

**The application of the Prescription
Act 68 of 1969 to unfair dismissal
disputes under the Labour
Relations Act 66 of 1995**

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LIST OF ABBREVIATIONS

CCMA	Commission for Conciliation, Mediation and Arbitration
FAWU	Food and Allied Workers Union
ILJ	Industrial Law Journal
LRA	Labour Relations Act
PELJ	Potchefstroom Electronic Law Journal
ZACC	South African Constitutional Court

KEYWORDS

Unfair dismissal, Commission for Conciliation, Mediation and Arbitration, Prescription Act, Labour Court, Bargaining Council, prescribe, Labour Relations Act, jurisdiction, dispute, referral, conciliation, arbitration, review, dispute resolution process, debt, obligation, extinguished, compensation, reinstatement, reemployment, inconsistent.

ABSTRACT

An employee being dismissed is a common occurrence. Once dismissed an employee has the opportunity to refer their dismissal dispute to the appropriate forum. The problem arises once the dispute is adjudicated by the appropriate forum, referred to the Labour Court and now exceeds the three year lifespan. The argument may well be that the dispute then prescribed.

The *Prescription Act* 68 of 1969 regulates the running of prescription. The questions that arise are when prescription will start to run in unfair dismissal disputes and when will the running of prescription be interrupted. The consistency between the *Prescription Act* 68 of 1969 and the *Labour Relations Act* 66 of 1995 is important in answering the aforementioned questions.

1 Introduction and problem statement

Dismissals occur on a daily basis. According to the CCMA's 2015/2016 annual report, the CCMA alone received 179 528 referrals for the said period.¹ Once the employee is dismissed, he or she has the opportunity to refer the matter to the Commission for Conciliation, Mediation and Arbitration (hereafter the "CCMA") or Bargaining Council.² The problem arises when the matter is referred from the CCMA or the Bargaining Council to the Labour Court and the life span of the matter exceeds three years.³ The first instinct of a legal professional will be to raise the issue of prescription and that the employees' claim has prescribed.

The *Prescription Act*⁴ (hereafter the "*Prescription Act*") regulates the time frames for prescription.⁵ A claim may prescribe after thirty years, fifteen years, six years or three years.⁶ The question may be asked as to when prescription will start to run in unfair dismissal disputes and when will the running of prescription be interrupted. The Court's stance on the consistency between the *Prescription Act* and the *Labour Relations Act*⁷ (hereafter the "*LRA*") plays an important role in determining the application of the *Prescription Act* to unfair dismissal disputes. It is important to determine whether an arbitration award will constitute a judgment debt, where a thirty-year prescription period would be applicable, or a simple debt, where the three-year prescription period will be applicable.⁸

The purpose of this research was to address legislation and rely on case law in an attempt to answer the research question. It was important to distinguish between the different types of debts that might arise, the role of the CCMA or Bargaining Council as well as when prescription starts to run and when will it be interrupted.

¹ CCMA 2016 <http://www.ccma.org.za/About-Us/Reports-Plans/Annual-Reports>.

² Section 191 of the *Labour Relations Act*, 66 of 1995.

³ As contemplated in Section 11 of the *Prescription Act* 68 of 1969.

⁴ 68 of 1969.

⁵ Section 11 of the *Prescription Act*.

⁶ Section 11 of the *Prescription Act*.

⁷ 66 of 1995.

⁸ *Myathaza v Johannesburg Metropolitan Bus Service (SOC) Ltd t/a Metrobus / Mazibuko v Concor Plant Cellucity (Pty) Ltd v Communication Workers Union on behalf of Peters* 2016 37 ILJ 413 (LAC) par 46.

This study was a literature study, which made use of text books, journal articles, internet sources, case law and legislation.

2 Role and jurisdiction of the CCMA and Labour Court

2.1 CCMA

Section 112 of the *LRA* establishes that the CCMA is a juristic person.⁹ Section 115 of the *LRA* deals with the functions of the CCMA and states as follows:¹⁰

115. Functions of Commission

(1) The Commission must -

(a) attempt to resolve, through conciliation, any dispute referred to it in terms of this Act;

(b) if a dispute that has been referred to it remains unresolved after conciliation, arbitrate the dispute if -

(i) this Act requires arbitration and any party to the dispute has requested that the dispute be resolved through arbitration; or

(ii) all the parties to a dispute in respect of which the Labour Court has jurisdiction consent to arbitration under the auspices of the Commission.

(c) assist in the establishment of workplace forums in the manner contemplated in Chapter V;

(d) compile and publish information and statistics about its activities; and

(e) at least every second year, review any rules made in terms of this section.

(2) The Commission may -

(a) if asked, advise a party to a dispute about the procedure to follow in terms of this Act;

(b) if asked, assist a party to a dispute to obtain legal advice, assistance or representation;

(bA) if requested, provide assistance of an administrative nature to an employee earning less than the threshold prescribed by the Minister under section 6(3) of the Basic Conditions of Employment Act to serve any notice or document in respect of conciliation or arbitration proceedings in terms of this Act, provided that the employee remains responsible in law for any such service;

(c) offer to resolve a dispute that has not been referred to the Commission through conciliation;

(cA) make rules-

(i) to regulate, subject to Schedule 3, the proceedings at its meetings and at the meetings of any committee of the Commission;

(ii)

(iii) regulating the practice and procedure -

(aa) for any process to resolve a dispute through conciliation;

(bb) at arbitration proceedings; and

(iv) determining the amount of any fee that the Commission may charge under section 147, and regulating the payment of such a fee in detail;

⁹ Du Toit *et al Labour Relations Law: a comprehensive guide* 118.

¹⁰ Section 115 of the *LRA*; Du Toit *et al Labour Relations Law: a comprehensive guide* 119.

- (d)
- (e)
- (f) conduct, oversee or scrutinise any election or ballot of a registered trade union or registered employers' organisation if asked to do so by that trade union or employers' organisation;
- (g) publish guidelines in relation to any matter dealt with in this Act;
- (h) conduct and publish research into matters relevant to its functions; and
- (i)¹¹

The primary function of the CCMA is to conciliate and arbitrate matters that are referred in terms of section 133¹² and 134 of the *LRA*.¹³ The CCMA may further oversee workplace forums, conduct ballots and provide guidelines.¹⁴ The aforementioned functions are granted to the CCMA in terms of the *LRA*.¹⁵

The role of the CCMA was described in *Sidumo v Rustenburg Platinum Mines Ltd*¹⁶ as follows:¹⁷

¹¹ Section 115 of the *LRA*; Du Toit et al *Labour Relations Law: a comprehensive guide* 119.

¹² 133. Resolution of disputes under auspices of Commission

(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
- (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.

¹³ Du Toit *et al Labour Relations Law: a comprehensive guide* 119;

134. Disputes about matters of mutual interest

(1) Any party to a dispute about a matter of mutual interest may refer the dispute in writing to the Commission, if the parties to the dispute are -

- (a) on the one side -
 - (i) one or more trade unions;
 - (ii) one or more employees; or
 - (iii) one or more trade unions and one or more employees; and
- (b) on the other side -

- (i) one or more employers' organisations;
- (ii) one or more employers; or
- (iii) one or more employers' organisations and one or more employers.

