[97] Accordingly, it has exclusive jurisdiction over matters that concern dismissals for operational requirements, strike dismissals, interpretation of the LRA and other labour legislation, interdicting industrial actions that does not comply with statutory requirements and other cases in which the dismissal is alleged to involve discrimination. [98]

Furthermore, its exclusive jurisdiction extends to reviews of arbitration awards issued by the CCMA, in which it is granted powers to supervise the manner in which the CCMA fulfils its statutory dispute resolution mandate through the exercise of these review powers.[99] However, there are matters that the LC has concurrent jurisdiction with the High Courts and other forums. In *De Beer Consolidated Mines (Pty) Ltd v CCMA*,[100] it was held that the LC has concurrent jurisdiction with the civil courts to hear any matter related to a contract of employment, regardless of whether any basic condition of employment constitutes a term of that contract.

The CC seized an opportunity in couple of times to pronounce on the jurisdiction of the LC. In *Chirwa v Transnet,*[101] Ngcobo J had this to say about the exclusive jurisdiction:

> "The declared intention of the LRA is 'to establish the Labour Court and the Labour Appeal Court as superior courts with exclusive jurisdiction to decide matters arising from the LRA'. These are specialised courts which function in a specialised area of law. They were established by Parliament specifically to administer the LRA. Their primary responsibility is to oversee the ongoing interpretation and application of the LRA and the development of labour relations policy and precedent. Through their skills and experience, judges of the Labour Court and the Labour Appeal Court accumulate expertise which enables them to resolve labour and employment disputes speedily. Moreover, the Labour Court is a superior court and has the authority, inherent powers and standing in relation to matters under its jurisdiction equal to that of the High Court."[102]

[97] Benjamin 2013 *ILO DIALOGUE* 134.
[98] Ss 156 and 157 of the LRA 66 of 1995; Benjamin 2013 *ILO DIALOGUE* 7.
[99] *Ibid*; S 145 of the LRA 66 of 1995
[100] (JA68/99) [2000] ZALAC 10, p 10.
[101] 2008 (4) SA367 (CC).
[102] *Ibid*, par 105.

In *Gcaba v Minister of Safety and Security,*[103] the applicant referred a matter of unfair labour practice to the Safety and Security Sectoral Bargaining Council, after the employer did not promote him. He subsequently withdrew the dispute from the bargaining council and approached the High court with an application to review the decision of the SAPS not to appoint him as station commissioner. The High court held that it lacked jurisdiction to determine the matter, as it concerned an employment matter. The matter reached the CC as an appeal, in which it was held that the LRA created procedures and institutions to deal with labour disputes.[104]

The applicant's cause of action was found to be rooted in the provisions of the LRA, as it concerned the conduct of the employer towards an employee which was viewed by the latter as constituting an unfair labour practice. It was held that, it would have been a different story if the matter was based on an administrative action, in which case the High court and other civil courts would have jurisdiction. Accordingly, his appeal was dismissed based on the reasoning that it should have been adjudicated by the LC. The CC stipulated that;

> "Once a set of carefully-crafted rules and structures has been created for the effective and speedy resolution of disputes and protection of rights in a particular area of law, it is preferable to use that particular system."[105]

There is a very important aspect that every person who intends to refer a matter to the LC must adhere to: that a matter must have been referred for conciliation first. The LAC in *NUMSA v Driveline* through Zondo AJP, as he was, delivered the majority judgement which stipulated that whether the matter will be arbitrated or adjudicated, it must have been referred for conciliation.[106] It was stated that in terms of section 191 (5) there are two incidents that must pre-cede before an employee may acquire the right to subject the dispute to arbitration or refer it to the LC. The first one is that the commissioner must issue a certificate to the effect that the dispute remained unresolved. The second one is when 30 days have passed since the dispute was referred.[107]

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[103] 2010 (1) SA238 (CC).
[104] *Ibid,* par 56-57.
[105] *Ibid.*
[106] 2000 (4) SA 645 (LAC), par 38.
[107] *Ibid,* par 73.

In *NUMSA v Intervalve (Pty) Ltd*, it was held that the LC does not even begin to have jurisdiction over the matter that was not referred.[108] In the recent judgement of *Association of mineworkers and construction union (AMCU) v Ngululu bulk carriers (pty) limited,*[109] the CC revived the principles distilled in *Driveline* and *Intervalve.* Before dealing with the issue the court first reiterated that albeit the LC is vested with jurisdiction to determine a matter relating to unfair dismissal, but such jurisdiction is deferred until the matter is referred for conciliation.[110] The LC may decline jurisdiction if it is not satisfied that an attempt was made to resolve the dispute through conciliation.[111]

Once the jurisdictional ground has been established, the LC must determine the matter. The parties are required to argue their respective cases in person or through their legal representatives.[112] The court must then make any appropriate order, which may include interim relief, interdict, award of compensation or award of damages.[113] If the dispute was about an alleged unfair dismissal or unfair labour practice, the court may order reinstatement, re-employment or compensation to the employee.[114] Grogan defines the term 'reinstatement' as to allow the employee to resume employment on the same terms and conditions that prevailed before the dismissal. [115] This definition accords with that of the CC in *Equity Aviation Services (Pty) Ltd v CCMA,* where it was stated as to mean that an employee must be restored to the *status quo ante* prior the dismissal and on the same terms and conditions.[116] Re-employment differs to reinstatement, in that re-employment refers to the process whereby the parties enter into a new contract of employment.[117] The new contract may or may not be on the same terms as the earlier contract.[118]

[108] [2015] 3 BLLR 205 (CC), par 108.
[109] (CCT15/18) [2020] ZACC 8 (6 May 2020).
[110] *Ibid*, par 16.
[111] Du Toit *et al Labour Relations Law: A Comprehensive Guide* 189.
[112] Basson and Strydom 1996 *South African Mercantile LJ* 5.
[113] S 158 (1) of the LRA 66 of 1995.
[114] S 193 of the LRA 66 of 1995.
[115] Grogan *Dismissal* (2004) 333 – 334.
[116] 2009 (2) BCLR 111 (CC), par 36.
[117] *CGM Industrial (Pty) Ltd v Teleki* LAC/A/07/05, par 12.
[118]Mosito and Mohapi "Reinstatement,re-employmentand compensation: a comparative discussion of concepts and perspectives in the employment law of Lesotho and South Africa" 2017 25.1 *Lesotho Law Journal* 1 13.

The employee or the employer who is dissatisfied with the outcomes in the LC, may appeal to the higher court than the LC. For quite some time the LAC was viewed as the final court of instance in labour matters concerning the interpretation of the LRA and other matters within the exclusive jurisdiction of the LC.[119] It was reasoned that such a state of affairs would promote consistency in interpretation and application of the LRA. The promulgation of the new LRA allowed the appeals from the LAC to reach the CC and some may even be heard and determined by the SCA before they reach the CC.[120]

2.3.3 Enforcement

Although the process of the CCMA is quick and cheap, but its informal nature makes it less respected by some of the parties, in that once they step out of its premises, they ignore the settlement agreements or arbitration awards issued against them. Some of the employers deliberately procrastinate to comply with the orders of the CCMA so that the period of enforcement may run against the employee.[121] The LRA has thus put measures to protect the vulnerable employees by having their arbitration awards certified in order for them to have a status of a court order.[122] However, this is not without challenges as the certification process may take a long time to be finalised.[123]

Another way of going about it is to apply to the LC in terms of section 158 (1)(c) of the LRA to have it made an order of the LC.[124] Once the award or settlement agreement has been made an order of court, it can be presented to the Sheriff of the Court to enforce it by seizing and auctioning any property of the debtor to obtain the money owed to the employee.[125] The LAC in *SA Post Office Ltd v CWU Obo Permanent Part-time employees*,[126] held that before the LC can grant the order, it must exercise its discretion by taking into account some factors such as are necessary to satisfy the demands of the law and fairness. It may, for example, be more reluctant to make an

[119] Benjamin 2013 *ILO DIALOGUE* 7.
[120] *Ibid.*
[121] Steenkamp and Bosch 2012 *Acta Juridica* 130.
[122] S 143 of the LRA 66 of 1995.
[123] Steenkamp and Bosch 2012 *Acta Juridica* 130.
[124] S 158(1)(c) of the LRA: "(1) The Labour Court may- (c) make any arbitration award or any settlement agreement an order of the Court".
[125] Benjamin 2013 *ILO DIALOGUE* 25.
[126] [2013] 12 BLLR 1203 (LAC).

award of reinstatement of employees an order of court where the employees unreasonably delayed in seeking the enforcement of the award.[127]

The view is that an application to have the award made an order of the LC must be made within three years of the issuing of the award, otherwise the right to do so will prescribed.[128] The merits of this view are still to be examined in the following chapters, as its foundation is not in the provisions of the LRA, but of the PA. Its legitimacy depends on whether the arbitration awards and settlement agreements constitute 'debt' for the purposes of the PA[129] (Chapter 3) and whether the provisions of the PA are not inconsistent with the provisions of the LRA (Chapter 4).[130]

2.4 Conclusion

This chapter discussed the roles played by the CCMA and LC in conciliation, arbitration and adjudication of labour dispute matters. It was stated that the CCMA is a creature of statue and it has jurisdiction in all the nine provinces in South Africa. Its powers are derived from statute and it cannot perform any function other than those conferred upon it by the LRA. The CCMA has been granted powers to conciliate and arbitrate any dispute referred to it in terms of any provision of the LRA and disputes in terms of section 134. Disputes are to be referred within 30 or 90 days after the alleged dismissal or unfair labour practice. The effect of non-compliance with these time frames will be that the party concerned will be barred and will have to apply for condonation by showing good cause for the delay.

When the matter remained unresolved after conciliation and arbitration and the certificate of non-resolution has been issued, an employee has 90 days to refer the matter to the LC. The LC as a court of equity must determine the matter and give any order that is fair.

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[127] Ibid, par 21D.
[128] Erasmus "Enforcement of settlement agreements and arbitration awards" (undated) https://www.labourguide.co.za/ccma-informations/75-ccma-section/2441-enforcement-of-settlement-agreements-and-arbitration-awards (accessed 14 July 2020).
[129] 68 of 1969.
[130] *Ibid*; LRA 66 of 1995.

CHAPTER- The Prescription Act 68 of 1969

3.1 Introduction

One of the important principles of law is to bring certainty in disputes and ensure that disputes are not dragged for indefinite periods of time, thereby leaving the parties living in uncertainties.[131] To bring certainty and stability in legal and social affairs, the South African law makes use of prescription periods.[132] This essentially refers to the effect of the lapse of time in creating or destroying legally recognizable rights.[133] The applicable rules and time frames creating or destroying these rights are governed by the Prescription Act (PA),[134] which will be the subject of discussion in this chapter.

This chapter is focusing on the nature of the PA, the applicable time frames that should be adhered to when enforcing a legally recognized right and lastly, the effect of non-compliance with these prescribed periods. This discussion must not be viewed in isolation to other preceding chapter, as it forms part and parcel of them. To be able to know correctly the question of whether the PA applies in labour dispute matters, it is pivotal that this chapter discuss in detail the basis upon which the PA becomes applicable in a particular scenario.

3.2 Prescription Periods

Within both the common law and Civil law legal systems there are established rules and means of gaining and losing a legally recognized right by means of passage of time.[135] These rules sometimes have an implication of freeing debtors from their obligations of having to pay money owed to their creditors.[136] While this may be a fortune for the debtor, but for the creditor it is a misfortune as it entails that such a creditor has lost his legal right to claim the payment due to non-enforcement of his right for a long time which has exceeded the limitation.[137]

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131 *Road Accident Fund v Mdeyide* [2010] ZACC 18; 2011 (2) SA 26 (CC); 2011 (1) BCLR 1 (CC), par 8.
132 *Ibid.*
133 Alexandra Davies *The influence of the Prescription Act, 68 of 1969 on the selected aspects of the notice in terms of section 129(1) (a) of the National Credit Act, 34 of 2005* (Magister Legum dissertation, University of Pretoria) 2014 8.
134 68 of 1969.
135 Schrage "The comparative legal history of limitation and prescription" 2018 39 *Obite*r 780 780.
136 *Ibid.*
137 Juss "Statutory interpretation and the meaning of debt" 2010 21 *King's Law Journal* 580 580.

As already mentioned above, the time limitations for enforcing legally recognized rights in South Africa are governed by the PA.[138] According to section 11 of this Act, the prescription periods are provided as follows:

> "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."[139]

It ought to be noted that the effect of these time periods is extinctive in nature.[140] This means, should the person fail to claim his right, it shall lapse after the specified period.[141] This assertion is corroborated by section 10 of the PA, which provides thus:

> "(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.

[138] 68 of 1969.
[139] S 11 of the PA.
[140] Davies *The influence of Prescription Act* 8.
[141] *Ibid.*

(2) By the prescription of a principal debt a subsidiary debt which arose from such principal debt shall also be extinguished by prescription."[142]

The policy behind the use of extinctive periods is to provide some stimuli to the creditors to bring their actions without unreasonable delays, failing which, they will face the sanction of losing their rights.[143] The court in *Leipsig v Bankorp Ltd* further described the policy involved in the use of extinctive periods in the following words:[144]

> "The main practical purpose of extinctive prescription is to promote certainty in the ordinary affairs of people. The various sources of uncertainty as to whether a valid debt ever arose, or, if it did, whether it has been discharged, are reduced by imposing a time limit on the existence of a debt."[145]

The implication of this, is that the creditor must keep track of the time but first he must be able to determine when the prescription starts to run, in order to know exactly when it ends. In this regard section 12 provides that prescription starts to run when the debt is due, subject to the creditor gaining knowledge of the existence of the debt, knowledge of the identity of the debtor or being in a position which could allow him to acquire such knowledge when exercising a reasonable care.[146] This means constructive knowledge will be imputed on a creditor who knew certain facts that would have enabled him to establish a debtor's identity.[147] When the debtor has willfully concealed the debt or his identity, the prescription period does not begin to run until the creditor acquires such concealed information.[148] The onus to prove that the

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[142] S 10 of the PA.
[143] Schrage 2018 *Obite*r 780.
[144] 1994 (2) SA 128 (A).
[145] *Ibid*, par 129 B.
[146] S 12 of the PA: "(1) Subject to the provisions of subsections (2) and (3), prescription shall commence to run as soon as the debt is due.
(2) If the debtor wilfully prevents the creditor from coming to know of the existence of the debt, prescription shall not commence to run until the creditor becomes aware of the existence of the debt.
(3) A debt shall not be deemed to be due until the creditor has knowledge of the identity of the debtor and of the
facts from which the debt arises: Provided that a creditor shall be deemed to have such knowledge if he could have
acquired it by exercising reasonable care."
[147] *Gericke v Sack* 1978 (1) SA 821 (A).
[148] Held by the court in *Jacobs v Adonis* 1996 (4) SA 246 (C) to mean deliberately and intentionally and not fraudulently.

creditor knew or could have known if reasonable care was exercised, rest upon the debtor.[149]

The question of when exactly the debt is said to be due was answered in the case of *Bank of Orange Free State v Cloete*[150] in the following words:

> "The date on which a debt becomes due usually coincides with the date on which a debt arises. But this is not always the case. The difference relates to the coming into existence of the debt on the one hand and its recoverability on the other. In its ordinary meaning, therefore a debt is only 'due' when it is immediately claimable by the creditor and as its correlative, it is immediately payable by the debtor. *A* debt can also be said to be claimable immediately if the creditor has the right to institute an action for its recovery. In order to be able to institute an action for the recovery of a debt, the creditor must have a complete cause of action- in respect of it at the stage when the summons is issued or at least the summons is served."[151]

What remained undefined in the PA is the term "debt". The question as to what constitutes a debt and whether it should be defined in wide or narrow terms has been the focus of renewed attention since 2016.[152] This is surely a concept worth defining when prescription of a right is concerned. The creditor ought to know whether his claim against the debtor qualifies as a "debt" in terms of the PA, so as to allow him to exercise his right within the prescribed period and know when exactly it became due. Before 2016 the courts and scholars attributed differing definitions to this contentious concept. Juss states that debt in its ordinary meaning refers to a situation where the debtor has an obligation to render or pay something to the creditor and it must be liquidated in nature as opposed to unliquidated claim.[153] The court in *Evins v Shield ins Co Ltd* (in relation to claims for compensation arising from bodily injuries sustained in a road accident and loss of support) interpreted the term as follows:[154]

> "The word "debt" in the Prescription Act must be given a wide and general meaning denoting not only a debt sounding in money which is due, but also, for example, a debt

[149] South African Law Reform Commission "Harmonisation of existing laws providing for different prescription periods" (30 April 2018) http://www.justice.gov.za/salrc/dpapers.htm (accessed 26 June 2020) 44.
[150] 1985 (2) SA 859 (E).
[151] *Ibid.*
[152] South African Law Reform Commission http://www.justice.gov.za/salrc/dpapers.htm 8.
[153] Juss 2010 *King's Law Journal* 580.
[154] 1979 (3) SA 1136 (W).

