

# PREScription IN LABOUR LAW

By Wanya Cloete

## INTRODUCTION:

The relationship between the periods set for pursuing unfair dismissal claims in terms of the LRA[1], and the prescription periods set in the Prescription Act[2] has been the subject of some confusion and debate. The debate is about the interpretation and application of section 16(1) of the Prescription Act.

## SECTION 16 OF THE PRESCRIPTION ACT:

Section 16(1) of the Prescription Act provides that the prescription periods set in the Prescription Act will apply "to any debt" arising after the commencement of the Act, except in circumstances where such provisions are inconsistent with any Act of parliament, which specifies time frames for when a claim can be made.

## FOOD AND ALLIED WORKERS UNION OBO GAOSHUBELWE V PIEMAN'S PANTRY (PTY) LIMITED

The employees were dismissed on 1 August 2001 for allegedly participating in an unprotected strike. On 7 August 2001, FAWU[3] on behalf of the dismissed employees referred a dispute to the CCMA[4] for conciliation.

FAWU contended that the dismissal was unfair in that none of its members received individual notifications of the disciplinary hearing, nor were they afforded sufficient opportunity to prepare their defence. FAWU referred an unfair dismissal dispute to the Labour Court for adjudication in terms of Section 191 of the LRA, approximately three and a half years after a certificate of non-resolution was issued by the CCMA.

Pieman's opposed FAWU's claim and contended that the claim had prescribed in terms of the Prescription Act, and that the Labour Court did not have the jurisdiction to hear the matter as the referral of the dispute to the Labour Court was made outside of the 90-day period prescribed by section 191(11) of the LRA, without any condonation application.

In upholding the special plea, the Labour Court held that the Prescription Act applies to claims brought under the LRA and found that, as the referral of the dispute for adjudication by the Labour Court was made more than three years after the date of dismissal, the applicant's claim had prescribed.

In the Labour Appeal Court: FAWU appealed to the Labour Appeal Court.[5] The issues before that Court were whether the Prescription Act applies to the referral and prosecution of disputes under section 191 of the LRA; and if it does, whether the unfair dismissal dispute referred by FAWU on behalf of its members had prescribed. The Labour Appeal Court held that, in this case, by the time the referral took place, the claim had prescribed.

## CONSTITUTIONAL COURT

The Constitutional Court on 20 March 2018 gave the majority decision that it has now accepted that the Prescription Act does apply to litigation in terms of the LRA and the controversy in this regard has been laid to rest.[6] However, the decision ameliorates the position for potential applicants in that prescription will be interrupted by a referral to the CCMA for conciliation. It should also be noted that the application of the Prescription Act in the context of the enforcement of arbitration awards has, since 1 January 2016, been regulated by section 145(9) of the LRA. This provides that, in respect of awards issued after this date, prescription is interrupted if an application is made to review and set aside an award.

This remains a complex area of our law and more judgements in this regard are sure to come our way in the future. Any party who wishes to enquire about this article or the legal position with relation to prescription of labour cases can contact us at [hendri@jratorneys.co.za](mailto:hendri@jratorneys.co.za) or 012 345 1347.

[1] Labour Relations Act, 1995

[2] Prescription Act, 1969

[3] Food and Allied Workers Union

[4] Commission for Conciliation, Mediation and Arbitration

[5] *FAWU obo Gaoshubelwe and Others v Pieman's Pantry (Pty) Ltd* (JA20/2015) [2016] ZALAC 46; [2016] 12 BLLR 1175 (LAC); (2017) 38 ILJ 132 (LAC) (8 September 2016)

[6] *Food and Allied Workers Union obo Gaoshubelwe v Pieman's Pantry (Pty) Limited* (CCT236/16) [2018] ZACC 7; 2018 (5) BCLR 527 (CC); [2018] 6 BLLR 531 (CC); (2018) 39 ILJ 1213 (CC) (20 March 2018)