(2) The party who refers the dispute to the Commission must satisfy if that a copy of the referral has been served on all the other parties to the dispute.

¹⁴ Du Toit *et al Labour Relations Law: a comprehensive guide* 119, 121.

¹⁵ Section 115 of the *LRA*.

¹⁶ 2008 2 SA 24 CC.

¹⁷ *Sidumo v Rustenburg Platinum Mines Ltd* 2008 2 SA 24 (CC) at par 139; *Myathaza v Johannesburg Metropolitan Bus Services (SOC) Limited t/a Metrobus and Others* 2016 ZACC 49 at par 45.

Its statutory task is to 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.

The CCMA has jurisdiction over certain disputes. The concept of disputes is however not defined. There are two categories of disputes. The first category is disputes referred in terms of the *LRA* and the second category is matters of mutual interest.¹⁸ Matters of mutual interest are considered to be matters that will have a reasonable effect on the interest on the parties that are involved.¹⁹ It was also held in *De Beers Consolidated Mines Ltd v CCMA*²⁰ that a matter of mutual interest can be interpreted to be any issue that will concern and involve the employment.²¹ It is however considered that the definition of a matter of mutual interest is dependent on the facts of each case and also the Courts interpretation thereof.²²

Disputes referred in terms of the *LRA* can be divided into disputes that relate to the interpretation of the *LRA* and disputes where a specific procedure is prescribed. Despite the division, all disputes should be conciliated and then either arbitrated or adjudicated.²³

When a matter is referred to the CCMA, the jurisdiction of the CCMA should be established. A party referring a matter to the CCMA should make the allegations that there was a dispute, there was an employment relationship, that the dispute

¹⁸ Du Toit *et al Labour Relations Law: a comprehensive guide* 122.

¹⁹ *SACCAWU v Bredasdorp Spar* 1998 ILJ 947 (CCMA); *SASBO v Bank of Lisbon International Ltd* 1993 14 ILJ 394 (IC); Manamela 2015 *Obiter* 794

²⁰ 2000 5 BLLR 578 (LC) at para 581 C.

²¹ Botha 2015 *Obiter* 198; Botha and Morajane 2011 *Tydskrif vir die Suid-Afrikaanse Reg* 177.

²² Botha 2015 *Obiter* 208.

²³ Du Toit *et al Labour Relations Law: a comprehensive guide* 122.

falls within the CCMA's jurisdiction and that the parties' relationship is not regulated by a collective agreement.²⁴

Section 135 of the *LRA* states that disputes referred to the CCMA should be conciliated by a Commissioner. Conciliation is when a third party assists the parties to arrive at a mutual agreement without any binding determination. These proceedings are confidential and although it is not defined by the *LRA*, it is considered to consist of mediation, fact-findings and making recommendations.²⁵

An unfair dismissal dispute should be referred to the CCMA within thirty days of the date of dismissal or when the employer makes his final decision regarding the dismissal. The party referring the matter will complete a 7.11 form, serve it on all the parties to the dispute and send same to the CCMA. This form should stipulate the parties to the dispute, nature of the dispute, date of the dispute and what is the desired outcome of the dispute.²⁶

In the event that the dispute is settled at conciliation, the parties enter into a settlement agreement. This settlement agreement may be made an arbitration award or an order of court in order to enforce it, should the need arise. If the dispute is not settled at conciliation, a certificate of non-resolution is issued by the Commissioner. Once the certificate of non-resolution is issued, time limits apply for the further steps in the dispute resolution process.²⁷

The next step in the dispute resolution process will be to refer the matter to arbitration with a 7.13 form within 90 days from which the Commissioner issued the certificate of non-resolution.²⁸

Once the arbitration hearing commences, the Commissioner should conduct the arbitration in a manner that he or she deems fit but it should be in the least

²⁴ Du Toit *et al Labour Relations Law: a comprehensive guide* 128.

²⁵ Van Niekerk *et al Law@work* 477.

²⁶ Van Niekerk *et al Law@work* 478; Rule 10(1) of the *Rules for the conduct of proceedings before the CCMA*.

²⁷ Van Niekerk *et al Law@work* 479.

²⁸ Van Niekerk *et al Law@work* 481; Rule 4 of the *Rules for the conduct of proceedings before the CCMA*; The CCMA may, in terms of section 136(1) (b) of the *LRA*, in the event of good cause condone the request for arbitration if it was made after the 90 day period.

possible legal formality. Parties may give evidence, call witnesses, cross-examine witnesses and submit closing arguments at the arbitration hearing.²⁹

2.2 Labour Court

The Labour Court has the same status as the High Court.³⁰ It was established as a court of law and equity.³¹ Section 156 of the *LRA* states that the Labour Court has national jurisdiction in all nine provinces.³² The Labour Court is not required, like the CCMA, to have offices in all nine provinces, but may perform their duties any place in South Africa.³³

The Labour Court has specific jurisdiction over matters of freedom of association, Bargaining Councils, dismissals, industrial action, workplace forums, trade unions and employer organisation.³⁴ The Labour Court's jurisdiction is limited by the *Constitution of the Republic of South Africa*³⁵ (hereafter the "*Constitution*").³⁶ This means that the Labour Court is bound by the *Constitution*. The Labour Court is also subordinate to the Labour Appeal Court.

The Labour Court may, despite for reviews and appeals, decline jurisdiction in the event that it can be established that no attempt was made to resolve the matter through conciliation. The Labour Court may however grant relief in severe circumstances or on an urgent basis.³⁷

Concurrent jurisdiction exists between the Labour Court and the High Court for all matters that have intruded or attempts to intrude on any fundamental right that may arise from the employment and labour relations, the constitutionality of any

²⁹ Van Niekerk *et al Law@work* 481; Section 138(2) of the *LRA*.

³⁰ Van Niekerk *et al Law@work* 485.

³¹ Section 151 of the *LRA*.

³² 156. Area of jurisdiction and seat of Labour Court

(1) The Labour Court has jurisdiction in all the provinces of the Republic.

(2) The Minister of Justice, acting on the advice of NEDLAC, must determine the seat of the Labour Court.

(3) The functions of the Labour Court may be performed at any place in the Republic.

³³ Du Toit *et al Labour Relations Law: a comprehensive guide* 183.

³⁴ Du Toit *et al Labour Relations Law: a comprehensive guide* 186-187.

³⁵ 108 of 1996.

³⁶ Du Toit *et al Labour Relations Law: a comprehensive guide* 189.

³⁷ Du Toit *et al Labour Relations Law: a comprehensive guide* 189.

executive act and the application of any law for administration that is the responsibility of the Minister.³⁸ In the event that a cause of action arises from a contract, the Labour Court and the High Court will have concurrent jurisdiction.³⁹

Section 158 grants the Labour Court certain powers. These powers, *inter alia*, are stipulated as:⁴⁰

158. Powers of Labour Court

(1) The Labour Court may -

(a) make any appropriate order, including -

(i) the grant of urgent interim relief;

(ii) an interdict;

(iii) an order directing the performance of any particular act which order, when implemented, will remedy a wrong and give effect to the primary objects of this Act.

(iv) a declaratory order;

(v) an award of compensation in any circumstance contemplated in this Act.

(vi) an award of damages in any circumstances contemplated in this Act; and

(vii) an order for costs;

...