> for the vindication of property. While this is so "debt" cannot embrace all rights between two persons. In my view, "debt" in ss 10 and 15(1) of the Prescription Act means an obligation or obligations flowing from a particular right."[155]

The definition that was provided by Juss does not conform to the one provided by the court, in the sense that the former excludes unliquidated claims from being termed "debts" but the court extends the definition to include such claims. In *Electricity Supply Commission (ESCOM) v Stewarts and Lloyds of SA (Pty) Ltd*[156] the court endorsed the definition of "*debt*" as contained in the Shorter Oxford English Dictionary and that of *Leviton and Son v De Klerk's Trustee*,[157] which provides thus;

> "a debt is that which is owed or due; anything (as money, goods or services) which one person is under obligation to pay or render to another; and whatever is due from any obligation."

In *Radebe v Government of the Republic of South Africa,*[158] the definition of debt was stretched so wide as to cover a claim for vindication of property, movable or immovable.[159] This ruling was overturned by the SCA in *ABSA Bank v Keet.*[160] This case concerned a question of whether a claim under *rei vindicatio* constitutes a 'debt' that prescribes after three years in terms of the PA.[161] The court was of the opinion that a ruling which endorses that a claim for vindicatory action is a 'debt' for the purposes of the PA and prescribes after three years is inconsistent with the scheme of the Act.[162] Such a ruling would undermine the importance of distinguishing between extinctive prescription and acquisitive prescription. The former has to do with the relationship between a creditor and a debtor (personal rights), while the latter with real rights.[163] The court went further to say;

> "The effect of extinctive prescription is that a right of action vested in the creditor, which is a corollary of a 'debt', becomes extinguished simultaneously with that debt. In other words, what the creditor loses as a result of operation of extinctive prescription is his

[155] *Ibid*, par 1141-1142.
[156] 1981 (3) SA 340 (A) 344.
[157] 1914 CPD 685.
[158] 1995 (3) SA 787 (N).
[159] *Ibid,* par 803-804.
[160] [2015] ZASCA 81.
[161] *Ibid,* par 1.
[162] *Ibid,* par 25.
[163] *Ibid*.

> right of action against the debtor, which is a personal right. The creditor does not lose a right to a thing. To equate the vindicatory action with a 'debt' has an unintended consequence in that by way of extinctive prescription the debtor acquires ownership of a creditor's property after three years instead of 30 years that is provided for in s 1 of the Prescription Act. This is an absurdity and not a sensible interpretation of the Prescription Act."[164]

During 2016 the term 'debt' received a special attention of the Constitutional Court in the case of *Links v MEC for Health, Northern Cape*[165] and *Makate v Vodacom (Pty) Ltd.*[166] The previous definitions were found to be limiting on the constitutional right of access to courts.[167] In *Links,* the Court held that it possessed jurisdiction to hear the matter because it concerned the interpretation of a statute that limited a constitutional right of the applicant to access courts.[168] In *Makate*,[169] the court stated that since the operation of the Constitution, every court is duty bound to read and interpret any legislation through the prism of the Constitution. The court felt obliged to interpret 'debt' as found in the PA in line with the spirit, purport and objective of the Bill of Rights as obligated by section 39(2) of the Constitution.[170]

Accordingly, the court found that a definition that is less intrusive on the right to access courts should be preferred and the *ESCOM*[171] definition was preferred.[172] It supported its decision by the dictum laid down in *SATAWU*,[173] which provides that constitutional rights that are guaranteed without express limitation imposed upon them should not be cut down by reading implicit limitations, and when the legislature does provide limitations on those rights, they should be interpreted in a manner that promotes less restriction of the right if such interpretation is possible.[174] It follows from these

[164] *Ibid*.
[165] 2016 ZACC 10.
[166] 2016 ZACC 13.
[167] S 34 of the Constitution of the Republic of South Africa, 1996: Everyone has the right to have any dispute that can be resolved by the application of law decided in a fair public hearing before a court or, where appropriate, another independent and impartial tribunal or forum.
[168] *Links v MEC for Health, Northern Cape* 2016 ZACC 10, par 22.
[169] *Makate v Vodacom (Pty) Ltd* 2016 ZACC 13, par 87.
[170] *Ibid*; The Constitution; F*raser v ABSA Bank Limited* 2007 (3) SA 484 (CC), par 43.
[171] *ESCOM v Stewarts and Lloyds of SA (Pty) Ltd* 1981 (3) SA 340 (A) 344.
[172] *Makate v Vodacom (Pty) Ltd* 2016 ZACC 13, par 91.
[173] *South African Transport and Allied Workers Union (SATAWU) v Moloto NO* 2012 (6) SA 249 (CC).
[174] *Ibid*, par 44.

judgements that any claim or obligation that is covered by the definition of debt shall prescribe on completion of the applicable prescription period as provided above.

3.3 Delayed completion of prescription

At times a creditor may encounter some impediments or impossibilities that hinders him from timeously asserting his right.[175] In such instances, the PA in section 13 provides for the delayed running of prescription.[176] According to this provision, the following instances are listed as restrictions that delay the running of prescription:

- When the creditor is still a minor, under curatorship or insane;
- The creditor has left the republic;
- The creditor and the debtor are spouses to one another;
- The debtor and creditor are partners and the debt emerged from the partnership agreement;
- The creditor is a juristic person and the debtor holds membership in the governing body of such business;
- There is an on-going arbitration dispute in which the debt is the subject of such dispute; or
- The executor of a deceased estate has not yet been appointed and the debt is claimed against such estate.[177]

The effect of these impediments on the running of prescription is that if the impediment stops on, after or within one year before the anticipated end date of the prescription period, one year will be added after the date on which the impediment stopped.[178] An example of this could be as follows:

If a debt becomes due on 15 January 2020, it will prescribe on 14 January 2023 which is after three years. Now if the debtor leaves the country on 15 January 2021 for three years and return on 15 January 2024, the normal prescription period would have

[175] South African Law Reform Commission http://www.justice.gov.za/salrc/dpapers.htm 51.
[176] S 13 of the PA.
[177] S 13(1)(a)-(h) of the PA.
[178] S 13 (1)(i) of the PA; Legal Wise "Prescription" (May 2020) https://www.legalwise.co.za/help-yourself/quicklaw-guides/prescription (accessed 01 October 2020).

ended, but for the impediment, one year will be added from the date of arrival in the country. The new prescription end date will be 14 January 2025.[179]

3.4 Interruption of prescription

The PA provides for the interruption of running of prescription and recognizes two forms of interruption: Acknowledgement of debt and judicial interruption.[180] Once prescription is interrupted, the period begins to run afresh.[181]

3.4.1 Acknowledgement of debt

The debtor may acknowledge debt expressly or tacitly.[182] Either form of acknowledgement warrants the interruption of prescription and consequently, the old prescription stops running and a new period starts running "afresh" from when the interruption occurred.[183] If the parties agreed to postpone the due date of the debt, the new period will start to run from the date when the debt again becomes due. [184]

An example of a tacit acknowledgement of liability may be seen in the case of *Bank of Orange Free State v Cloete*.[185] In this case, the debtor purchased a motor vehicle on credit and bound himself as surety and co-principal debtor for the debt. The principal debtor failed to pay the initial instalment amounts but later rectified by making some payments. The principal debtor stopped paying instalments and then the car was repossessed by the bank. The latter sued the surety for an outstanding debt. The respondent surety, raised the defense of prescription, arguing that the action had prescribed because it was instituted against him more than 3 years after the principal debt was due. The court held that the conduct of the principal debtor of making some later payments amounted to tacit acknowledgement of debt, which would have the

[179] Calculation method learnt from Legal Wise https://www.legalwise.co.za/help-yourself/quicklaw-guides/prescription.
[180] Section 14 of the Prescription Act of 1969 provides for interruption of prescription by acknowledgement of liability and Section 15 provides for judicial interruption of prescription.
[181] South African Law Reform Commission http://www.justice.gov.za/salrc/dpapers.htm 92.
[182] *Cape Town Municipality v Allie NO* 1981 (2) SA 1 (C), par 5G-H (*It is quite plain that both at common law, and in terms of the Prescription Acts of 1943 and 1969, a creditor may safely forebear to institute action against his debtor if the debtor has acknowledged liability for the debt and it seems right that it should be so. Why should the law compel a creditor to sue a debtor who does not dispute, but acknowledges, his liability?*).
[183] Section 14 of the Prescription Act; Loubser *Extinctive Prescription* (1996) 123-142.
[184] *Ibid.*
[185] 1985 2 (SA) 859 (E).

effect of interrupting the running of prescription against both the principal debtor and the surety.[186]

3.4.2 Judicial interruption

Section 15 of the PA provides that a creditor may interrupt the running of prescription by service on the debtor a process in which the debt is claimed.[187] During the process of claiming of a debt and before successful prosecution to final judgement, the running of prescription is suspended.[188] Once the process is successfully prosecuted to final judgement, a prescription period of thirty years will begin to run afresh from the date of the final judgement.[189] However, the interruption lapses if the creditor fails to prosecute the claim under the process to final judgement, abandons the judgement or the judgement is set aside.[190] Furthermore, the prescription period continues running from the point it was suspended at the time the process was served.[191]

3.5 Core values underlying Prescription periods

Each statute has its own objectives behind its enactment and there is no provision that is without objective.[192] When the legislature promulgates an Act, there is a mischief that is sought to be rectified.[193] The PA too has its own objectives for each provision that has been incorporated into the statute. It is stated that prescription starts to run from when the debt becomes due.[194] The policy favouring the commencement from the due date of debt recognises that injustice is inevitable if the period can start to run before a claim can become enforceable and it favours the interests of a creditor.[195]

Sometimes the creditor is unaware of the existence of the debt or the identity of debtor. In such circumstances the debt does not become due until he acquires such

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[186] Ramabele-Thamae "Suretyship and Prescription: The effect of a delay or interruption in prescription against the principal debtor on the obligation of the surety" 2012 19 *LLJ* 87 93.
[187] S 15 (1) of the PA.
[188] *Ibid.*
[189] South African Law Reform Commission http://www.justice.gov.za/salrc/dpapers.htm 53.
[190] Section 15 of the Prescription Act; De Wet in Gauntlett (ed) *Opuscula Miscellanea* (1979) 95 and 128; *Sieberhagen v Grunow* 1957 (3) SA 485 (C), par 489.
[191] South African Law Reform Commission http://www.justice.gov.za/salrc/dpapers.htm 53.
[192] Thombre "General principles of statutory interpretation with special reference to golden rule & mischief rule" 2019 5 *International Journal of Law* 135 135.
[193] *Ibid*, 137.
[194] S 12(1) of the PA.
[195] South African Law Reform Commission http://www.justice.gov.za/salrc/dpapers.htm 15.

knowledge.[196] The principle is premised on the policy of fairness to a creditor, recognising the unfairness that may ensue when a period starts to run and ends before the person becomes aware of the existence of a right.[197] The policy behind the delayed running of prescription and interrupted running of prescription is based on the principle that the former advances fairness towards the creditor by recognizing the existence of factors that can inhibit the timeous assertion of a right. On the other hand, the interruption of prescription is protecting a creditor's own interests in ensuring that a debt does not become prescribed.[198]

The objective behind the recognized general prescription period of three years is to protect the interests of the debtor against the unfairness of having to defend long-standing claims.[199] Schrage supports this assertion by holding that;

> "For the defendant (the debtor or possessor), prescription and limitation imply a certain protection against claims that have been at rest for too long. A claim should not continuously hang above the head of the debtor like a sword of Damocles. Claims against which defences might have been lost in the course of a very long period ought to be dismissed."[200]

Furthermore, the prescription period stands as a punishment to the creditor for being negligent about his assets.[201] Schrage states that the law dislikes and punishes those who are negligent and careless about their own assets.[202]

3.6 Consequences of non-compliance with time frames

Certainty in adjudication of disputes has always been the focus of the courts, as means to promote stability in social and legal affairs and prescription periods are viewed as one of the methods of achieving such objective.[203] Prescription extinguishes the claim of the creditor against the debtor in law and has an effect that once the principal debt

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[196] *Ibid.*
[197] *Ibid*, 16.
[198] *Ibid*, 17.
[199] South African Law Reform Commission http://www.justice.gov.za/salrc/dpapers.htm 14.
[200] Schrage 2018 *Obite*r 781.
[201] *Ibid.*
[202] *Ibid.*
[203] *Road Accident Fund v Mdeyide* 2011 (1) BCLR 1 (CC), par 8.

has extinguished, all the ancillary debts suffer the same fate.[204] In *Lipschitz v Dechamps Textiles GMBH,*[205] the court held as follows:

> Extinction has the effect that once prescription takes place, no vestige of a debt remains in existence.[206]

Unlike the other areas of law where the late filling of claims may be condoned according to the rules of Court, currently there is no condonation in terms of the PA where there is late filling of a claim. Claimants with genuine claims may not have the opportunity to institute their cases even where there is a just cause for failure to institute such claim.[207]

3.7 Application of Prescription Act

According to section 16(1) of the PA,[208] its provisions relating to prescription period of debts are applicable to any law and any debt that arose after the promulgation of the Act. This is subject to any law that prescribes different time frames for the claiming of debts under that law or impose different conditions for the instituting of actions for the recovery of debts.[209] The important point to note is that the PA does not become inapplicable only because of differences between the two Acts, but they must be inconsistent with one another.[210]

This provision is the centre of the entire discussion, as it invokes two questions: whether or not the concept of debt as discussed above encompasses in it the claims arising from labour dispute matters and secondly, whether or not the provisions of the PA are applicable in labour matters where the LRA[211] is concerned. It is to be remembered that in chapter two it was stated that the LRA provides its own time frames for the institution of actions and in this chapter, it was shown that the PA also provides its own time frames for institution of actions. Now what needs to be determined is whether the LRA excludes the application of the PA when it provides its own time frames, or their effect is not to cancel but was meant to run concurrently with

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[204] Ramabele-Thamae 2012 *LLJ* 90.
[205] 1978 (4) SA 427 (C).
[206] *Ibid*, par 430-431.
[207] South African Law Reform Commission http://www.justice.gov.za/salrc/dpapers.htm 1.
[208] 68 of 1969.
[209] *Ibid;* Ramabele-Thamae 2012 *LLJ* 91.
[210] S 16 (1) of the PA.
[211] 66 of 1995.

those found in the PA. The definite answer to these questions will be heavily discussed in the ensuing chapter (Chapter 4) and it will be answered through the case law developments.