(f) subject to the provisions of this Act, condone the late filing of any document with, or the late referral of any dispute to, the Court;

(g) subject to section 145, review the performance or purported performance of any function provided for in this Act on any grounds that are permissible in law;

(h) review any decision taken or any act performed by the State in its capacity as employer, on such grounds as are permissible in law;

...

There are two types of defects that are reviewable by the Labour Court. The first type is arbitration awards of the CCMA or Bargaining Council that is reviewable in terms of section 145 of the *LRA* and the second type is any function performed that may be reviewed in terms of section 158(1)(g). Section 145(2) describes the different defects that may be reviewed and includes situations where a Commissioner committed misconduct in respect of the duties of a Commissioner, committed an irregularity during the conduct of the arbitration or the Commissioner exceeded his powers as arbitrator. The last ground for review will be in the event that a party obtained the award in an improper way.

³⁸ Du Toit *et al Labour Relations Law: a comprehensive guide* 183; *Gcaba v Minister for Safety and Security* 2010 1 SA 238 (CC).

³⁹ Du Toit *et al Labour Relations Law: a comprehensive guide* 185.

⁴⁰ Section 158 of the *LRA*.

3 Concept of debt

Section 213 of the *LRA* defines the term 'remuneration' as:⁴¹

...any payment in money or in kind, or both in money and in kind, made or owing to any person in return for that person working for any other person, including the State, and remunerate has a corresponding meaning.

The aforementioned definition of 'remuneration' is in contrast to the definition of the term 'debt'. The New Shorter Oxford Dictionary describes the term 'debt' as:⁴²

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.

In defining the meaning of the term 'debt' reference is made to the matter of *Standard Bank of SA v Oneanate Investments (In Liquidation)*⁴³ where it was stated that:⁴⁴

...the concept of a "debt" for the purposes of the [prescription] act, is wider than the technical term "cause of action..."

Further reference is made to the matter of *CGU Insurance v Rumdel Construction (Pty) Ltd*⁴⁵ where it was stated that:⁴⁶

...it is important to bear in mind that the courts are now specifically concerned with prescription of a "debt" within the meaning of the 1969 Act. The Act does not define "debt" and "there is...a discernible looseness of language" in its use thereof with the result that "debt" means different things in different contexts. For this reason 'debt' in the context of s 15(1) must bear "a wide and general meaning". It does not have the technical meaning given to the phrase 'cause of action' when used in the context of pleadings (*Standard Bank of South Africa Ltd v Oneanate Investments (Pty) Ltd (in Liquidation)*). In *Evins v Shield Insurance Co Ltd* Trollip JA made a point of the distinction between "debt" and "cause of action", and describes the latter in the following way:

⁴¹ Section 213 of the *LRA*; Van Niekerk *et al Law@work* 212.

⁴² *Makate v Vodacom (Pty)* 2016 ZACC at para 187.

⁴³ 1998 1 SA 811 (SCA).

⁴⁴ *Standard Bank of SA v Oneanate Investments (In Liquidation)* 1998 1 SA 811 (SCA) at para 826J; *FAWU obo Gaoshubelwe and Others v Pieman's Pantry (Pty) Ltd* 2017 38 ILJ 132 (LAC) at para 52.

⁴⁵ 2004 2 SA 622 (SCA).

⁴⁶ *CGU Insurance v Rumdel Construction (Pty) Ltd* 2004 2 SA 622 (SCA) at para 6; *FAWU obo Gaoshubelwe and Others v Pieman's Pantry (Pty) Ltd* 2017 38 ILJ 132 (LAC) at para 52.

"Cause of action" is ordinarily used to describe the factual basis, the set of material facts, that begets the plaintiff's legal right of action and, complementarily, the defendant's "debt", the word used in the Prescription Act.'

The debt is not the set of material facts. It is that which is begotten by the set of material facts....

In order to understand the application of the *Prescription Act* to matters under the *LRA*, it is necessary to understand how and why the debt arises. It is important to understand what kind of debt arises and how the running of prescription will relate to it.

The concept of debt was largely dealt with in the matter of *Makate v Vodacom (Pty) Ltd*⁴⁷ where it was held that the term 'debt' has a wide meaning.⁴⁸ In order to reach the conclusion that a debt, as contemplated in section 10(1) of the *Prescription Act*, will include a claim to negotiate and determine a term in an agreement, the Court referred to the matter of *Desai NO v Desai NNO*.⁴⁹

Based on the aforementioned matter, it was held that every obligation, despite being positive or negative, will be considered to be debt as contemplated in section 10(1) of the *Prescription Act*. This means that the requirement of a party to do something or not to do something will be considered to be a debt. Therefore a claim for an interdict will also be considered as a debt.⁵⁰

It was determined that an obligation that seeks to be enforced is not a debt as envisaged by the *Prescription Act*. An obligation to negotiate a reasonable remuneration is also not a debt. Until negotiations come to a conclusion there will be nothing due and it will not constitute a claim. As the *Prescription Act* states that a debt will be extinguished by prescription, a debt will also be extinguished by a payment or the performance of an act. If nothing yet exists it can't be

⁴⁷ 2016 ZACC 13.

⁴⁸ *Makate v Vodacom (Pty)* 2014 1 SA 191 (G) at para 181; *Makate v Vodacom (Pty)* 2016 ZACC 13 at para 82.

⁴⁹ 1996 1 SA 141 (SCA); *Makate v Vodacom (Pty)* 2016 ZACC 13 at para 83.

⁵⁰ *Makate v Vodacom (Pty)* 2016 ZACC 13 at para 84.

extinguished. The participation in negotiations will not extinguish the obligation of a party.⁵¹

The corresponding meaning of a debt is situated in the creditor where the payment of money, delivery of good or rendering of services are claimed. The moment when one of the aforementioned happens, the debt is extinguished. The right of action is then also extinguished. This is the reason why section 12(1) of the *Prescription Act* states that prescription will start to run once a debt is due. The debt will merely become due when it is claimable or recoverable.⁵²

It should however be noted that not every action will constitute a debt. It was held in *Absa Bank Limited v Keet*⁵³ that acquisitive prescription related to the correlative of rights such as ownership, while extinctive prescription relates to debts that are distinguished. This concept is important because it illustrates that not every right to approach the Court will constitute a debt and result in extinctive prescription. For example, the right to claim that a motor vehicle should be delivered does not give rise to a debt.⁵⁴

Relevant for this thesis is the question of whether an arbitration award issued for a dismissal dispute is a 'debt' as envisaged in the *Prescription Act*.⁵⁵ There is no definition for the term 'debt' in the *Prescription Act*. There are however a few judicial pronouncements for the meaning of the term 'debt'.⁵⁶

Section 11 of the *Prescription Act* deals with the different types of 'debts'. If the list of 'debts' in section 11 is carefully read it is clear that, except for a judgment debt, the remainder of the list consist of 'debts' with no judgments that determine that the debtor is liable for the debt. This means that these 'debts' are debts

⁵¹ *Makate v Vodacom (Pty)* 2016 ZACC 13 at para 186.

⁵² *Makate v Vodacom (Pty)* 2016 ZACC 13 at para 188.

⁵³ 2015 4 SA 474 (SCA).

⁵⁴ *Makate v Vodacom (Pty)* 2016 ZACC 13 at para 189-190.

⁵⁵ *Myathaza v Johannesburg Metropolitan Bus Services (SOC) Limited t/a Metrobus and Others* 2016 ZACC 49 at para 106.

⁵⁶ *Myathaza v Johannesburg Metropolitan Bus Services (SOC) Limited t/a Metrobus and Others* 2016 ZACC 49 at para 107.

where no proceedings were instituted to determine whether the debtor is liable for a debt or not.⁵⁷

4 Provisions of the Prescription Act 68 of 1969 relating to the Labour Relations Act 66 of 1995

The application and running of prescription has raised a number of issues in labour disputes. Until recently it was considered that any claim under the *LRA* will not be enforceable after three years because of the prescription rule under the *Prescription Act*. The aforementioned stance was confirmed in matter like *Solidarity & others v Eskom Holdings Ltd*⁵⁸ and *SA Post Office Ltd v Communication Workers Union obo Permanent Part time Employees*.⁵⁹

A scenario is sketched of where an employee was unfairly dismissed and an unfair dismissal was referred for conciliation and arbitration. It is found that the employee's dismissal was unfair and reinstatement was ordered. The employer decided to lodge a review application to Labour Court in order to review the award made by the Commissioner. Once the review application is up for determination before the Labour Court, the employer realises that three years lapsed and raises the point of prescription. If the point of prescription is upheld, there will be no need to determine the review application.⁶⁰

The Labour Court has been confronted with a number of matters relating to the application of the *Prescription Act*. It is important to note that some of the matters were before the amendments of the *LRA*. For purposes of this thesis, the researcher focused and defined her research on the most recent cases decided by the Labour Appeal Court and Constitutional Court.

Two judgments were delivered in 2016 by the Labour Appeal Court regarding the relationship between disputes under the *LRA* and the *Prescription Act*. The first

⁵⁷ *Myathaza v Johannesburg Metropolitan Bus Services (SOC) Limited t/a Metrobus and Others* 2016 ZACC 49 at para 109.

⁵⁸ 2008 29 ILJ 1450 (LAC).

⁵⁹ 2013 12 BLLR 1203 (LAC); Grogan 2017 *Employment Law Journal*.

⁶⁰ Grogan 2017 *Employment Law Journal*.

matter was *Myathaza v Johannesburg Metropolitan Bus Service (SOC) Ltd t/a Metrobus/ Mazibuko v Concor Plant Cellucity (Pty) Ltd v Communication Workers Union on behalf of Peters*⁶¹ which has since been considered by the Constitutional Court. The second matter is the matter of *Food and Allied Workers' Union on behalf of Gaoshubelwe and Others v Pieman's Pantry Pty (Ltd)*⁶² where it was held that all matters that are referred to the CCMA or the Bargaining Council will be subject to the provisions of the *Prescription Act*.⁶³ This matter is also the most recent authority that was considered by the Constitutional Court.

4.1 *Myathaza v Johannesburg Metropolitan Bus Services (SOC) Limited t/a Metrobus and Others 2016 ZACC 49*

4.1.1 Judgment by Judge Jafta

The first case that was considered was the constitutional matter of *Myathaza v Johannesburg Metropolitan Bus Services (SOC) Limited t/a Metrobus and Others*⁶⁴ (hereafter the "*Myathaza case*"). The question in this matter was whether the arbitration award issued in favour of the Applicant has expired after three years in terms of the *Prescription Act*. It was important for the court to consider whether the *Prescription Act* applies to the *LRA*, whether the award will constitute a debt as provided for in section 10 of the *Prescription Act* and whether the debt prescribed.⁶⁵

The facts of the matter were that the Applicant was employed as a bus driver by the Respondent for seven years. The Applicant was suspended together with other employees for irregularly issuing of tickets. Two unions reached agreement

⁶¹ 2016 37 ILJ 413 (LAC).

⁶² 2017 38 ILJ 132 (LAC).

⁶³ Naidoo 2017 <http://www.derebus.org.za>.

⁶⁴ 2016 ZACC 49.

⁶⁵ *Myathaza v Johannesburg Metropolitan Bus Services (SOC) Limited t/a Metrobus and Others* 2016 ZACC 49 at para 1.

that the employees pleaded guilty and that the employer will not take further disciplinary action against them and they will accept a final written warning.⁶⁶

The Applicant refused to plead guilty and insisted to continue with the disciplinary enquiry. He further did not return to work and was absent from work without permission. The employer informed him of his disciplinary hearing by telegram and without confirming whether he received same, continued with the disciplinary action in absentia. He was found guilty of being absent without permission and subsequently dismissed. His union's internal appeal was also dismissed.⁶⁷

The Applicant referred an unfair dismissal dispute to the relevant Bargaining Council and an Arbitrator was appointed to arbitrate the matter since the conciliation phase was unsuccessful. It was common cause that the dismissal of the Applicant was procedurally unfair and the Arbitrator had to decide whether the dismissal was substantively unfair.⁶⁸

The Arbitrator ruled that the dismissal of the Applicant was substantively and procedurally unfair. The employer was ordered to retrospectively reinstate the employee from the date of his dismissal and without the loss of benefit.⁶⁹

The Respondent failed to pay the Applicant and when the Applicant reported to work he was told to go home as the Respondent was going to contend the matter in review proceedings in the Labour Court. All pleadings was filed and the matter was ready for hearing. No hearing date was requested and the review application was still pending seven years later.⁷⁰

⁶⁶ *Myathaza v Johannesburg Metropolitan Bus Services (SOC) Limited t/a Metrobus and Others* 2016 ZACC 49 at para 2.

⁶⁷ *Myathaza v Johannesburg Metropolitan Bus Services (SOC) Limited t/a Metrobus and Others* 2016 ZACC 49 at para 3.

⁶⁸ *Myathaza v Johannesburg Metropolitan Bus Services (SOC) Limited t/a Metrobus and Others* 2016 ZACC 49 at para 4.

⁶⁹ *Myathaza v Johannesburg Metropolitan Bus Services (SOC) Limited t/a Metrobus and Others* 2016 ZACC 49 at para 5.

⁷⁰ *Myathaza v Johannesburg Metropolitan Bus Services (SOC) Limited t/a Metrobus and Others* 2016 ZACC 49 at para 7.

The Applicant proceeded to apply to make the arbitration award an order of court. The application was opposed by the Respondent based on the fact that the review application is still pending and secondly that it prescribed after three years. The Applicant contended that the award was not a debt as envisaged as provided for in the *Prescription Act* and therefore it did not prescribe.⁷¹

The Labour Court held that the arbitration award was considered to be a debt and that it prescribed after three years.⁷² The matter was then appealed to the Labour Appeal Court.⁷³ The Labour Appeal Court reviewed the decision of the Labour Court. The court started with its enquiry by considering whether the *Prescription Act* should apply to claims that arise under the auspice of the *LRA*. A further question that was asked was whether the *Prescription Act* was consistent with the *LRA*.⁷⁴

The Labour Appeal Court started correctly with the enquiry but incorrectly held that the award was considered to be a debt as envisaged in section 10 of the *Prescription Act*. The Labour Appeal Court relied on the judgment of *Desai NO v Desai NNO*⁷⁵ where it was held that a debt is considered to be the obligation to do or not to do something.⁷⁶

After the Labour Appeal Court concluded that an arbitration award is considered to be a debt as provided for in the *Prescription Act*, the Labour Appeal Court proceeded to consider whether the *LRA* made provision for time limits within which it should be enforced. The Court had to determine whether the arbitration award is a judgment debt that will prescribe after 30 years or a simple debt that

⁷¹ *Myathaza v Johannesburg Metropolitan Bus Services (SOC) Limited t/a Metrobus and Others* 2016 ZACC 49 at para 8.