3.8 Conclusion

This chapter was mainly focused on the provisions of the PA, specifically to those relating to the time frames of claiming a debt. The discussion revealed that the general prescription period of debts is three years but there are other periods applicable in different scenarios. It was further stated that should the creditor fail to claim the debt within the applicable period, it lapses without an option of condonation for the late filing of claim.

Chapter 4 – Case law

4.1 Introduction

In the preceding chapters, particularly in chapter two and chapter three, a distinction was made between the time frames that are applicable as per the LRA and those applicable as per the PA. These two statutes provided different time frames for the enforcement or claiming of debts. It is against this background that this chapter will consider the court's view on the applicability of the PA into labour dispute matters. The structure of the discussion will separate the views of the courts prior 2016 and the views post 2016. This year is important in this issue as it was for the first time that the Constitutional Court was provided with an opportunity to give direction on this vexed question.

4.2 Case law prior 2016

Before the *Food and Allied Workers Union obo Gaushubelwe v Pieman's Pantry (Pty) Ltd,*[212] judgement that was decided on 2018 by the CC, there was no unanimity amongst the courts when deciding cases that involved the question of whether the PA applied to labour dispute matters. The main point of confusion was on deciding whether labour matters gave rise to "debts" as contemplated in section 12(1) of the PA,[213] and whether the PA is not inconsistent with the provisions of the LRA, which is something that might preclude its operation.

In 2008 the LC in *POPCRU o.b.o Sifuba v Commissioner of the South African Police Services*,[214] had to determine whether a valid arbitration award constituted a debt for the purposes of the PA. The court stated that a valid arbitration award must be considered as a novation of a former debt on which the award was granted and the arbitration award itself constitutes the new debt.[215] From this statement, it can be deduced that the court regarded the arbitration award as a debt, in which case, the provisions of the PA may be applicable to it, if nothing else precludes same. Accordingly, the prescription period applicable is three years.[216]

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[212] (2018) 39 ILJ 1213 (CC).
[213] 68 of 1969.
[214] [2009] 12 BLLR 1236 (LC) (5 December 2008).
[215] *Ibid*, par 32.
[216] *Ibid*.

The court went on to say, this new debt creates new rights, duties and obligations which stem from the arbitration award and this new debt becomes due on the date and time of the issuing of the valid arbitration award.[217] The court stated that its view is further supported by equity considerations.[218] It supported this assertion by referring to what was held by Pillay J *in Mpanzama v Fidelity Guards Holdings (Pty) Ltd*,[219] when he stated that it would be inequitable to allow a sloppy litigant to have uncontrolled period of instituting litigations, so the three year period seeks to remedy that situation.[220]

The LC had another opportunity in 2011 in the case of *FAWU v Country bird*,[221] which dealt with the dismissal of 24 employees for partaking in an unprotected strike. The dismissal happened in 2006, which is almost 6 years from the date of the incident and the date of instituting the proceedings.[222] As a result of this much delay, the respondent raised the defence of prescription and also claiming that due to the long delay, condonation was not possible.[223] The court agreed with the respondent that PA applied in this matter and it is not inconsistent with the LRA.[224] In supporting its conclusion, it too relied on *Mpanzama v Fidelity Guards Holdings (Pty) Ltd*[225] where it was held that whatever the rationale may be for the doctrine of prescription, the LRA compels the effective resolution of disputes. This means that labour disputes must be resolved or finalized expeditiously, in which case the PA serves that purpose.[226]

During 2013, the position changed from the way it was on the previous cases. The LC contradicted itself in the case of *Cellucity (Pty) Ltd v CWU obo Peters*,[227] when it delivered a judgement that held that the PA was not applicable in labour dispute matters involving the LRA.[228] In this case the respondent was dismissed by the applicant on 3 June 2009 and then on the 19th of the same month and same year she

[217] *Ibid*.
[218] *Ibid*, par 44.
[219] [2000] 12 BLLR 1459 (LC).
[220] *Ibid*, par 15.
[221] (2012) 33 ILJ 865 (LC) (8 November 2011).
[222] *Ibid*, par 1.
[223] *Ibid*, par 2.
[224] *Ibid*, par 6.
[225] [2000] 12 BLLR 1459 (LC).
[226] *Ibid*, par 9-10.
[227] [2014] 2 BLLR 172 (LC) (14 November 2013).
[228] *Ibid*.

referred the matter to the CCMA as an unfair dismissal dispute.[229] The CCMA issued an arbitration award in favour of the employee which amounted to R42 000 on the 21st August 2009 as compensation for a substantively unfair dismissal.[230]

On the 21st October 2009 the employer brought a review to the LC, which was dismissed by court on the 6th of November 2012.[231] A writ of execution was issued on the strength of the arbitration award since the review application was dismissed.[232] It was against this writ of execution that the company approached the LC on an unopposed application for a declarator that the award has prescribed.[233] The company did not dispute that the employee was entitled to the arbitration award of R42 000, but they argued that the entitlement was no longer available in 2013 because the award had prescribed at that time.[234]

The company listed several grounds on which its assertion is based on. It provided that the arbitration award giving rise to the writ of execution was handed down on 9 September 2009, which is the due date of the debt as the cause of action giving rise to this matter arose on such date. This meant that the employee had to institute the process of claiming the debt because in the absence of such process, the debt prescribed on 9 September 2012.[235] Furthermore, the company argued that the proceedings that are held in accordance with section 143 of the LRA, which are targeted at certifying an award (which the applicant had duly completed) did not constitute an interruption in terms of the PA.[236]

After careful consideration of the company's case, the court deduced that its case was mainly built on the assumption that claims under the LRA fall under the PA. The court's view was that such an assumption was not valid as the design of the LRA was inconsistent with such submission. Its reasoning was that the LRA has its own time periods that are to be used for referral of disputes and claims. When its time frames

[229] *Ibid*, par 2.
[230] *Ibid*.
[231] *Ibid*, par 3.
[232] *Ibid*, par 4.
[233] *Ibid*.
[234] *Ibid*, par 5.
[235] *Ibid.*
[236] *Ibid*, par 6.

are not adhered to, it offers the tool of condonation.[237] Moreover, the court held that if the PA indeed applied in LRA matters;

> "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."[238]

According to the court, this distinction poses a challenge because a litigant who has to go the arbitration route and gets an award in his favour will not be able to enforce that award after three years, yet a litigant who must go the adjudication route in terms of the LRA will obtain a "judgment debt" which prescribes 30 years after it is handed down.[239] Furthermore, the court held that the LRA design does not provide an impenetrable divide between the proceedings in the CCMA and / or Bargaining Councils and the Labour Court, which means proceedings can move across the divide between court and tribunal in both directions.[240] In this regard, the court made an example by section 158 (2) and (3) of the LRA[241] which reads as follows:

> "(2) If at any stage after a dispute has been referred to the Labour Court, it becomes apparent that the dispute ought to have been referred to arbitration, the Court may-
>
> (a) stay the proceedings and refer the dispute to arbitration; or
>
> (b) with the consent of the parties and if it is expedient to do so, continue with the proceedings with the Court sitting as an arbitrator, in which case the Court may only make any order that a commissioner or arbitrator would have been entitled to make."[242]

Based on these findings, the court was of the opinion that the application of the PA into LRA matters, will have an unintended effect as it would create inequalities between litigants using different routes for their disputes and will be unworkable where disputes move between tribunal and court and vice versa.[243] Over and above these considerations, the court held that the question of public policy comes into play in this

[237] *Ibid*, par 15.
[238] *Ibid*, par 16.
[239] Ibid, par 19.
[240] Ibid, par 20.
[241] 66 of 1995.
[242] *Ibid*.
[243] *Ibid*, 21.

matter. It referred to *Barkhuizen v Napier*[244] to hold that public policy and *boni mores* are deeply entrenched into the Constitution and its underlying values.[245] If the PA were to be applied, it would frustrate the full realization of the right to fair labour practices of the employees, more especially the vulnerable members of the society. Due to financial constraints, they may struggle to afford the means to execute an award in their favour or are unable to timeously pursue their rights because of a lack of resources.[246]

In applying the public policy consideration in the facts, the court stated that the employer deliberately delayed payment of the arbitration award as an attempt to evade the payment of compensation to Peters, compensation to which the employer acknowledges she was entitled. The court stated that, mischievous tactics that are targeted at exhausting the ability of the dismissed employees to obtain what is rightfully their due should be frowned upon by this court. [247] This position was affirmed in the case of *Coetzee v The Member of the Executive Council of the Provincial Government of the Western Cape,*[248] where it was held that the respondent was erroneous to think that the PA applied under the LRA disputes because the two Acts are inconsistent with one another.[249] It was stated that the inconsistency is visible on the issue of time frames. The LRA on one side includes specific time periods for the referral of claims and makes use of the tool of condonation when such periods are exceeded, while the PA on the other hand provides extinctive periods with no tool of condonation.[250] Furthermore, the court reiterated what was said in the above case with these words:

> "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

[244] 2007 (5) SA 323 (CC).
[245] *Ibid*, par 28.
[246] *Cellucity (Pty) Ltd v CWU obo Peters,* par 8.
[247] *Ibid*, par 9.
[248] (C751/2008) [2013] ZALCCT 12; (2013) 34 ILJ 2865 (LC).
[249] *Ibid*, par 15.
[250] *Ibid.*

> values, particularly the right to equality and of access to justice. The LRA does not proscribe a hierarchy of dismissal claims litigants may bring."[251]

Soon after this case, the Johannesburg LC delivered yet another contradicting judgement in 2014 in the case of *Job creation v Meko*.[252] The respondent obtained an arbitration award in his favour from the Metal Engineering Industries Bargaining Council, which was later certified by the CCMA in terms of section 143 (3) of the LRA.[253] The respondent also obtained a writ of execution to attach some items belonging to the applicant in order to settle the arbitration award.[254] However, it took the respondent four years and one month after the date of the arbitration award and three years and seven months to execute the writ of execution.[255] As a result of this much delay, the applicant argued that the arbitration award had prescribed after the end of three years, as it constitutes a debt.[256] The responded opposed on the ground that the PA did not apply in this matter.[257]

The LC aligned itself with the decision that was held in *Mpanzama*[258] case where it was stated as follows;

> "Given that the Labour Relations Act does not expressly exclude the operation of the Prescription Act, it will therefore not be inconsistent to apply the provisions of the Prescription Act to section 143 read with section 158(1)(c) of the Labour Relations Act."[259]

Furthermore, the court relied on *Uitenhage Municipality v Malloy*,[260] where it was stated that the PA applies to the Basic Conditions of Employment Act.[261] In a nutshell the court was of the view that the PA does apply to labour matters that arise under the LRA. In 2014 this decision was backed up by the Johannesburg LC in the case of

[251] *Coetzee* case, par 16.
[252] (J989/14) [2014] ZALCJHB 201 (6 June 2014).
[253] *Job creation v Meko*, par 2.
[254] *Ibid*, par 3.
[255] Ibid, par 5.
[256] *Ibid*.
[257] *Ibid*.
[258] [2000] 12 BLLR 1459 (LC).
[259] *Job creation v Meko*, par 14.
[260] 1998 (19) ILJ 757 (SCA).
[261] *Job Creation v Meko*, par 14.

Kekana v Department of Health and Welfare: Limpopo.[262] The applicant in this matter sought to make the arbitration award that was issued on his favour a court order.[263]

Although there is no time period that is specified under section 158 (1) (c) for making an arbitration award a court order, but the applicant was expected to bring the matter within a reasonable time. Due to the failure of the applicant to bring the matter within a reasonable time, the respondent raised a point concerning prescription, stating that the matter has prescribed.[264] As is usually the case, the applicant contended that the arbitration award is not a debt and PA does not apply in this matter.[265] The court dismissed such contention by holding that an arbitration award is regarded as a debt that is extinguished by the lapse of three years.[266]

The court referred to an unreported case of *Mangenegene Mbaleki France v PCC Cement (Pty) Ltd*,[267] where it was held that the provisions of the PA are applicable to the LRA disputes and it is common cause that the applicant brought the application to have the arbitration award made an order of Court after the prescription period of three years lapsed. In the circumstances the prescription point raised by the respondent was upheld.[268]

The court also touched on the issue of equity consideration relating to prescription. On this issue it referred to the case of *Sifuba*,[269] where it was held:

> "Equity must be applied even-handedly to both employer and employees. The employee had three years in which to prosecute his claim. The Respondent had persistently denied liability for the debt. The respondent did not obstruct the applicant in instituting proceedings."[270]

In simple terms the court was emphasizing that the Court cannot come to the assistance of a sloppy litigant because it would be inequitable to the respondent if the

[262] (J25368/12) [2014] ZALCJHB 324 (22 July 2014).
[263] *Kekana v Department of Health,* par 1.
[264] *Ibid*, par 2-3.
[265] *Ibid*, par 6.
[266] *Ibid*, par 9.
[267] case number JR 698/12.
[268] *Kekana v Department of Health*, par 18-20.
[269] [2009] 12 BLLR 1236 (LC) (5 December 2008).
[270] *Ibid*.

applicant is allowed to profit from his own inaction in the name of equity consideration.[271] The final decision of the court was that the PA applied.

Another interesting case dealing with this vexed question of the application of PA in labour matters is that of *South African Municipal Workers Union obo MacFarlane v Nelson Mandela Metropolitan Municipality*.[272] The interesting aspect of this case is that it took a different direction in answering the question of applicability of PA in labour disputes. All the cases that have been discussed above only focused on the application of the PA under LRA matters. The difference with this one is that it deals with the application of PA in Employment Equity Act disputes (EEA).[273] Another interesting aspect with it is that it was decided in 2015, soon after the court in *Kekana v Department of Health and Welfare: Limpopo*,[274] ruled that the PA applied in labour matters, but in this case the decision held otherwise.