⁷² *Myathaza v Johannesburg Metropolitan Bus Services (SOC) Limited t/a Metrobus and Others* 2016 ZACC 49 at para 9.

⁷³ *Myathaza v Johannesburg Metropolitan Bus Services (SOC) Limited t/a Metrobus and Others* 2016 ZACC 49 at para 10.

⁷⁴ *Myathaza v Johannesburg Metropolitan Bus Services (SOC) Limited t/a Metrobus and Others* 2016 ZACC 49 at para 12.

⁷⁵ 1996 (1) SA 141 (SCA).

⁷⁶ *Desai NO v Desai NNO* 1996 1 SA 141 (SCA) at page 9; *Myathaza v Johannesburg Metropolitan Bus Services (SOC) Limited t/a Metrobus and Others* 2016 ZACC 49 at para 13.

will prescribe after three years. The Labour Appeal Court concluded that it was a simple debt and it prescribed after three years.⁷⁷

Referring to section 15 of the *Prescription Act*, the Labour Appeal Court came to the conclusion that the lodging of review proceedings does not interrupt the running of prescription because review proceedings are not considered to be a process where a creditor claims the payment of a debt. The Labour Appeal Court therefore concluded that the arbitration award prescribed and subsequently dismissed the appeal.⁷⁸

In order to consider whether the *Prescription Act* and *LRA* are inconsistent with each other, one needs to look at section 16 of the *Prescription Act*. Section 16 states that:⁷⁹

- (1) Subject to the provisions of subsection (2) (b), the provisions of this chapter shall, save in so far as they are inconsistent with the provisions of any Act of Parliament which prescribes a specified period within which a claim is to be made or an action is to be instituted in respect of a debt or imposes conditions on the institution of an action for the recovery of a debt, apply to any debt arising after the commencement of this Act.
- (2) The provisions of any law—
 - (a) which immediately before the commencement of this Act applied to the prescription of a debt which arose before such commencement.”

This section recognises that there is other legislation that regulated prescription before the implementation of the *Prescription Act*.⁸⁰ Section 16(1) of the *Prescription Act* deals with the sections in the *Prescription Act* that will be applicable to debts that arose after the *Prescription Act* commenced, except for instances where these provisions does not conform with any other Act where time frames are specified to lodge a claim.⁸¹

⁷⁷ *Myathaza v Johannesburg Metropolitan Bus Services (SOC) Limited t/a Metrobus and Others* 2016 ZACC 49 at para 15.

⁷⁸ *Myathaza v Johannesburg Metropolitan Bus Services (SOC) Limited t/a Metrobus and Others* 2016 ZACC 49 at para 16.

⁷⁹ Section 16 of the *Prescription Act*. *Myathaza v Johannesburg Metropolitan Bus Services (SOC) Limited t/a Metrobus and Others* 2016 ZACC 49 at para 37.

⁸⁰ *Myathaza v Johannesburg Metropolitan Bus Services (SOC) Limited t/a Metrobus and Others* 2016 ZACC 49 at para 38.

⁸¹ Naidoo 2017 <http://www.derebus.org.za>.

It is clear that there are differences between the *Prescription Act* and the *LRA*. The *Prescription Act* recognises only civil courts as forums where debts may be enforced where the *LRA* recognises the CCMA and Bargaining Councils as forums to resolve disputes more timeously than courts. The *Prescription Act* bars creditors from instituting legal action within a certain period if they fail to enforce the debt and these periods are longer than those provided for in the *LRA*. Lastly, an arbitration award issued by the CCMA or Bargaining Council is considered to be an outcome that settles a dispute between the parties, where the *Prescription Act* is applicable to a claim that should still be determined by the Court.⁸² The *Prescription Act* will not be applicable where the claim was settled between the parties and the outcome is not binding on the parties before it is made an order of Court. The three-year period provided for in the *Prescription Act* is meant for disputes that should be determined by the Court.⁸³

It is also difficult in determining when prescription will start to run. In terms of section 12 of the *Prescription Act* it will start to run the moment the debt becomes due.⁸⁴ It is clear that section 12 of the *Prescription Act* is not applicable to arbitration awards because the debt becomes due before the dispute was conciliated and arbitrated. The prescription, also, cannot start to run from the date of the arbitration award because the party against whom the award was made is afforded six weeks to challenge the award in terms of section 145 of the *LRA*.⁸⁵

Section 15 of the *Prescription Act* supports the fact that judicial interruption relates to claims that are awaiting a final judgment or where a judgment was set

⁸² *Myathaza v Johannesburg Metropolitan Bus Services (SOC) Limited t/a Metrobus and Others* 2016 ZACC 49 at para 43.

⁸³ *Myathaza v Johannesburg Metropolitan Bus Services (SOC) Limited t/a Metrobus and Others* 2016 ZACC 49 at para 44.

⁸⁴ *Myathaza v Johannesburg Metropolitan Bus Services (SOC) Limited t/a Metrobus and Others* 2016 ZACC 49 at para 46.

⁸⁵ *Myathaza v Johannesburg Metropolitan Bus Services (SOC) Limited t/a Metrobus and Others* 2016 ZACC 49 at para 47.

aside. This section does not apply to an arbitration award. An arbitration award is considered to be a final and binding decision made.⁸⁶

The *LRA* makes provision for shorter periods to enforce arbitration awards. The arbitration award may be enforced within a stipulated period as provided for in the award unless the award is taken on review. In terms of section 145 of the *LRA*, the review application should be lodged within six weeks and heard within six months. This period may be extended by the Labour Court on good cause shown.⁸⁷

Where a review application is unsuccessful the award should be enforced within one year. In the event that the *Prescription Act* would have been applicable, it means that the award could not have been enforced within that period. The party in whose favour the award was made may then wait three years and only enforce the award to interrupt the running of prescription. The party may then discover that the award may no longer be enforced under the *LRA* because of the long delay. This will be the position despite the award not prescribing. There would be no purpose to apply the *Prescription Act* to arbitration award that are not enforceable under the *LRA*. These awards are not enforceable.⁸⁸

In the event that the *Prescription Act* is applied to arbitration awards it would defeat the purpose of the *LRA* which makes provision for the expeditious resolving of labour disputes. This also means that the party that failed to challenge the arbitration award by a review application may still rely on the *Prescription Act* to avoid the obligations imposed by the arbitration award. This further undermines the provision of six weeks within which a review application should be instituted.⁸⁹

⁸⁶ *Myathaza v Johannesburg Metropolitan Bus Services (SOC) Limited t/a Metrobus and Others* 2016 ZACC 49 at para 49.

⁸⁷ *Myathaza v Johannesburg Metropolitan Bus Services (SOC) Limited t/a Metrobus and Others* 2016 ZACC 49 at para 50.

⁸⁸ *Myathaza v Johannesburg Metropolitan Bus Services (SOC) Limited t/a Metrobus and Others* 2016 ZACC 49 at para 51.

⁸⁹ *Myathaza v Johannesburg Metropolitan Bus Services (SOC) Limited t/a Metrobus and Others* 2016 ZACC 49 at para 52.

It is important to note that the purpose of the *LRA* is not to regulate the time limits that apply to the enforcement of debts. Its purpose is rather to give effect to section 23 and 33 of the *Constitution*. One of the primary objects of the *LRA* is to resolve labour disputes effectively. The CCMA and Bargaining Councils are considered to be organs of states and were established to reach the objectives of the *LRA* speedily. Awards issued by the CCMA and Bargaining Councils resolve disputes and do not enforce debts.⁹⁰

The aforementioned was confirmed in *Sidumo v Rustenburg Platinum Mines Ltd*⁹¹ where it was stated that:⁹²

It is clear that the CCMA has been established to expedite the resolution of labour disputes in an efficient and cost-effective manner. Special procedures have been created to avoid the delays and costs associated with dispute resolution in the ordinary courts. In this sense, the CCMA is properly understood as an administrative tribunal. Our Constitution recognises the need for the conduct of administrative agencies to be scrutinised, to ensure that they act lawfully, reasonably and procedurally fairly. As the Labour Relations Act already provides for the scrutiny on review of decisions of the CCMA by the Labour Court, no further delay will be caused by that scrutiny being on the basis of the constitutional standards established in section 33. So the need for speedy and cheap resolution of disputes does not mean that the CCMA should not be held accountable for its decisions, nor that it should not be monitored by the Labour Court to ensure that it acts lawfully, reasonably and procedurally fairly. Indeed, as Sachs J has reasoned, it is entirely consistent with our constitutional order that the procedures and decisions of the CCMA should be lawful, reasonable and procedurally fair and that this should be ensured by appropriate scrutiny by the Labour Courts.

Further, a debt as provided for in the *Prescription Act*, cannot be reviewed unless it is a judgment debt. A debt in terms of the *Prescription Act* does not earn interest, other than an arbitration award that earns interest from the date that it was made.⁹³

⁹⁰ *Myathaza v Johannesburg Metropolitan Bus Services (SOC) Limited t/a Metrobus and Others* 2016 ZACC 49 at para 53.

⁹¹ 2008 2 SA 24 CC.

⁹² *Sidumo v Rustenburg Platinum Mines Ltd* 2008 2 SA 24 (CC) at para 140; *Myathaza v Johannesburg Metropolitan Bus Services (SOC) Limited t/a Metrobus and Others* 2016 ZACC 49 at para 54.

⁹³ *Myathaza v Johannesburg Metropolitan Bus Services (SOC) Limited t/a Metrobus and Others* 2016 ZACC 49 at para 55.

All of the aforementioned confirms that the *LRA* is not consistent with the *Prescription Act*. This inconsistency is not due to the different time limits but in terms of the provision that the Labour Court may make an arbitration award an order of court in order to enforce it. If the *Prescription Act* is applicable it will defeat the purpose of the *LRA* to enforce the right to fair labour practices.⁹⁴ This will prevent parties to refer matters and have same heard.

The three main inconsistencies are considered to firstly be that the *Prescription Act* recognises civil courts as the only courts to resolve disputes, where the *LRA* makes provision for statutory tribunals to resolve disputes.⁹⁵ Secondly, the periods as contemplated in section 11 of the *Prescription Act* differs from the *LRA* that provides time limits to make sure that disputes are resolved expeditiously.⁹⁶ Thirdly, arbitration awards are considered to be final and binding on parties after submitting arguments, where the claim under the *Prescription Act* is extinguished by a time period before it was determined by a Court.⁹⁷

This problem is resolved by section 210 of the *LRA* that provides that the *LRA* will take precedence over any other legislation that is in conflict with it.⁹⁸ This is due to the objective of the *LRA* to promote section 23 of the *Constitution*. The *Prescription Act* will also disable the Labour Court to exercise its power that is established under section 158(c) of the *LRA*.⁹⁹

In the current matter, the arbitration award could not prescribe as there was no obligation to pay money, deliver goods or render services by the Respondent to

⁹⁴ *Myathaza v Johannesburg Metropolitan Bus Services (SOC) Limited t/a Metrobus and Others* 2016 ZACC 49 at para 56.

⁹⁵ Naidoo 2017 <http://www.derebus.org.za>.

⁹⁶ Naidoo 2017 <http://www.derebus.org.za>.

⁹⁷ Naidoo 2017 <http://www.derebus.org.za>.

⁹⁸ *National Bargaining Council for the Clothing Manufacturing Industry (KZN) v Glamour Fashions Worker Primary and Others* 2017 38 ILJ 1849 (LC) at para 18.

⁹⁹ *Myathaza v Johannesburg Metropolitan Bus Services (SOC) Limited t/a Metrobus and Others* 2016 ZACC 49 at para 57.

the Applicant. The fact that the term 'debt' means that something should or should not be done was overruled in the matter of *Makate v Vodacom*.¹⁰⁰

Both Judge Jafta and Zondo concluded that the *Prescription Act* does not apply to arbitration awards issued under the *LRA*.¹⁰¹

The last point to consider was section 145(9) of the *LRA* that came into force in 2015. This section provides that an application to set aside an award will interrupt the running of prescription. This section does not apply to the current matter and there is no indication that this amendment was intended to mean that the *Prescription Act* will apply to arbitration awards.¹⁰²

Therefore, the appeal to the Constitutional Court succeeded. The review application was not prosecuted to finality and the pleadings were closed. The Constitutional Court proceeded to make the award an order of court.¹⁰³

4.1.2 Judgment by Judge Froneman

Judge Froneman agreed with the judgment of Judge Jafta but disagreed with the finding that the *Prescription Act* is inconsistent with the *LRA*. Judge Froneman is of the opinion that the two Acts may very well complement each other in a way that protects the right to access justice and the expeditious resolution of labour disputes under the *LRA*.¹⁰⁴

Judge Froneman is further of the opinion that it will be unfair towards the Applicant if review proceedings are instituted and then the Respondent relies on prescription. This unfairness can be resolved by the principle that prescription will

¹⁰⁰ 2016 4 SA 121 (CC); *Myathaza v Johannesburg Metropolitan Bus Services (SOC) Limited t/a Metrobus and Others* 2016 ZACC 49 at para 59.

¹⁰¹ *Myathaza v Johannesburg Metropolitan Bus Services (SOC) Limited t/a Metrobus and Others* 2016 ZACC 49 at para 60.

¹⁰² *Myathaza v Johannesburg Metropolitan Bus Services (SOC) Limited t/a Metrobus and Others* 2016 ZACC 49 at para 61.

¹⁰³ *Myathaza v Johannesburg Metropolitan Bus Services (SOC) Limited t/a Metrobus and Others* 2016 ZACC 49 at para 62.