The CCMA in this matter received a complaint which was described as "equal pay for equal work" dispute.[275] The dispute was referred in terms of section 6(4) of the EEA, which provides that:

> "a difference in terms and conditions between employees who perform the same work, or work of equal value, that is based on certain prescribed grounds, constitutes unfair discrimination".[276]

The basis of the complaint was that one of the employees was paid far more money than the other employees who can first in the company and who were responsible for teaching him the job.[277] The respondent objected that the CCMA possessed jurisdiction to hear the matter because it was brought before it after three years, so it has now prescribed.[278] This is in view of the fact that Mr Conradie was appointed on the top notch of Grade 7, with effect from 1 November 2009 and it is upon this date that the complainants acquired a complete cause of action and/or statutory right not to be unfairly discriminated against.[279] Furthermore, the respondent submitted an

[271] *Kekana v Department of Health*, par 16.
[272] [2015] 3 BALR 349 (CCMA).
[273] 55 of 1998.
[274] (J25368/12) [2014] ZALCJHB 324 (22 July 2014).
[275] *South African Municipal Workers Union obo MacFarlane,* par 8.
[276] S 6(4) of the EEA 55 of 1998.
[277] *South African Municipal Workers Union obo MacFarlane,* par 10.
[278] *Ibid,* par 15.
[279] *Ibid*, par 16.

alternative argument to the first point which contended that according to section 10 of the EEA, the applicant should have referred the dispute within six months after the conduct complained of.[280]

On consideration of these submissions, the CCMA adopted a view that the PA does not apply in labour dispute matters. To illustrate this point, it used section 191 of the LRA as an example to show that there are time periods that are set for the referral of disputes. In terms of this section a dispute must be referred to the CCMA within 30 days after the date of dismissal and within 90 days when the issue relates to unfair labour practice.[281] Another example that was used to strengthen this view was the time period set in terms of section 10 of the EEA pertaining to the referral of a dispute within 6 months.[282] The CCMA further stated that in both of these statutes there is a tool of condonation that is used for the failure to comply with these time frames.[283]

The CCMA compared the two judgements of *Mpanzama v Fidelity Guards Holding* (*Pty*) *Ltd*[284] and *Coetzee v The Member of the Executive Council of the Provincial Government of the Western Cape.*[285] It stated that in the former judgement the court ruled that the PA was applicable in labour disputes, solely on the reason that the LRA does not expressly preclude its operation.[286] In the latter judgement it was held that the PA is incompatible with the design of the LRA and the court in that case reasoned, *inter alia* that:

> "public policy considerations do not support the application of prescription to labour matters and if the Prescription Act did apply, there should be distinction as regards its application between the different routes required by the LRA. 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".[287]

[280] *Ibid*, par 18-19.
[281] *Ibid*, par 34.
[282] *Ibid*.
[283] *Ibid*.
[284] [2000] 12 BLLR 1459 (LC).
[285] (C751/2008) [2013] ZALCCT 12; (2013) 34 ILJ 2865 (LC).
[286] *South African Municipal Workers Union obo MacFarlane,* par 39.
[287] *Ibid*, par 40-41.

Having compared the two judgements, the court aligned itself with the *Coetzee* judgement and discarded the idea that PA applies to all labour matters.[288] The view of the court was that the PA only becomes applicable to legislations that do not prescribe their own periods within which actions must be instituted. An example of such situation is in cases where the LRA does not specify the time frame within which a settlement agreement may be made a court order or does not stipulate the time frame within which an arbitration award must be enforced or to deliver a severance package dispute.[289] The court was of the view that the fact that section 10(3) of the EEA tolerates condonation for the late filing of an unfair discrimination claim challenges or contradicts the notion of prescription.[290]

According to the court, the possibility of condonation deletes the applicability of the PA and it was further of the view that the Legislature would have abolished the right to apply for condonation if it intended the PA to apply.[291] Following the wording of section 10(3) of the EEA which states that the CCMA may "at any time" condone a party's failure to comply with the 6 months' time frame, the court concluded that it could not have been the intention of the Legislature to apply the PA in claims made under section 6 of the EEA.[292]

The court further stated that the use of the words "at any time" may add up to a very long time which may exceed beyond the prescribed period in terms of the PA and these words are clear indicators that the Legislature intended that prescription exclusively be governed by the provisions of the EEA.[293]

A clear and closer observation from these cases unambiguously shows that the courts were confused as to what exactly is the correct approach on this topic. Year after year, the courts were contradicting each other by delivering contradicting judgements. The doctrine of *stare decisis* was not applied in matters concerning this topic and legal certainty was very minimal. However, things took a different turn in 2016 after the Constitutional Court seized an opportunity to pronounce on this vexed question.

[288] *Ibid*, par 42-43.
[289] *Ibid*, par 44-45.
[290] *Ibid*, par 48.
[291] Ibid, par 49-50.
[292] *Ibid*, 54-55.
[293] *Ibid*, 56-57.

4.3 Position post 2016

The CC grabbed the opportunity of pronouncing on the matter with both hands when it allowed the case of *Myathaza v Johannesburg Metropolitan Bus Services (SOC) Ltd t/a Metrobus*,[294] to make its way to its doors. As this is the highest court of the land, the labour law practitioners hoped that it will put clarity and certainty in this area of law. However, the results that were hoped for were not achieved in this case.

4.3.1 *Myathaza v Johannesburg Metropolitan Bus Services (SOC) Ltd t/a Metrobus*

Introduction

The CC in this matter was for the first time asked to determine whether an arbitration award that is issued in terms of the LRA prescribes after the lapse of three years from the date of issue. In answering this question, the court was of the view that in order to correctly answer the question, it had to first determine whether the PA applies to matters governed by the LRA. Furthermore, the court will have to determine whether an arbitration award constitutes a debt in terms of section 10 of the PA. The Court was divided into three when it delivered the judgement. The first judgement was penned by Jafta J, second one by Froneman J and the last one by Zondo J.[295]

Judgement by Jafta J

The judgement written by Jaft J was of the view that the PA is not applicable in LRA matters. The reasons advanced in this judgement provides that the LRA has its own special dispute resolution system that operates separately from the courts except where an award is reviewed or converted into a court order, which is something that was not contemplated by the PA when it was enacted in 1969.[296] It was further stated that the two Acts differ from each other in the objectives that each one of them seeks to achieve and the manner of achieving them. The objective of the PA is to encourage creditors to institute legal proceedings without unreasonable delays that may affect

[294] (CCT232/15) [2016] ZACC 49.
[295] *Myathaza*, par 1.
[296] *Myathaza*, par 27.

the quality of dispute adjudication if witnesses are no longer available or their memories have faded.[297]

The case of *Uitenhage Municipality* was referred to, in which it was said that:

> "One of the main purposes of the Prescription Act is to protect a debtor from old claims against which it cannot effectively defend itself because of loss of records or witnesses caused by the lapse of time."[298]

Furthermore, the Justice affirmed this by referring to the case of *Mdeyide*, where Van der Westhuizen J stated:

> "This Court has repeatedly emphasised the vital role time limits play in bringing certainty and stability to social and legal affairs and maintaining the quality of adjudication. Without prescription periods, legal disputes would have the potential to be drawn out for indefinite periods of time bringing about prolonged uncertainty to the parties to the dispute. The quality of adjudication by courts is likely to suffer as time passes, because evidence may have become lost, witnesses may no longer be available to testify, or their recollection of events may have faded. The quality of adjudication is central to the rule of law. For the law to be respected, decisions of courts must be given as soon as possible after the events giving rise to disputes and must follow from sound reasoning, based on the best available evidence."[299]

The Justice stated that all the prescription periods that are set by section 11 of the PA are inconsistent with the scheme of the LRA, because even the shortest period of three years is way too long to comply with the spirit of the LRA that requires disputes to be resolved expeditiously.[300] To illustrate this point, the Justice stated that without the tool of condonation, a party who waits until the last day of the three year period as set in the PA, would be denied the opportunity of enforcing his award under the LRA because he did not act within a reasonable time.[301] The importance of acting within a reasonable time is to avoid the catastrophic effects that may befall the employer's

[297] *Ibid*, par 28.
[298] *Uitenhage Municipality v Molloy* 1998 (2) SA 735 (SCA), par 742I-743A; *Myathaza* par 29.
[299] *Road Accident Fund v Mdeyide* 2011 (1) BCLR 1 (CC), par 8; *Myathaza* par 30.
[300] *Myathaza*, par 32.
[301] *Ibid.*

business and the employee's source of income if the three year period may be said to apply in LRA matters.[302]

This judgement further made reference to section 16 of the PA which states that the whole chapter III will not be applicable to matters that are regulated by other Act of parliament that prescribes different periods that are inconsistent with those provided in that chapter.[303] What followed was a detailed explanation of why the LRA is found to be inconsistent with the PA.

LRA inconsistent with the Prescription Act

The first reason advanced by this judgement was that the PA envisaged the Civil courts as the only place at which debts may be claimed, while the LRA envisaged the CCMA and bargaining councils as forums that should resolve labour disputes and do so far more expeditiously than the time taken in courts.[304] The second reason was that the PA extinguishes the right of a creditor to claim a debt if he has failed to institute proceedings within some specified periods which are far longer than the periods prescribed by the LRA at pre-arbitration stage.[305] Thirdly, an arbitration award issued in terms of the LRA is only issued when a dispute has been finally settled, while on the other hand, the PA is designed to extinguish the right to enforce a claim that is still to be determined by a court.[306]

The fourth reason that was advanced was that it is difficult to determine which prescription period is applicable in an arbitration award, as it constitutes a final and binding remedy, while the three year prescription period is meant for claims or disputes which are yet to be determined and in respect of which evidence and witnesses may be lost if there is a long delay.[307] The fifth reason was that the LRA, unlike the PA, it provides a legal framework for resolving labour disputes and not debt collection mechanism.[308] In *Sidumo,*[309] it was held that it uses the CCMA and bargaining councils to:

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[302] *Myathaza*, par 33.
[303] *Ibid*, par 38.
[304] *Myathaza*, par 43.
[305] *Ibid*.
[306] *Ibid*.
[307] *Myathaza,* par 44.
[308] *Ibid*.
[309] *Sidumo v Rustenburg Platinum Mines Ltd* [2007] 12 BLLR 1097 (CC).

> "resolve disputes that arise in the workplace by implementing the provisions of the Labour Relations Act read in the light of the provisions in particular, of section 23 of the Constitution. Section 23(1) of the Constitution provides that workers and employers are entitled to fair labour practices. The adjudicative task performed by the CCMA involves the determination of disputes often involving the question of fair labour practices that are of importance to the litigants before the CCMA. It is not an institution for private, agreed arbitration but a state institution established for the resolution of disputes. The procedures provided for in the Labour Relations Act make plain that the disputes are to be speedily and cheaply resolved by the CCMA. No appeal lies from the CCMA, but the Labour Relations Act expressly requires that the Labour Courts are to scrutinise the decisions of the CCMA."[310]

The sixth reason for non-applicability of the PA is related to the question of when the prescription period starts to run. In terms of section 12 of the PA, it is said that the prescription commences to run when the debt becomes due.[311] This judgement is of the view that section 12 is not applicable in an arbitration award because the debt underlying the arbitration award becomes due way before the matter is referred for conciliation or arbitration.[312] Moreover, the prescription period cannot start running on the date of issuing the arbitration award because according to section 145 of the LRA, a party is afforded six weeks within which to lodge a review against the award.[313]

The seventh reason relates to the interruption of prescription period. In terms of the PA a party may interrupt the prescription period by the service to the debtor of a process claiming the debt. However, in the LRA a party is allowed to challenge an arbitration award by way of review and if the award is challenged on review and the respondent opposes the review, service of opposing papers upon the applicant may not interrupt prescription because it is not a process by which the respondent may claim payment.[314] According to this judgement, the structure of section 15 of the PA unambiguously shows that judicial interruption is meant for claims that are yet to be prosecuted to final judgement or where the judgement is abandoned or set aside, as opposed to an arbitration award which is itself a final and binding decision.[315]

[310] *Ibid*, par 139; *Myathaza*, par 45.
[311] *Myathaza*, par 46.
[312] *Ibid*.
[313] *Myathaza*, par 45.
[314] *Ibid*, par 48.
[315] *Myathaza*, par 49.

The eighth reason relates to the enforcement of an arbitration award that has survived a review challenge. According to section 145 (5), a review must be heard within six months from the date of its launch, but of course the LC is granted powers to extent this period on good cause shown.[316] According to this judgement, this is an indication that an award that has survived a review challenge should be enforced within a year and if the PA were to be applicable, it would mean that a party may wait until the last day of the three year period to interrupt the prescription.[317] The result of such a long delay is that such a party will be precluded by the LRA to enforce the award due to unreasonable delay and this would be a position despite the fact that the award would not have prescribed.[318] Consequently, it would serve no purpose to apply the PA to awards which are not enforceable under the LRA. This is because an unenforceable award is as good as a prescribed one. Both cannot be enforced.[319]

The nineth and last reason relate to the type of debt that was contemplated by each of the two Act when they were enacted. The debt that was contemplated in the PA cannot be reviewed or appealed against, with the exception of a judgement debt.[320] The debt under the PA does not earn interest unless the parties in a contract agree otherwise, again with the exception of a judgement debt.[321] The position is different with an arbitration award that is issued in terms of the LRA because it earns interest from the date it is issued, according to section 143 (2) and it is reviewable in terms of section 145 and may be appealed against in terms of section 24 (7).[322] The justice sealed his judgement by holding that section 210 of the LRA declares that in situations like the present one, in which there is a legislation that conflicts with the LRA, the latter takes precedence over such legislation.[323]

Third Judgement by Zondo J

The judgement of Zondo J concurred with that of Jafta J but opted to write separately in order to put a different perspective into the matter. His judgement firmly states that the PA is not applicable, and even if it was to be assumed that it is applicable, the

[316] The LRA.
[317] *Myathaza*, par 50.
[318] *Ibid*.
[319] *Myathaza*, par 51.
[320] Prescription Act 68 of 1969; *Myathaza*, par 55.
[321] *Myathaza*, par 55.
[322] The LRA; *Myathaz*a, par 55.
[323] *Myathaza*, par 57.

provisions that are relied upon to conclude in that way are not applicable to an arbitration award.[324] One reason why Zondo J concluded this way is that in terms of section 14(2) of the PA a debtor may interrupt the running of prescription by acknowledgement of liability but with regards to an arbitration award, there can be no mention of interruption of prescription because the award has already decided the liability and made a decision that is binding upon the debtor.[325] It cannot therefore be possible to interrupt it because it has been finalised and there can be no arranging of another due date, as it has been settled by the arbitration award.[326]

The second reason is that section 15 of the PA is not applicable when an applicant makes an application in terms of section 158(1) to make an arbitration award a court order.[327] Section 15 of the PA deals with judicial interruption and states that judicial interruption happens when there has been a service on the debtor of a process whereby the creditor claims payment.[328] According to Zondo, by "process" the Act refers to judicial or court process. Furthermore, section 15(2) read with section 15(4), provides that the creditor is expected to prosecute his claim under the process to final "judgement" but if the process is successfully interrupted, prescription shall commence to run afresh on the day on which the judgment of the court becomes executable.[329] These provisions denote that the "process" that section 15 refers to is not only a court process, but also that if the claim is successfully prosecuted, must lead to a "judgement of the court".[330]

Furthermore, the court referred to section 15(6) which provides that the word "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.[331] From this provision it accepted that there are other documents that are not mentioned but which may be used to start the process. However, such other documents should be documents that can commence legal proceedings.[332] From the above principles, Zondo J held that in the present case the

[324] *Ibid*, par 104.
[325] *Ibid*, par 112.
[326] *Myathaza*, par 113.
[327] *Ibid*, par 114.
[328] PA 68 of 1969.
[329] *Ibid*.
[330] *Myathaza*, par 115.
[331] PA 68 of 1969.
[332] *Myathaza*, par 116.

section 158(1)(c) application is not a process whereby the applicant claimed payment of any debt but simple a certification of an award to be a court order.[333]

The conclusion reached on this point was that an arbitration award is not a court judgement and that is confirmed by the fact that an arbitration award requiring the reinstatement of an employee is not enforceable on its own but has to be made a court order in order for it to be enforceable.[334] However, a judgement is immediately enforceable unless its enforceability is suspended for a later date.[335]

If it was to be assumed that an arbitration award is a debt contemplated in the PA and that it became due on the date of its issue, the question that would arise is whether an application to make an arbitration award an order of the Labour Court is a process contemplated in section 15(1) read with subsection (6).[336] The answer would be "no", because by the time of the launch and service of a section 158(1)(c) application by an applicant, his claim for reinstatement or for the payment of compensation for unfair dismissal has long been prosecuted by way of arbitration which resulted in the arbitration award in his or her favour.[337]

The section 15 interruption is relevant to a creditor who has a claim that is yet to be prosecuted by litigation to final judgement, rather than a creditor who has already prosecuted his/her claim through arbitration. The implication of this is that the service of the section 158(1) application by the applicant on the respondent within the prescribed three years period of issuing of the arbitration award could not have interrupted the running of prescription.[338] If it is so, it means that the prescription would have started running on the date of issue of the arbitration award, but the applicant would have lacked a way of interrupting its running as contemplated in section 15(1), which is something untenable in law. That would have to be the position if it is accepted that the PA applies after issuing of an arbitration award and that the award is a debt as contemplated in the PA. This all points to the direction that the PA does not apply in such cases.[339]

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[333] *Ibid*, par 118.
[334] *Myathaza*, par 142.
[335] *Ibid*.
[336] *Myathaza*, par 127.
[337] *Ibid*, par 128.
[338] *Myathaza*, par 129.
[339] *Ibid*.

Second judgement: Froneman J

Froneman J diametrically opposed the findings of the first and third judgement. His view was that the two Acts are capable of being interpreted in a way that complement each other and in a way that best protect the right of access to justice, meanwhile promoting the speedy resolution of disputes under the LRA.[340] What froneman was arguing for is the re-interpretation of the PA Act in a manner that will conform to the LRA dispute resolution system and in a manner that advances the constitutional imperatives.[341]

The tactic that is usually used by respondents of instituting review proceedings in order to avoid implementation of an arbitration award that has been issued in favour of the applicant, should be eliminated by providing that prescription should not run until the review proceedings are decided.[342] The building blocks of that re-interpretation should be based on the principle that:

(a) under the PA, the running of prescription is interrupted by the commencement of the adjudicative proceedings until they are finalized.
(b) The CCMA should be regarded as an independent and impartial forum that is vested with powers of resolving disputes that need the application of law, as per section 34 of the Constitution.[343]
(c) Therefore, the commencement of proceedings in the CCMA must be taken to amount to adjudicative proceedings that interrupt the running of prescription under section 15 of the PA.
(d) Review of the arbitration award that has been issued by the CCMA must be taken to fulfil the same role that an appeal does in cases heard by the LC, in that an appeal stays everything until it is finalized.[344]

Referring to the case of *Van der Merwe v Protea Insurance Co Ltd*,[345] it was stated that the contemplated "final judgement" in terms of section 15 is a judgment in the court in which the process is instituted or, if the creditor is unsuccessful in such court,

[340] *Myathaza*, par 66.
[341] *Ibid*, par 67.
[342] *Ibid*.
[343] The Constitution.
[344] *Myathaza*, par 68.
[345] 1982 (1) SA 770 (E) at 773A-C.

any higher tribunal in which the creditor is ultimately successful on appeal in relation to the 'process in question'.[346]

If these principles are to be applied then the commencement of conciliation or arbitration proceedings, in the CCMA will amount to judicial process and any delay within that process will not affect the interruption of running of prescription.[347] This position should be same also with the review of an arbitration award and just as an appeal, until final judgement the review stays the executability of an arbitration award. The interruption will lapse if the review is not pursued to final judgement.[348]

Froneman saw a discrepancy in the distinction that is made between an ordinary arbitration and a statutory arbitration. Where a debt is a subject of an arbitration, the period of prescription gets delayed and an award that is issued by the arbitrator in terms of the agreement possess a status of a court order between the parties and the applicable prescription period is that which is applicable to a judgment debt.[349] There seems little reason why parties subjected to statutory arbitration should not enjoy similar protection in respect of arbitration awards in their favour.[350]

CCMA process: commencement of adjudicative proceedings?

The court had to determine whether the means of commencing proceedings in the CCMA could sufficiently be held to be a "process" for the purposes of section 15(1) of the PA, which states that prescription is interrupted by the service on the debtor of "any process whereby the creditor claims payment of the debt".[351] Another question that arises from this is whether a claim made before the CCMA is for the payment of a "debt".[352] In answering the first question, Froneman stated that section 15(6) defines process as including 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".[353] This definition accords with the

[346] *Ibid*, par 773A-C; *Myathaza* par 70.
[347] *Myathaza*, par 69.
[348] *Ibid*.
[349] *Ibid*, par 71.
[350] *Ibid*.
[351] S 15 of the PA 68 of 1969.
[352] *Myathaza*, par 74.
[353] PA 68 of 1969.

service of referrals in the CCMA, as that is the way proceedings are commenced in the CCMA.[354]

With regards to the second question, it was stated that the meaning that must be attached to the term "debt" should be restricted to a claim that can be resolved by the application of law. This means "debt" must be restricted to enforcement of legal obligations and it should be accepted that legal obligations may take different forms.[355] They may take the form of positive obligation, which prompts one to do something and a positive obligation may require one to render performance in the form of monetary payment or performing some other act where the obligation does not sound in money. Another form of obligation may be a negative, one which refrains someone from acting in a particular manner.[356]

It was stated that an unfair dismissal claim instituted under the LRA fits perfectly in the definition of "debt" as it enforces three kinds of positive legal obligations: reinstatement, re-employment and compensation.[357] In the case of reinstatement, the employer is required to resuscitate the employment contract with all rights and responsibilities and the employer will be required to provide employment and pay remuneration. All these obligations accord with the meaning of "debt" as found in the PA, when it is narrowly interpreted.[358] Froneman relied on what was held by the majority in *Makate*,[359] where court accepted that there may be other debts beyond a claim for payment. The court there accepted the definition that was used in *Escom*,[360] which provided that a debt is:

> "1. Something owed or due: something (as money, goods or service) which one person is under an obligation to pay or render to another. 2. A liability or obligation to pay or render something; the condition of being so obligated."[361]

[354] *Myathaza*, par 75.
[355] *Ibid*, par 78.
[356] *Ibid*.
[357] *Ibid*, par 79.
[358] *Ibid*.
[359] *Makate v Vodacom (Pty) Ltd* 2016 (6) BCLR 709 (CC), par 92-3.
[360] *ESC v Stewarts and Lloyds of SA (Pty) Ltd* 1981 (3) SA 340 (A) (*Escom*).
[361] *Ibid*; *Myathaza*, par 80.

The Justice concluded that the answer to both questions leads to a conclusion that the service of referrals setting in motion the dispute resolution process under the CCMA interrupts the running of prescription.[362]

Review: final step in arbitration process

Another perspective that was brought into the matter was the re-interpretation of the PA to bring it in line with the right of access to courts.[363] When contrasting the LC judgements and arbitrations under the LRA, it is visible that the former more promotes the right of access to court than the latter. LC judgements are subject to appeals to the LAC and further up the hierarchy, meanwhile arbitration under the LRA is merely an adjudication without a right of appeal but only review.[364]

This difference calls for re-interpretation of the PA to include section 145 review under the LRA as a ground that interrupts prescription until its process is finalised. This interpretation will best protect the right of access to courts, as it will play the same role of finality as the right of appeal does in ordinary matters.[365] This position is confirmed by section 145(9) of the LRA which came into effect in January 2015, as this section provides that an application to set aside an arbitration award interrupts the running of prescription.[366] Another way of going about it could be to regard the opposition of the applicant to the review proceedings as interrupting prescription anew because his defence could be regarded as "commencing process for payment of a debt" under section 15(1) and another is to regard the arbitration as having a status of a judgement debt as in private arbitration.[367] Whichever route that is followed, it will lead to a conclusion that until the review is finalised the applicant's claim cannot prescribe.[368]

If the right to access court is to be given effect to, it should be noted that the 30 days prescribed by the LRA for referral of unfair dismissal is way too short than the periods set out in the PA, thus presenting a more drastic infringement of the right of access to

[362] *Myathaza*, par 82.
[363] S 34 of the Constitution, "Everyone has a right to have any dispute that can be resolved by the application of the law decided in a fair public hearing before a court or where appropriate another independent and impartial tribunal or forum".
[364] *Myathaza*, par 83-85.
[365] *Ibid*, par 68.
[366] *Ibid*, par 88.
[367] *Ibid*, par 89.
[368] *Myathaza*, par 90.

justice than the provisions of the PA.[369] Another factor to be looked at is that the law differentiates between time-bars and true prescription periods. The former can tolerate failure to comply through condonation, but the latter requires strict adherence. Although their consequences differ in the event of non-compliance, but it is feasible to have them both operating in tandem. An example is the Institution of Legal Proceedings Against Certain Organs of State Act[370] co-existing with the PA. The former Act requires a person who wishes to sue the State to provide six months' notice from the date the debt became due, but non-compliance may be condoned. The six months' notice does not render the PA non-applicable.[371]

If the above two Acts co-exist perfectly with each other, there is no reason why the time frames set out in the LRA cannot co-exist with the provisions of the PA. The 30-day referral period should be taken as a time-bar clause that co-exist with the normal prescription periods under the PA.[372] The LRA did not expressly exclude the application of the PA and it certainly did not express that it intended the time-bar limits to replace the prescription periods set out in the PA. The lack of provisions in the LRA that regulate the delay of completion of prescription, interruption of prescription by acknowledgement of liability, and the judicial interruption of prescription confirms that the legislature saw no need to reinvent them under the LRA, as they are already dealt with in the PA.[373]

Case Analysis

In overall this case created no precedent because there was no majority judgement. Instead of shedding light, it exacerbated the confusion and uncertainty. It came as no surprise that the court could not secure a majority judgement as the manner it was constituted on this case was somehow faulted. The number of judges that were presiding over this matter were eight and according to the rules of the Constitutional Court, they constituted a quorum.[374] Although the quorum was constituted but it is submitted that since the number of judges was even, the majority judgement could not

[369] *Ibid*, par 93.
[370] 40 of 2002.
[371] *Myathaza*, par 94.
[372] *Ibid*.
[373] *Myathaza*, par 96.
[374] Constitutional Court of RSA "Role of the Constitutional Court" (undated) at https://www.concourt.org.za/index.php/about-us/role accessed (03 Sept 2021).

have been secured because if their number was odd the judicial tie would have been broken by the odd number.

As a result of this failure to appoint an odd number of judges, the court could not give a clear direction as to what should happen in a similar case that was before it, that of *Mogaila v Coca Cola Fortune (pty) Limited*.[375] In this case the applicant was dismissed by Coca Cola after being found guilty of assault. The applicant took the matter to CCMA where a reinstate order was awarded on her favour during 2008.[376] The employer took the matter to review to the LC and the latter dismissed the review and a petition to the LAC was also dismissed on October 2013.[377]

Since the review and appeal failed, the applicant sought to enforce the arbitration award by reporting for duty on November 2013 but she was chased away by the employer on the ground that since the arbitration award constituted a "debt" for the purposes of the PA and Ms Mogaila had failed to enforce it within three years after 29 April 2008, the award could no longer be implemented as it had prescribed.[378] The CC referred to *Myathaza* and stated that since there was none of the judgements that secured majority, no binding force came from that judgement. It went on to say that either approach may be used, between that of Jafta J and Zondo J, or that of Froneman J.[379]

According to the first and third judgement the arbitration award has not prescribed because the PA does not apply or because even if it did apply, the reinstatement order was "not an obligation to pay money, deliver goods or render services. On the second judgement's account the arbitration award would have prescribed in April 2016 because the CCMA referral interrupted the running of prescription and the interruption persisted until the finalisation of the review proceedings in October 2013.[380] The filing of an application to the CC further interrupted prescription until the finalisation of the proceedings. On both approaches, the applicant was found to be entitled to proceed with the certification of the award.[381] Just two years down the line, the CC seized

[375] [2017] 5 BLLR 439 (CC).
[376] *Mogaila*, par 4.
[377] *Ibid*, par 6.
[378] *Mogaila*, par 7-8.
[379] *Ibid*, par 27.
[380] *Ibid*, par 28.
[381] *Ibid*, par 29.

another opportunity in 2018 to decide the issue of the applicability of the PA in labour matters and end the confusion in the case of *Food and Allied Workers Union obo Gaushubelwe v Pieman's Pantry (Pty) Ltd.*[382]

4.3.2 *FAWU obo Gaushubelwe v Pieman's Pantry (Pty) Ltd*

Factual background

In this matter the employees were dismissed for partaking in an unprotected strike. FAWU referred the dispute to the CCMA for conciliation on the 7 of August 2001, six days after the dismissal.[383] On 3 September 2001 the matter was conciliated but it remained unresolved and the certificate to that effect was issued. FAWU referred the matter to be arbitrated by the CCMA but the latter declined that it had jurisdiction on the matter as the dismissal related to participation in a strike that did not comply with the provisions of Chapter IV of the LRA.[384]

Three and half years down the line on 16 March 2005, FAWU referred the matter to the Labour Court for adjudication. The respondent objected to the matter on the ground that the claim for reinstatement had prescribed. In reply FAWU submitted that the PA did not apply in the matter, but if it did, the referral to the CCMA interrupted the running of prescription.[385]

Labour Court

The Labour Court upheld the special plea that was raised by Pieman's and stated that the PA applied to all claims made under the LRA and as a result, because the dispute was referred for adjudication after three years, the claim had prescribed.[386] Furthermore, it was rejected that the referral of the dispute to conciliation interrupted the running of prescription on the basis that that the referral of the dispute to the CCMA does not constitute a process by which prescription could be interrupted under the PA.[387] FAWU escalated the matter to the LAC.