¹⁰⁴ *Myathaza v Johannesburg Metropolitan Bus Services (SOC) Limited t/a Metrobus and Others* 2016 ZACC 49 at para 66.

only start to run until the court proceedings are finalised. Both acts can be accommodated by the re-interpretation of the *Prescription Act*.¹⁰⁵

The re-interpretation will rely on four building blocks including:

- a) In terms of the *Prescription Act* prescription will only be interrupted by the start of adjudicative proceedings and will be interrupted until it is concluded;
- b) The CCMA and Bargaining Council is considered to be an independent and impartial forum and that it can resolve matters by applying the law;
- c) The instituting of claims before the CCMA is considered to be adjudicative proceedings and it will interrupt prescription;
- d) Review proceedings are considered to fulfil the same role to finalise court proceedings as an appeal will be.¹⁰⁶

Once the judicial process is started it will be regulated in terms of the court rules and any delays occasioned will not interrupt the running of prescription.¹⁰⁷ The interruption will continue until the final judgment is executable.¹⁰⁸ In the event that a matter is taken on appeal, the judgment will not yet be executable.¹⁰⁹ The judgment will only be executable when the appeal is finalised.¹¹⁰

In terms of section 15(1) of the *Prescription Act* it is important to determine whether the commencement of proceedings in the CCMA is considered to be a "process" in terms of the *LRA* and whether a claim before the CCMA is considered to be a "debt".¹¹¹

¹⁰⁵ *Myathaza v Johannesburg Metropolitan Bus Services (SOC) Limited t/a Metrobus and Others* 2016 ZACC 49 at para 67.

¹⁰⁶ *Myathaza v Johannesburg Metropolitan Bus Services (SOC) Limited t/a Metrobus and Others* 2016 ZACC 49 at para 68.

¹⁰⁷ *Titus v Union and SWA Insurance Co Ltd* 1980 2 SA 701 (TKS) at para 704F-G.

¹⁰⁸ Section 15(4) of the *Prescription Act*.

¹⁰⁹ Section 18 of the *Superior Courts Act* 10 of 2013.

¹¹⁰ *Myathaza v Johannesburg Metropolitan Bus Services (SOC) Limited t/a Metrobus and Others* 2016 ZACC 49 at para 69.

¹¹¹ *Myathaza v Johannesburg Metropolitan Bus Services (SOC) Limited t/a Metrobus and Others* 2016 ZACC 49 at para 74.

It is difficult to determine the meaning of the term 'debt'. According to Judge Froneman, the term should be considered in close harmony to the demands set out in section 34 of the *Constitution*. In light of this section, the starting point will be that it should be a claim that can be resolved by the application of the law. In other words, this means that, in order to qualify as a 'debt', it should be a claim for the enforcement of any legal obligation. These obligations are usually considered as an obligation to do something or an obligation to not do something. These obligations usually entail an execution by warrant of execution for outstanding amounts, contempt of court proceedings or an order to do or refrain from doing something.¹¹²

Whether a referral of an unfair dismissal dispute constitutes a 'debt' as envisaged in section 15(1) of the *Prescription Act*, the Court held that a claim to enforce a legal obligation will qualify as a debt as held in the *Prescription Act*. This legal obligation will include a positive obligation where a party is called upon to do something.¹¹³

An unfair dismissal can place three possible legal obligations on an employer. These obligations include compensation, re-employment and reinstatement.¹¹⁴ In each of these cases, there is an obligation on the employer to do something. Therefore it can be considered to fall within the meaning of the term 'debt' as envisaged by the *Prescription Act*.¹¹⁵

According to Judge Froneman, the process commencing the proceedings in the CCMA serves to interrupt the running of prescription as envisaged in section 15 of

¹¹² *Myathaza v Johannesburg Metropolitan Bus Services (SOC) Limited t/a Metrobus and Others* 2016 ZACC 49 at para 78.

¹¹³ Naidoo 2017 <http://www.derebus.org.za>.

¹¹⁴ Section 193 of the *LRA, Equity Aviation Services (Pty) Ltd v Commission for Conciliation, Mediation and Arbitration and Others* 2008 12 BLLR 1129 (CC) at para 1; Mosito and Mohapi 2017 *Lesotho Law Journal* 1.

¹¹⁵ *Myathaza v Johannesburg Metropolitan Bus Services (SOC) Limited t/a Metrobus and Others* 2016 ZACC 49 at para 79.

the *Prescription Act*.¹¹⁶ Therefore the Court held that the referral of an unfair dismissal dispute will interrupt the running of prescription.¹¹⁷

It is a common principle that the running of prescription should not commence until the court proceedings are finalised. It may then also be considered that the instituting of review proceedings extends the finalisation of the judgment. There is no statutory time limit for the lodging of a common law review as is the case with appeals. The position for the review of arbitration awards under the *LRA* is vastly different than the common law position.¹¹⁸

The lodging of a review application interrupts prescription as envisaged by Section 15(1) of the *Prescription Act*. Until the review application is finalised, prescription cannot run. According to Judge Froneman, section 145(9) of the *LRA* constitutes that the lodging of a review application will interrupt the running of prescription.¹¹⁹

Another alternative may be that an opposition to the review application is considered to be another interruption of the running of prescription as the Respondent may have a defence to the claim. A defence to a claim is also considered to be the commencing of a process for the payment of a debt as envisaged by section 15(1) of the *Prescription Act*. An arbitration award may further be considered to be a judgment debt. Despite which way the arguments are directed, the Applicant's claim cannot prescribe until the review application is finalised.¹²⁰

The 30-day time period for the referral of unfair dismissal disputes under the *LRA* is a time-bar clause and is not the same as the normal prescription periods in the *Prescription Act*. These time-bars are not considered to replace the prescription periods in the *Prescription Act*. To replace the time limits as envisaged in the *LRA*

¹¹⁶ *Myathaza v Johannesburg Metropolitan Bus Services (SOC) Limited t/a Metrobus and Others* 2016 ZACC 49 at para 82.

¹¹⁷ Naidoo 2017 <http://www.derebus.org.za>.

¹¹⁸ *Myathaza v Johannesburg Metropolitan Bus Services (SOC) Limited t/a Metrobus and Others* 2016 ZACC 49 at para 83.

¹¹⁹ *Myathaza v Johannesburg Metropolitan Bus Services (SOC) Limited t/a Metrobus and Others* 2016 ZACC 49 at para 88.

¹²⁰ *Myathaza v Johannesburg Metropolitan Bus Services (SOC) Limited t/a Metrobus and Others* 2016 ZACC 49 at para 89-90.

will undermine the speedy resolution of disputes. There is no reason why these situations under the *LRA* should be reinvented.¹²¹

The main difference between the judgment of Judge Froneman and Judge Jafta is based on the fact that Judge Froneman's judgment did not consider there to be differences between the *LRA* and the *Prescription Act*. He held that both acts may be interpreted in such a manner to protect the right of access to justice while also ensuring that labour disputes are resolved expeditiously. According to him, the importance was that the *Prescription Act* should be re-interpreted to consider and give effect to constitutional imperatives.¹²²

4.1.3 Judgment by Judge Zondo

Judge Zondo considered whether the *Prescription Act* applies to unfair dismissal disputes under the *LRA*. If it does not apply, the appeal in the matter should succeed. If it does apply the next question will be whether the arbitration award will be deemed to be a "debt" as envisaged in section 11(d) of the *Prescription Act*. Once again, if the answer is no, the appeal should succeed. If the answer is yes, the question will be whether the debt prescribed when the Applicant lodged the review application at the Labour Court. If it prescribed, the appeal will be dismissed.¹²³

Judge Zondo also considered whether an arbitration award is considered to be a 'debt'. If section 11 of the *Prescription Act* is properly read it is clear that all the debts listed are debts where there is no judgment yet to determine whether the debtor has any liability towards the debt. This means that other to the judgment debt, the other debts are in respect for when no proceedings instituted to determine the liability of the debtor for the debt. For prescription to start running, the debt should be due and the debt should be due before the proceedings may

¹²¹ *Myathaza v Johannesburg Metropolitan Bus Services (SOC) Limited t/a Metrobus and Others* 2016 ZACC 49 at para 96.