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[382] (2018) 39 ILJ 1213 (CC).
[383] *FAWU*, par 3.
[384] *Ibid*, par 4.
[385] *Ibid*, par 5.
[386] *FAWU*, par 14.
[387] *Ibid*.

Labour Appeal Court

The LAC analysed the provisions of section 210 of the LRA[388] and those of section 16(1) of the PA.[389] It stated that these provisions regulate the applicability of the PA in instances where its time frames are inconsistent with provisions of the LRA, in so far as it provides its own time frames for claiming of debts. In particular, section 210 of the LRA stipulates unambiguously that should there be any conflict between its provisions and the provisions of any other Act, except the Constitution, the LRA will prevail.[390] However, the LAC stated that the mere fact that the two Acts provide distinguishable time frames is not enough to found inconsistency. Accordingly, it held that the time frames set out in section 191 of the LRA do not create cause of action but they regulate the process of obtaining a remedy.[391] They merely provide time-bars but not prescription periods.[392]

On these bases, the LAC held that the PA applied to all matters litigated under the provisions of the LRA.[393] With regards to FAWU's contention that the running of prescription has been interrupted by the CCMA conciliation, the LAC discarded this argument. It held that the referral of dispute to the CCMA is just a procedure that is akin to completing a claim form.[394] According to the PA, what can interrupt prescription is process whereby legal proceedings are commenced,[395] not claim forms. The view of the LAC was that the only manner that can interrupt prescription under the LRA is a referral of the dispute for adjudication by the LC in terms of section 191(5).[396]

Constitutional Court

Dissatisfied with the results, FAWU referred the matter to the Constitutional Court for a final ruling in the matter. The CC wrote three separate judgements which were penned by Zondi AJ (Minority), Zondo DCJ (Concurring to Zondi) and lastly by Kollapen AJ (Majority).

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[388] LRA 66 of 1995.
[389] PA 68 of 1969.
[390] LRA 66 of 1995; *FAWU*, par 16.
[391] *FAWU*, par 18.
[392] *Ibid*.
[393] *FAWU*, par 19.
[394] *FAWU*, par 20.
[395] S15(1) of the PA 68 of 1969.
[396] *FAWU*, par 20.

Zondi AJ Judgement

Does the Prescription Act apply to litigation under the LRA?

Justice Zondi in his judgement stated that the first question he is going to deal with is whether the PA applies to litigations made under the auspices of the LRA. The point of departure in answering this question is section 16(1) of the PA which stipulates that the provisions of the PA are applicable to any debt unless 'inconsistency' exist between its provisions and any other Act.[397] Accordingly, the general rule is that the PA applies in all debts including those arising from labour matters, unless there is inconsistency between its time frames and those of the LRA.[398] This therefore necessitates inconsistency evaluation.[399]

Inconsistency evaluation

The Justice referred to what was held by the first judgement in *Myathaza* in relation to what is meant by "inconsistency". According to that first judgement it was stated that:

> "[i]n the context of the Constitution, inconsistency is given a wider meaning which goes beyond contradiction or conflict. Legislation or conduct is taken to be inconsistent with a provision in the Constitution if it differs with a constitutional provision. Sometimes this arises from the overbroad language of a statute."[400]

With the above in mind, it was held that to found inconsistency it is not required that there should be a conflict that renders the two statutes mutually exclusive. It is sufficient that there are material differences between the two.[401] Zondi's judgement unambiguously made out that it aligned itself with the view that the provisions of the PA are inconsistent with those of the LRA, particularly where time periods are concerned. In his view those time frames are not procedural in nature, but they are substantive in nature.[402] For the reasons that are to follow Zondi found that the PA does not apply to matters litigated under the LRA.

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[397] S 16 of PA 68 of 1969.
[398] *FAWU*, par 41.
[399] *Ibid,* par 42.
[400] *Myathaza*, par 39.
[401] *FAWU*, par 47.
[402] *Ibid*.

Firstly, Zondi states that the differing time frames on their own indicate that PA does not apply. According to him the LRA should be viewed in the same manner as with the Constitution, in that the historical backgrounds preceding their promulgation is similar. Like the Constitution, the LRA was promulgated to change the law that governed the labour relations and to give effect to fair labour practices.[403] When the LRA was enacted, it signalled a drastic change in the industrial relations landscape from one characterised by strike, conflict, and industrial injustice to one in which the rights of the employers and employees are governed by the Constitution.[404] This entails that the LRA is umbilically linked to the Constitution.[405]

Therefore, the LRA is not just any ordinary statute that may be interpreted anyhow but it must be interpreted in the similar manner like the Constitution.[406] A close reading of section 191 of the LRA clearly demonstrate a unique LRA dispensation in which special rights, obligations, principles, processes, procedures, fora, and remedies are created. An employee is afforded a special right to lodge a complaint to the CCMA should he be unfairly dismissed. A process of vindicating that right is by submitting a referral form within 30 days after the dismissal. A remedy is created when that employee fails to abide by those 30 days period in that he may seek condonation, if good cause is shown.[407]

If the CCMA declares that the dispute remains unresolved or the 30 days lapse since the day of the referral, depending on the nature of the dispute, the employee may refer it to arbitration or Labour Court for adjudication within 90 days.[408] In this phase too, non-observance of the time frame may be condoned.[409] This special dispute resolution system is self-sufficient and there will never be a need to apply the PA if its time frames are adhered to because the dispute may be resolved within one year.[410]

Furthermore, it is difficult to comprehend how the PA may be applicable in a dispute that is referred for conciliation. For argument' sake say the employee referred the matter more than three years and shown good cause for condonation and the CCMA

[403] *FAWU*, par 49.
[404] *Ibid*, par 63-64.
[405] *Ibid*.
[406] *FAWU*, par 64.
[407] *Ibid,* par 65-66.
[408] S 191(5)(a) -(b) of the LRA 66 of 1995.
[409] *Ibid*; *FAWU*, par 66.
[410] *FAWU*, par 67.

would possess the discretion to permit such referral. Without this permission there can be no conciliation. Without conciliation the Labour Court would have no jurisdiction to entertain the matter and no other court would have jurisdiction.[411] That would be the end of the matter. Applying the PA would also raise other difficulties, which include who decides whether the matter has prescribed or not as the CCMA is not equipped with that power. The only power it has is to condone non-observance of the time frame on good cause shown. As mentioned earlier, because conciliation would not have occurred, no court would have jurisdiction to entertain the matter and decide if the dispute has prescribed or not.[412]

Another difficulty relates to the issue of condonation by both the CCMA and the Labour Court. Both these *fora* are empowered to condone non-observance of the time frames if good cause is shown, and there is no time limitation for doing so. Meaning condonation may occur even after three years.[413] This of course will conflict with the PA which states that debts prescribe after three years. Therefore, if it is accepted that the PA applies then that would imply that after the three years period the CCMA or Labour Court ceases to have competency to condone the delay which is the competency that the LRA specifically confers on them.[414]

If such could be accepted, the effect will be that these *fora* would be stripped of their powers that are specifically conferred upon them by the LRA.[415] Not only will this affect their power to condone late referrals but, the employee's rights to refer their disputes to these *fora* will also be limited.[416] Furthermore, the effect of this position will negatively affect the effective dispute resolution system. Accordingly, Zondi reached a final decision that in terms of section 210 of the LRA, the LRA must prevail.[417]

ZONDO DCJ (Concurring to Zondi)

The second judgement in this case was penned by Zondo concurring with Zondi, but he chose to write separately in order to give his reasons as to why he believes that the PA is not applicable. He stated first that it should be taken into high regard the fact

[411] *Ibid,* par 68.
[412] *Ibid*.
[413] *FAWU*, par 69.
[414] *Ibid*.
[415] *FAWU*, par 70.
[416] *Ibid*.
[417] S 210 of the LRA 66 of 1995.

that the right of an employee to refer an unfair dismissal dispute emanated from the LRA.[418] This will therefore entail that the processes that are to be followed, the time frames to be observed and correct *fora* are to be sought from the provisions of the LRA. It would be senseless that a right acquired under the LRA will be lost under the PA without a provision allowing that in the LRA.[419]

Had it been the intention of the legislature that the LRA dispute resolution system be subjected to the provisions of the PA, they would have added a prefix to the relevant provisions relating to condonation and good cause with the phrase: "subject to the Prescription Act". The fact that it was not done so, indicates that the PA was not intended to apply.[420] Another factor that must be considered in order to clearly determine the intention of the legislature is the manner in which the LRA dispute resolution system came about. The LRA was enacted a long time after the PA was enacted and its purpose was to change the position that prevailed in the common law and the way the PA did things. During the drafting of the LRA, Parliament was well aware of the PA regime, but it nevertheless put a regime that differed significantly with the PA regime.[421]

This means that the drafters had ample time to incorporate in the LRA that "subject to the Prescription Act" the LC may condone non-observance of the 90 days periods.[422] However, despite the knowledge about the existence of the PA they did not draft the LRA in this manner. This is simply because they never intended it to apply or have any role to play in the dismissal dispute resolution dispensation under the LRA.[423]

Difficulties of interpretation

Applying the PA would pose difficulties of interpretation. This is due to the fact that according to the PA, the prescription periods apply from the date of dismissal, as it is considered as a time where a debt is said to be due and serving of the referral document to the conciliation process is considered as an interruption.[424] The difficulty in this is that under the PA, when a debt is due, it is enforceable and it is the right of

[418] *FAWU*, par 88.
[419] *Ibid*.
[420] *FAWU*, par 90.
[421] *Ibid*, par 92.
[422] *FAWU*, par 93.
[423] *Ibid*.
[424] *FAWU*, par 111.

the creditor to immediately institute proceedings for its recovery. However, under the LRA it is not possible to obtain order of reinstatement or payment of compensation without a proof that conciliation has been attempted and failed.[425]

Proof of failure is by the issuing of a certificate by a commissioner to the effect that the dispute remains unresolved or by the expiry of 30 days of the referral of the dispute to the conciliation process.[426] The ultimate result is that at the time of referring the dispute for conciliation the CCMA and the LC do not possess jurisdiction to arbitrate or adjudicate the matter for purposes of issuing an order for the recovery of the debt.[427]

Common law Presumptions

Not only the difficulties of interpretation that suggests that PA should not be applicable, but the common law presumptions too. It is one of the common law presumptions that if a statute creates rights that never existed before and details out the remedies applicable when they are breached, then there are no other remedies that should be applied in case of breach other than those remedies given by that statute.[428]

It was the view of this judgement that it could also be said that where an Act creates special ways of losing certain rights that are conferred upon a person by that statute, then those special ways are the only acceptable ways of losing those rights. The right that no one should be unfairly dismissed emanated from section 185[429] of the LRA as a special right that never existed in the common law. Furthermore, the LRA provided provisions that governs how, where and when an unfair dismissal claim may be enforced and how an employee forfeits it.[430] It therefore makes no sense why the PA should play any role in determining whether an employee has lost this right.[431]

Another common law presumption states that a specific statute excludes the application of a general statute.[432] In this case the PA is a general statute that applies in all areas where there is debt or claims to be recovered. However, the LRA is a

[425] *Ibid*.
[426] *Ibid*.
[427] *FAWU*, par 112.
[428] *Ibid*, par 121.
[429] S 185 of the LRA 66 of 1995 "Every employee has the right not to be: (a) unfairly dismissed; and (b) subjected to unfair labour practice".
[430] S 191 of the LRA 66 of 1995.
[431] *FAWU*, par 121.
[432] *Ibid*, par 122.

specific statute dealing specifically with, among others, the right not to be unfairly dismissed and how unfair dismissal claims are enforced and lost.[433] An example of the application of this presumption in a similar case was found in *Sidumo v Rustenburg Platinum Mines.*[434] In this case the court was asked to decide whether the reviewing of an arbitration award should be governed by the PAJA review regime or the LRA review regime.[435] The court had to take into account that PAJA was enacted solely to promote section 33 of the Constitution which provides that everyone is entitled to an administrative action that is lawful, reasonable and procedurally fair.[436]

The SCA in *Sidumo* held that arbitration awards are administrative actions that should be reviewed under the PAJA.[437] In the CC, the court was faced with the challenge of reconciling this decision with the provisions of section 145 of the LRA which stated that CCMA arbitration awards were to be reviewed under that provision.[438] The grounds listed in that section and those listed under section 6 of the PAJA differed significantly. Furthermore, the time frames listed in section 145 are shorter to those listed under PAJA.[439] According to the LRA a review must be lodged within six weeks after the issuing of the arbitration award, while PAJA requires that it be lodged with 180 days of the making of the administrative action or of the applicant gaining knowledge of the administrative action.[440] The court therefore held in *Sidumo* that this is an appropriate case for the application of the principle that specialised provisions trump general provisions.[441]

It was the view of this judgement that the same approach must be taken with regards to the application of the PA. This latter statue is a general one, while the LRA is a

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[433] *Ibid*.
[434] [2007] 12 BLLR 1097 (CC).
[435] *Ibid*, par 97-100.
[436] **S 33 of the Constitution: "**Everyone has the right to administrative action that is lawful, reasonable and procedurally fair.
(2) Everyone whose rights have been adversely affected by administrative action has;
the right to be given written reasons.
(3) National legislation must be enacted to give effect to these rights and must-
(a) provide for the review of administrative action by a court or, where appropriate,
(6) impose a duty on the state to give effect to the rights in subsections **(1)** and (2);
an independent and impartial tribunal;
and
(c) promote an efficient administration.
[437] Sidumo, 104.
[438] S 145 of the LRA.
[439] *FAWU*, par 123.
[440] S 145 of the LRA 66 of 1995; S 7 of the PAJA 3 of 2000; *FAWU*, par 124.
[441] *FAWU*, par 126.

specific statute enacted to give effect to the right to fair labour practices whose dispute resolution framework was purposefully designed, and it contains specialised provisions.[442] If the principle that "specialised provisions trump general provisions" is applied, the result will be that unfair dismissal disputes may be referred to conciliation or adjudication even after three years if the employee shows good cause for condonation and the provisions of the PA relating to the three year prescription period will have no application to unfair dismissal claims under the LRA.[443]

Non-agreed intrusion

Moreover, if the three-year prescription period rule is to be brought into the LRA dispute resolution system whereas the LRA has a clearly crafted provision on when an employee forfeits his or her unfair dismissal claim is to bring into the LRA a "non-agreed intrusion".[444] This is so because in *Sidumo* the court held that when the statute was created:

> "The State in both its executive and legislative arms was involved in finalising the LRA together with persons representing business, labour and community interests. Section 210 is unsurprising. The main protagonists in industrial relations, having negotiated the terms of the legislation, were not likely to countenance any non-agreed intrusions."[445]

KOLLAPEN AJ (Majority)

The third judgement took an entirely different view as juxtaposed to the two preceding judgements. Albeit it took a totally different view, it secured a majority of votes and it is the one setting a binding precedence. The view of Kollapen is that the provisions of the PA are not inconsistent with the LRA and are therefore applicable in disputes under the LRA.[446] This view is based on firstly on the finding by this judgement that an arbitration award qualifies as debt as mentioned in the PA. Secondly, on the basis that these two statutes are compatible with one another. Although they provide different

[442] *FAWU*, par 127.
[443] *Ibid.*
[444] *FAWU*, par 129.
[445] *Sidumo*, par 100.
[446] *FAWU*, par 139.

time frames, but the applicability of their different time frames is in different aspects of the litigation process.[447]

Meaning of debt

The first aspect this judgement dealt with was evaluating whether labour dispute matters such as arbitration awards constitute 'debt' as envisaged in the PA. It stated that while there is no clear definition in the PA of what constitute debt, the court have developed a definition that proved to be acceptable. It accepted the definition that was adopted in *Escom* case,[448] where it was stipulated that the word 'debt' must be given its ordinary meaning as appearing in the Shorter Oxford Dictionary. According to it, debt is:

> "1. Something owed or due: something (as money, goods or service) which one person is under an obligation to pay or render to another.
>
> 2. A liability or obligation to pay or render something; the condition of being so obligated."[449]

Regard being had to this, it followed that a claim for dismissal seeks to enforce three possible kinds of obligations against an employer: reinstatement, re-employment, and compensation. All three obligations fit neatly within the definition of debt that *Escom* accepted, as they constitute either an obligation to pay or render something.[450] Furthermore, it was held that an unfair dismissal claim activates proceedings for the recovery of a debt as contemplated in section 16(1) of the PA.[451] The court having found this, it had to still look at the role played by the different time frames as found on both the impugned statutes.

The role played by the LRA and PA time periods

The court expressed a view that the two-time frames play different roles in the litigation process of recovering a debt. Although they both specify the exact time frame within which a particular step in the litigation process should be taken, but in the one instance

[447] *Ibid*, par 140.
[448] *ESCOM v Stewarts and Lloyds of SA (Pty) Ltd* 1981 (3) SA 340 (A).
[449] *The New Shorter English Dictionary* 3ed (Clarendon Press, Oxford 1993) vol 1 at 604; *FAWU* par 155.
[450] *FAWU*, par 156.
[451] *Ibid*, par 157.

non-adherence is condonable while in the other it is straight extinction.[452] The LRA deals with time frames that do not have an effect of extinguishing claims on non-compliance, while the PA extinguishes claims if its time frames are not adhered to. This difference should be accepted as a time bar for the time frames that allow condonation on non-compliance and true prescription period for the ones that result to extinction.[453] The next aspect that had to be determined was the question of whether the two statutes are inconsistent with one another.

Inconsistency versus difference

According to this judgement what is needed by section 16 of the PA[454] in order to exclude its application is an inconsistency between its time periods and those of the LRA. It was stated that inconsistency should be distinguished from mere difference between these two statues.[455] This means that the mere fact that the LRA has its own time frames and the PA has got its own too, does not result in inconsistency. What is required to prove inconsistency is that the provisions of the PA are inconsistent with the relevant provisions of the LRA.[456]

The ability to deduce whether inconsistency is available could ensue once a proper evaluation of the provisions of the two Acts have been undertaken.[457] The case of *Mdeyide,*[458] was relied on for the test to determine inconsistency. The test was said to be as follows:

> "[I]n every case in which a plaintiff relies upon a [certain provision], the cardinal question is whether that provision is inconsistent with [another provision]."[459]

Following this test, it was pivotal to consider the provisions of section 191 of the LRA[460] and compare them with those of the PA[461] in order to determine inconsistency between the two Acts. A closer look at section 191 reveals two things about it. The first one it

[452] *FAWU*, par 143.
[453] *Ibid*.
[454] 68 of 1969.
[455] *FAWU*, par 160.
[456] *Ibid*.
[457] *FAWU*, par 162.
[458] *Mdeyide* para 45.
[459] *Ibid; FAWU*, par 165.
[460] 66 of 1995.
[461] 68 of 1969.

sets out the time period within which a referral of dispute should be made[462] and the second one relates to the remedy that must be used on non-observance of that time period, which is that 'good cause must be shown'.[463]

However, what this provision fails to do is to create an outer limit to the litigation process that provides for the prescription of a claim. What is certain is that should a litigant fail to observe the time frame and fail to show good cause, the claim would extinguish.[464] This route of extinction of claim is however different from that of a prescription period, in that the latter would ensue due to the running of prescription within a particular time period. The ultimate result is the same but the route of achieving it is different in each case. [465]

The LRA time frames indicate to the litigant when to take required steps in the dispute resolution system in order to successfully prosecute a claim, while the role of the PA is to put a cut-off point where those steps are no longer possible to be taken owing to the claim being prescribed.[466] If these two statutes play these different roles, it then cannot be said that there is an inconsistency with regards to their time periods. Had the position been that the LRA had its own prescription periods then the situation would be decided otherwise, however, that is not the case here.[467]

The time frames set out in these Acts regulate different features and different stages of the dispute resolution process. It follows that they are not only capable of being reconciled but they can co-exist with one another in harmony. Furthermore, the application of the PA would also enhance the speed of resolution of the disputes by firstly, leaving undisturbed the compulsory periods of referral of disputes as set out in section 191.[468] Certainly, the applicability of the PA cannot have as an unintended consequence the implied extension of those time periods to coincide with the period of prescription. Secondly, if the time of submitting the claims to the relevant *fora* is capped by an outer time limit, that would definitely promote efficiency in the dispute resolution process. This would also ensure that employment disputes are not litigated

[462] S 191(1)(b) of the LRA 66 of 1995.
[463] S 191 (2) of the LRA 66 of 1995.
[464] *FAWU*, par 167.
[465] *Ibid*.
[466] *FAWU*, par 177.
[467] *FAWU*, par 178.
[468] *FAWU*, par 179.

after a considerable passage of time as this may negatively affect the quality of dispute adjudication and also contravene the policy that says employment related disputes must be resolved quickly. Furthermore, the ability of employees to earn living will be affected and the business of the employer would be stalled unreasonable.[469]

Based on these observations this judgement concluded that the LRA provisions are not in conflict with the provisions of the PA. If inconsistency could not be established, it follows that there is also no conflict.[470] Meeting the definition of 'conflict' is a considerable higher bar than meeting inconsistency. With that being said, the court found that no existence of conflict has been proved.[471]

The good cause "at any time" argument

The court went further to deal with the argument that is constantly raised, which says that section 191(2) allows a litigant to refer the dispute at any time, so long he/she can prove good cause for the delay.[472] It stated that what seems to be a proposition arising out of this argument is that the words "at any time" militate against the provisions of the PA in that they create a litigation time frame that is either inconsistent with or in conflict with the PA.[473] The court diametrically opposed this contention and stated that regard must be had to the character of section 191, together with the contemporary meaning that is now attached to the words "at any time".[474]

Section 191(2) should be interpreted in conformity of the whole section and the broader scheme of the LRA. Interpreting this provision in isolation or disjunctively should be avoided.[475] Carefully read, this subsection does not in any way entitle an employee to refer a dispute outside the time frames mentioned in section 191(1)(b) nor does it have an intention of creating a separate and different time regime. However, what it does is to regulate the procedure to be followed by an employee in asserting a right created by the LRA.[476]

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[469] *FAWU*, par 180.
[470] *FAWU*, par 181.
[471] *Ibid*.
[472] *FAWU*, par 182.
[473] *Ibid*.
[474] *Ibid*.
[475] *FAWU*, par 183.
[476] *Ibid*.

It follows that section 191(2) is not substantive in nature but rather is procedural. Not only this subsection but the whole scheme of section 191 is procedural, while the provisions of the PA are substantive in nature. This distinction is pivotal as it contemplates substantive matter such as prescription and a matter that is procedural such as a time bar running along parallel tracks and having different objectives.[477] The latter's role is to regulate by imposing time bars, the procedure to be followed in vindicating a right, while the former regulates through the imposition of cut-off periods in respect of litigation.[478] Their distinctiveness in operation leads to the conclusion that they can operate together harmoniously. On these bases alone, the court's view was that whatever meaning was attached to the words "at any time" matters no more, given the very different nature of prescription periods and time bars and what they seek to achieve.[479]

If the literal meaning of the phrase "at any time' could be adopted, the result will run contrary to the stated objectives of the LRA and the expeditious resolution of disputes that the LRA seeks.[480] The importance of resolving disputes expeditiously has been overemphasized by the courts and that the granting of condonation for delays must be subjected to scrutiny.[481] The LC in *Makuse*[482] stated as follows with regards to the issue of condonation;

> "condonation for delays in all labour law litigation is not simply there for the taking. The courts have made it clear that applications for condonation will be subject to 'strict scrutiny', and that the principles of condonation should be applied on a 'much stricter' basis."[483]

What ought to be deduced from the above judgement is that in all cases where a litigant seeks condonation, the court should not just give it away without applying its mind to determine whether it is appropriate to do so. Thus, the argument that advances that a referral to conciliation can be sought at any time is clearly contrary with the approach adopted in this LC judgement.[484]

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[477] *FAWU*, par 184.
[478] *Ibid*.
[479] *Ibid*.
[480] *FAWU*, par 187.
[481] *Ibid*.
[482] *Makuse v Commission for Conciliation, Mediation and Arbitration* [2015] ZALCJHB 265.
[483] *Ibid*, par 5; *FAWU*, par 188.
[484] *FAWU*, par 188.

Furthermore, the LC in *Balaram*[485] and *Gianfranco*[486] had an opportunity to consider the meaning of the phrase "at any time" as used in section 191(2). Both these judgements came to the same view that the meaning of this phrase had to be considered in context. In the former judgement the LC stated that condonation could be requested at any point before a binding arbitration has been made.[487] In the latter case, the view was that condonation should be sought at a conciliation stage and the phrase "at any time" be taken to mean at any time during the conciliation phase. The following words were used;

> "Seen in this context, the words 'at any time' in subsection (2) must be qualified to mean at any time during the conciliation process. As a general principle, an application for condonation must be made as soon as the employee becomes aware that condonation must be sought. This would usually be before the hearing of the conciliation proceedings. In my view, the use of the words 'at any time' was intended to cater for, *inter alia*, the contingency that the need for condonation is brought to the notice of the employee only at the conciliation. In such a case, he could there and then apply for condonation. A formal, written application would not be a prerequisite for the granting of condonation."[488]

Drawing from the above, the conclusion is that the phrase "at any time" does not result in the extension of the mandatory time periods of 30 and 90 days as set out in section 191(2) and accordingly do not provide the basis for an inconsistency argument in relation to the PA.[489] The concluding remarks that were made by the court through this judgement were that both the PA and the LRA seek to achieve same objectives which are the efficient and timely resolution of disputes. They are not at opposite ends of the litigation spectrum nor do they seek to advance different and inconsistent litigation imperatives. They can and do co-exist alongside each other in an integrated fashion.[490]

Analysis of the case

[485] *Balaram v Commission for Conciliation Mediation and Arbitration* [2000] 9 BLLR 1015 (LC).
[486] *Gianfranco Hairstylists v Howard* [2000] 3 BLLR 292 (LC) (*Gianfranco*).
[487] *Balaram* para 20.2.
[488] *Gianfranco* paras 12-3; *FAWU* 190.
[489] *FAWU*, par 193.
[490] *FAWU*, par 214.

As the LRA currently stands, s145(9) which took effect on 1 January 2015 points to the direction that indeed the PA should be applicable in LRA matters. This provision does not expressly state that the PA is applicable, but from its wording it can be deduced that it recognizes its applicability, as it provides as follows:

> "An application to set aside an arbitration award in terms of this section interrupts the running of prescription in terms of the Prescription Act, in respect of that award"[491]

From these words it is visible that as soon as the arbitration award is granted, the LRA considers the PA to have kicked in and should the award be reviewed, the provisions of the PA are interrupted. On these bases it is therefore argued that the *FAWU* majority judgement did not develop the law further than what was provided for by the LRA. It is not disputed that the 2015 amendment did not apply to this judgement as section 145(10) stated that subsection 9 was to apply to arbitration awards issued after 1 January 2015,[492] but the court had to give a judgement that will not contradict the envisaged amendment and one that will set a precedent that is in line with the said amendment.

Had the court went with view that PA is not applicable, that judgement would have suffered the fate of being overruled as soon as the amendment kicks in because it would run counter to the LRA provisions.

4.4 Conclusion

The ultimate conclusion that has been reached after considering a list of cases is that the PA applies to labour dispute matters. The LRA and the PA may co-exist alongside each other in harmony. The time frames that are provided in the LRA will run without disturbance, but the litigant must ensure that his claim is prosecuted before the expiry of the three years period because if he has not done so, he will suffer the consequences of having a prescribed claim. The three years period works a cut-off limit. Since now it cleared that the PA applies, what follows in the next chapter is to determine when exactly is the due date of the debt in labour matters. This is important to know for the purposes of calculating the three years period from the first day it

[491] S 145(9) of the LRA (2015 Amendment).
[492] *FAWU*, par 8; For the date on which this amendment took effect see the Government Gazette No. 38317, dated 19 December 2014.

started counting. Secondly, the next chapter will determine what needs to be done by the litigant in order to interrupt or stop the running of prescription in labour dispute matters. It will also discuss how the two Acts may be reconciled with their differing time periods.

CHAPTER 5- INTERRUPTION OF PRESCRIPTION

5.1 Introduction

In the preceding chapter it was stated that it was concluded by the majority in the Constitutional Court judgment in *FAWU* that the provisions of the PA are applicable in labour disputes that are adjudicated under the LRA.[493] Under normal circumstances when the PA is applicable, there are instances that are provided for the interruption of the running of prescription as discussed in chapter 3. These include the interruption by acknowledgement of debt[494] and judicial interruption.[495] The purpose of this chapter is to look at whether these grounds of interruption can be applied in labour claims. Moreover, this chapter will discuss the effect of section 145 (9)-(10) of the Labour Relations Amendment Act (LRAA)[496] on review applications that are brought under section 145(1) and 158(1)(g) of the LRA in relation to the effect they have on the running of prescription after an arbitration award has been issued.

5.2 Interruption by acknowledgement of debt

With regards to the interruption of prescription that is provided for in section 14 of the PA, it is clear that if the courts found an arbitration award to qualify as a debt,[497] it therefore follows that acknowledging the existence of this debt by the debtor will interrupt the running of prescription. The consequence of this interruption will be that the prescription period will start running afresh from the date of acknowledgement of debt. [498]

5.3 Judicial interruption

In chapter three it was mentioned that the PA in section 15 makes provision for the interruption of prescription through judicial process of claiming a debt. This section provides that the running of prescription will be interrupted by a

[493] *FAWU*, par 214.
[494] S 14 of the PA 68 of 1969.
[495] *Ibid*, s 15.
[496] LRAA 6 of 2014.
[497] FAWU, par 157.
[498] South African Law Reform Commission http://www.justice.gov.za/salrc/dpapers.htm 92.

> "service on the debtor of any process whereby the creditor claims payment of the debt"[499]

It is now prudent that before concluding whether the labour award claims are susceptible to judicial interruption, one must first assess whether the initiation of labour dispute in the CCMA qualifies as a judicial process and whether the referral forms that are used to initiate those proceedings constitute a service of a process as contemplated in section 15(1) of the PA.[500] The answer to these questions lies with the majority judgment in *FAWU*.[501] With regards to the question of whether the referral forms constitute a service of a process, the court looked at the definition of a 'process' as provided in section 15(6) of the PA.[502] In this subsection it is stated that a 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".[503]

Looking at the list of these documents mentioned here, the court stated that albeit most of these documents are ordinarily associated with actual litigation in courts but the use of the words "any document whereby legal proceedings are commenced" denotes that a more generous approach may be adapted to what may constitute such a document.[504] The requirement in this subsection is that a document in question should be one that may be used to commence proceedings.[505]

It was further stated that if the interpretation of the term "any document" could be confined only to documents that are used in formal court processes, the effect of such interpretation would run counter to the interpretation exercise that is demanded by section 39(2) of the Constitution.[506] This section requires the court to interpret any law

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[499] S15(1) of the PA
[500] Jacques van Wyk "Is an unfair dismissal claim subject to prescription? If so, does the referral of a dispute to the ccma for conciliation interrupt the running of prescription?" dated (October 2018) at https://www.werksmans.com/legal-updates-and-opinions/is-an-unfair-dismissal-claim-subject-to-prescription-if-so-does-the-referral-of-a-dispute-to-the-ccma-for-conciliation-interrupt-the-running-of-prescription/ accessed (03 Nov 2021).
[501] *FAWU*, par 194.
[502] S 15(6) of the PA 68 of 1969.
[503] *Ibid*.
[504] *FAWU*, par 195.
[505] *Ibid*.
[506] *FAWU*, par 196.

in furtherance of the rights in the Bill of Rights.[507] In light of this, the court stated that the interruption of prescription in claims is in fact made to resolve the harsh consequences that the uninterrupted prescription has on the right of access to courts, which is provided for in section 34 of the Constitution.[508] Accordingly, the court found that a broader meaning must be attached to the term "any document".[509]

The court went on to consider whether the referral document indeed commences proceedings. It accepted what was held in the first and second judgment in *Myathaza* that the CCMA is an independent and impartial forum as required by section 34 of the Constitution, where a dispute is resolved by the application of law.[510] This therefore meant that the CCMA functions like any court of law in resolving labour matters and its arbitration process constitutes adjudicative proceedings.[511]

Now the question remained as to whether the CCMA conciliation process also qualifies as adjudicative proceedings? In this regard the court stated that the LRA makes it mandatory that a referral to conciliation be the first step in the process of activating the adjudicative element of the CCMA.[512] The conciliation process was found to be inextricably linked to the arbitration process and no one can activate the adjudicative features of the CCMA without resorting first to conciliation.[513] Based on this, the court found that it would be an injustice to the scheme of the LRA and CCMA to view its conciliation process as less than a step to commence legal proceedings in an independent and impartial forum.[514]

A close analysis of the conciliation process reveals that indeed it is a commencement of a legal process. Albeit the process is facilitated by the Commissioner, whose duty is to allow parties a space to reach a mutually acceptable solution, but this process is not entirely informal.[515] At that stage the LRA contemplates a possible resolution of a dispute and the Commissioner is expected to correctly identify the nature of the dispute so that it will correctly reflect in the certificate of outcome.[516] The importance

[507] S39 of the Constitution.
[508] *FAWU*, par 196.
[509] *Ibid*.
[510] *Myathaza*, par 23 and 73.
[511] *FAWU*, par 198.
[512] *Ibid*, par 199.
[513] *Ibid*
[514] *FAWU*, par 199.
[515] *FAWU*, par 200.
[516] *Ibid.*

of this is that, should the matter reach the arbitration stage, then the evidence contained in the referral form and outcome certificate will be relevant. This goes to show that the conciliation proceedings are forming part of the adjudicative process.[517]

Moreover, the CCMA rules in particular Rule 5A recognizes conciliation as part of the proceedings before the CCMA.[518] In conclusion on this aspect, the court held that section 15 of the PA is also applicable in labour dispute matters. The referral of a dispute for conciliation to the CCMA interrupts the running of prescription.[519]

5.4 Effect of Review on Prescription

As was discussed in chapter two, the LRA makes provision for a debtor to launch a review application to the Labour Court to set aside an arbitration award in terms of section 145(1).[520] The Labour court is then tasked by section 158(1)(g) to review the functions of the CCMA.[521] A review application in its nature is an urgent matter that should not be submitted over the period of six weeks and should be finalized speedily.[522] It is unfortunate that although it is known that a review application is an urgent matter but some parties, more in particular the employers, tend to abuse their power and play delay tactics in order to have the claims against them prescribed.[523] They try by all means to cripple the financial stability of the employee in order to prohibit them from taking further legal steps until the prescription period terminates the claim.[524]

In order to curb this unwanted behaviour, the legislature introduced an amendment to the LRA provisions in the form of LRAA 6 of 2014.[525] In terms of section 145(9), an application for review to the Labour Court is considered to interrupt the running of prescription in terms of the PA.[526] This subsection applies to every arbitration award

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[517] *Ibid*
[518] CCMA rules; *FAWU*, par 201.
[519] *FAWU*, par 204.
[520] S145(1) of the LRA 66 of 1995.
[521] *Ibid.*
[522] DW De Villiers "The new section 145(9) of the LRA- Unique, but welcome" (16 June 2015) https://islssl.org/wp-content/uploads/2015/10/SouthAfrica-DawidDeVilliers.pdf (accessed on 22 Nov 2021) 1.
[523] *Ibid.*
[524] DW De Villiers https://islssl.org/wp-content/uploads/2015/10/SouthAfrica-DawidDeVilliers.pdf 1.
[525] *Ibid.*
[526] S 145(9) of the LRAA 6 of 2014.

issued after the 1st of January 2015.[527] The effect of this amendment is that the prescription period will continue to be interrupted until the dismissal of the review application by the Labour court.[528]

5.5 Conclusion

The essential aspects of the above discussion are that it has been found that the interruption of prescription as outlined in the PA is applicable as well in labour disputes. The declaration of an arbitration award as constituting a "debt" by the Constitutional Court in *FAWU* entails that section 14 of the PA is applicable as soon as the debtor makes acknowledgement of the existence of the award. Section 15 of the PA pertaining to judicial interruption is also found to be applicable in labour disputes. The referral document for conciliation is considered to be a document that initiates legal proceedings in an independent forum (CCMA). Moreover, it was also discussed that should a party wish to launch a review of the award issued by the Commission; the running of prescription is interrupted until there is finality in the application.

[527] S 145(10) of the LRAA 6 of 2014.
[528] *FAWU*, par 204.

CHAPTER 6- CONCLUSION

6.1 Introduction

The purpose of this chapter is to summarise the information that was discussed in all the preceding chapters. The main focus will be on the vital aspects of each chapter and then link the information from the beginning to the end, to show that the main question was answered in this research.

6.2 Summary

Chapter one of this study contained the introduction and the road map that was to be followed to the final chapter of the research. That chapter indicated that the labour dispute matters are regulated by the LRA which sets out timeframes that are to be followed in each step of the proceedings before the CCMA and the Labour court. For the referral of disputes to the CCMA/bargaining council for conciliation the time frame is 30 or 90 days after the alleged dismissal.[529] Should a dispute remain unresolved, it may be referred to the Labour Court for adjudication within 90 days after it was certified as being unresolved.[530] In the event that an employee is unable to adhere strictly to these time frames, the LRA opened a door of showing a good cause for condonation.[531] The point of contention is around this issue of condonation.

The main issue is whether the employee is still able to show good cause for condonation if the delay was in excess of three years period, considering the provisions of the PA that render all ordinary debts to have prescribed after a period of three years.[532] Now this called for the in-depth discussion as to whether the labour claims are considered as “debts” as contemplated in the PA.[533] Furthermore, it necessitated an inquiry as to whether the provisions of the PA are not inconsistent with the provisions of the LRA.[534] For the purposes of looking whether these two Acts are not inconsistent with one another, it became necessary to first look at the

[529] S 191(1) of the LRA 66 of 1995.
[530] *Ibid*, s 191(11).
[531] *Ibid.*
[532] S 11 of the PA 68 of 1969.
[533] *Ibid*, S 16(1).
[534] *Ibid.*

provisions of the LRA in chapter two and the provisions of the PA in chapter 3, more in particular those relating to the issue of time frames, the consequences of their non-observance and the meaning of “debt” in the PA.

In chapter two the discussion mainly focused on the provisions of the LRA, more in particular section 191 of this Act[535] as it sets out the time frames of referring matters. It was stated that in terms of subsection 1(a)-(b) an aggrieved party may refer his matter for conciliation either to the CCMA or Bargaining Council within 30 days of the alleged dismissal.[536] If the matter pertains to unfair labour practice, the period of referral is 90 days.[537] In section 191(2) it is further stated that should that person fail to adhere to those specified periods, the court can condone if there is good cause shown.[538]

In the event where the matter has to pass on to the Labour Court due to non-resolution in the CCMA, the party concerned must refer it within 90 days in terms of section 191(11). In the same provision it is stated that should that party fail to observe the exact time frame, there must be a good cause shown for condonation. In this respect, it was submitted that in the LRA non-adherence to the time frames is not fatal in its nature, in the sense that it does not extinguish the claim as there is a room for condonation if there is good cause shown.[539]

A difference was found to exist when these LRA provisions were contrasted with the PA provisions in chapter three. In this chapter it was stated that the PA has its own time frames that have an extinguishing effect in their nature as per *Lipschitz v Dechamps Textiles GMBH.*[540] The relevant time frame for claiming all ordinary debts is three years[541] and the PA does not have a room for condonation. Since the PA only applies in claiming of debts, it then became necessary to find out the meaning of “debt”. From the provisions of the PA there was no definition that was found but it was found in case law.

[535] LRA 66 of 1995.
[536] *Ibid.*
[537] *Ibid.*
[538] LRA 66 of 1995.
[539] S 191(2) of the LRA 66 of 1995.
[540] 1978 (4) SA 427 (C).
[541] S 11 of the PA 68 of 1969.

The importance of getting the correct definition of "debt" lies with the fact that a creditor ought to know whether his claim against the debtor qualifies as a "debt". This would allow him to exercise his right within the prescribed period and know when exactly it became due. The Constitutional court in *Makate*[542] stated that a definition that should be accepted is the one laid down in *ESCOM*[543] where it is provided as follows:

> "a debt is that which is owed or due; anything (as money, goods or services) which one person is under obligation to pay or render to another; and whatever is due from any obligation."

Now should a claim satisfy this definition, then it qualifies as a debt under the PA and the relevant prescription period will apply from the due date to the end of the prescription period of that particular debt. However, there are two instances that are provided as interruptions of the running of the prescription period. In section 14 of the PA, the Act makes provision for the interruption by acknowledgement of the debt by the debtor.[544] Section 15 the Act makes provision for the judicial interruption where a creditor serves on the debtor a process in which the debt is claimed.[545] The effect of both these instances is that the prescription period will start running afresh.[546]

What is clear here is that the provisions of the PA are foreign to the scheme and nature of the LRA. The difference between the two statutes is visible in relation to their time frames. What was necessary to be done was to reconcile the two Acts and find out whether the PA could be applicable to the LRA disputes. The task in chapter four was to look at case law and find out whether the labour claims could qualify as debts as contemplated in the PA. Secondly, it was to be discovered whether these two statutes could be reconcilable or they are inconsistent with one another.

In chapter four the main case that was relied on to get to the answers was the Constitutional judgement of *FAWU*. In this case the majority judgement found that while there is no clear definition in the PA of what constitute debt, the courts have developed a definition that proved to be acceptable. It accepted the definition that was adopted in *Escom* case,[547] where it was stipulated that the word 'debt' must be given

[542] 2016 ZACC 13.
[543] 1981 (3) SA 340 (A) 344.
[544] S 14 of the PA 68 of 1969.
[545] S 15 (1) of the PA 68 of 1969.
[546] South African Law Reform Commission http://www.justice.gov.za/salrc/dpapers.htm 92.
[547] *Electricity Supply Commission v Stewarts and Lloyds of SA (Pty) Ltd* 1981 (3) SA 340 (A) (*Escom*).

its ordinary meaning as appearing in the Shorter Oxford Dictionary. According to it, debt is:

> "1. Something owed or due: something (as money, goods or service) which one person is under an obligation to pay or render to another.
>
> 2. A liability or obligation to pay or render something; the condition of being so obligated."[548]

Regard being had to this, it followed that a claim for dismissal seeks to enforce three possible kinds of obligations against an employer: reinstatement, re-employment, and compensation. All three obligations fit neatly within the definition of debt that *Escom* accepted, as they constitute either an obligation to pay or render something.[549] Furthermore, it was held that an unfair dismissal claim activates proceedings for the recovery of a debt as contemplated in section 16(1) of the PA.[550]

With regards to the role played by the two different time frames found on the two Acts, the court stated that although they both specify the exact time frame within which a particular step in the litigation process should be taken, but in the one instance non-adherence is condonable while in the other it is straight extinction.[551] The LRA deals with time frames that do not have an effect of extinguishing claims on non-compliance, while the PA extinguishes claims if its time frames are not adhered to. This difference should be accepted as a time bar for the time frames that allow condonation on non-compliance and true prescription period for the ones that result to extinction.[552]

The role played by these time frames led the court to state that they regulate different features and different stages of the dispute resolution process. It followed that they are not only capable of being reconciled but they can co-exist with one another in harmony.[553] The ultimate answer that was reached in chapter four based on the *FAWU* judgment was that the PA applies in labour dispute matters that are regulated by the LRA. This conclusion led the discussion into an inquiry in chapter five as to whether

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[548] *The New Shorter English Dictionary* 3ed (Clarendon Press, Oxford 1993) vol 1 at 604; *FAWU* par 155.
[549] FAWU, par 156.
[550] Ibid, par 157.
[551] *FAWU*, par 143.
[552] *Ibid*.
[553] *FAWU*, par 179.

the two grounds of interruption of prescription as found in the PA are applicable in the LRA matters.

In chapter five it was found that if the courts found an arbitration award to qualify as a debt,[554] it therefore follows that acknowledging the existence of this debt by the debtor will interrupt the running of prescription. With regards to judicial interruption, it was found that it is also applicable in labour matters. The *FAWU* judgement accepted what was held in the first and second judgment in *Myathaza* that the CCMA is an independent and impartial forum as required by section 34 of the Constitution, where a dispute is resolved by the application of law.[555] This therefore meant that the CCMA functions like any court of law in resolving labour matters and its arbitration process constitutes adjudicative proceedings.[556] Furthermore, the conciliation process was found to be commencing legal proceedings.[557]

Another aspect that was discussed in chapter five is the effect of the review proceedings in the running of prescription. It was found that in terms of section 145 (9) of the LRAA,[558] the review proceedings interrupt the running of prescription until they have been dismissed in the Labour Court.

[554] *FAWU.*
[555] *Myathaza*, par 23 and 73.
[556] *FAWU*, par 198.
[557] FAWU, par 199.
[558] 6 of 2014.

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