¹²² Naidoo 2017 <http://www.derebus.org.za>.

¹²³ *Myathaza v Johannesburg Metropolitan Bus Services (SOC) Limited t/a Metrobus and Others* 2016 ZACC 49 at para 99.

be instituted to recover it. For example, a summons cannot be issued before the debt becomes due and payable.¹²⁴

As previously discussed, section 15 of the *Prescription Act* is vitally important to the application of the *Prescription Act* to unfair dismissal disputes. This section makes it clear that it deals with judicial interruption. This means that these should be a judicial process which is understood to be a court process. From this section it can be understood that the running of prescription will only be interrupted by a court process that will lead to a judgment made by a court.¹²⁵

Section 15(6) of the *Prescription Act* states that:¹²⁶

(6)For the purposes of this section, 'process' includes a petition, a notice of motion, a rule nisi, a pleading in reconvention, a third party notice referred to in any rule of court, and any document whereby legal proceedings are commenced.

All of the abovementioned notices are processes that are used in court proceedings and regulated by the rules of the courts. Most of these processes are used to commence legal proceedings. This list is however not exclusive but it should lead to a judgment to be obtained from court.¹²⁷

According to Judge Zondo, prescription can only be interrupted in one of two ways. Firstly by the debtor and secondly by the creditor. The interruption by the debtor will be where he acknowledges liability and by the creditor will be when he institutes proceedings and claims payment from the debtor.¹²⁸

In the current matter it is contended that the Applicant failed to lodge the review application within three years which would have interrupted the prescription of the arbitration award. Section 15(1) of the *Prescription Act* however states that this is

¹²⁴ *Myathaza v Johannesburg Metropolitan Bus Services (SOC) Limited t/a Metrobus and Others* 2016 ZACC 49 at para 109.

¹²⁵ *Myathaza v Johannesburg Metropolitan Bus Services (SOC) Limited t/a Metrobus and Others* 2016 ZACC 49 at para 115.

¹²⁶ Section 15(6) of the *Prescription Act*; *Myathaza v Johannesburg Metropolitan Bus Services (SOC) Limited t/a Metrobus and Others* 2016 ZACC 49 at para 115.

¹²⁷ *Myathaza v Johannesburg Metropolitan Bus Services (SOC) Limited t/a Metrobus and Others* 2016 ZACC 49 at para 116.

¹²⁸ *Myathaza v Johannesburg Metropolitan Bus Services (SOC) Limited t/a Metrobus and Others* 2016 ZACC 49 at para 117.

not a true reflection because a review application in terms of section 158(1)(c) is not a process where the Applicant claims payment of a debt.¹²⁹

The debt as envisaged by section 11(d) of the *Prescription Act* is a debt which will be interrupted by the service of a process where payment is claimed. The three-year period will also be applicable to such a debt. This debt does not include an arbitration award.¹³⁰

The *Prescription Act* reveals three important principles. The first is, that once the debt is due, the prescription will start to run. Secondly, the running of prescription should be interrupted before it runs for the entire period of prescription. Thirdly, in the event that the creditor fails to interrupt the running of prescription and the debtor does not acknowledge his liability, the debt will be considered to be prescribed. The debt will then be extinguished by the running of prescription.¹³¹

Judge Zondo disagrees with Judge Froneman in that the *Prescription Act* plays any role in the *LRA* dispute resolution system. The *LRA* and its system is rather a self-standing system with its own periods in terms of time-bars and steps that should be taken. The *Prescription Act* therefore has no application to dismissal disputes. Whether the *Prescription Act* has any application after a judgment has been handed down by the *Labour Court* is a question for another day.¹³²

In the event that an employee decides to prosecute his damages relating to his unfair dismissal dispute in a civil court, then the *Prescription Act* may be

¹²⁹ *Myathaza v Johannesburg Metropolitan Bus Services (SOC) Limited t/a Metrobus and Others* 2016 ZACC 49 at para 118.

¹³⁰ *Myathaza v Johannesburg Metropolitan Bus Services (SOC) Limited t/a Metrobus and Others* 2016 ZACC 49 at para 119.

¹³¹ *Myathaza v Johannesburg Metropolitan Bus Services (SOC) Limited t/a Metrobus and Others* 2016 ZACC 49 at para 125.

¹³² *Myathaza v Johannesburg Metropolitan Bus Services (SOC) Limited t/a Metrobus and Others* 2016 ZACC 49 at para 131.

applicable. It will however have no application if the dispute is referred to the CCMA or Bargaining Council.¹³³

If it is considered that the *LRA* had no time-bars and the three-year period would apply to unfair dismissal disputes it would mean that, once an employee is dismissed, he would have three years to refer his dispute to conciliation. The *LRA* however has clear time periods to comply with. Section 191 of the *LRA* clearly stipulates that an unfair dismissal should be referred within 30 days from the date of dismissal. If the employee fails to refer it within the prescribed time period, the employee should lodge a condonation application explaining why it is late.¹³⁴

4.2 *Food and Allied Workers Union obo Gaoshubelwe and Others v Pieman's Pantry (Pty) Ltd 2017 38 ILJ 132 (LAC)*

The second case that was considered was the matter of *Food and Allied Workers Union (hereafter "FAWU") obo Gaoshubelwe and Others v Pieman's Pantry (Pty) Ltd*¹³⁵ (hereafter the "*Pieman's case*"). In this matter, the Court had to decide whether the *Prescription Awe* will apply to the referral of disputes in terms of section 91¹³⁶ of the *LRA* and secondly whether the unfair dismissal dispute that was referred prescribed.¹³⁷

¹³³ *Myathaza v Johannesburg Metropolitan Bus Services (SOC) Limited t/a Metrobus and Others* 2016 ZACC 49 at para 132.

¹³⁴ *Myathaza v Johannesburg Metropolitan Bus Services (SOC) Limited t/a Metrobus and Others* 2016 ZACC 49 at para 135-136.

¹³⁵ 2017 38 ILJ 132 (LAC).

¹³⁶ 191. Disputes about unfair dismissals and unfair labour practices

(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 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 has expired.....

(3) The employee must satisfy the council or the Commission that a copy of the referral has been served on the employer.

It was contended on behalf of the Applicant that the *Prescription Act* is not applicable to litigation under the *LRA*. They further contended that, in the event that it was found that the *Prescription Act* does apply, the initial referral in terms of section 191(1) of the *LRA* interrupted the prescription. The reason for the

-
- (4) The council of the Commission must attempt to resolve the dispute through conciliation.
- (5) If a council or a commissioner has certified that the dispute remains unresolved, or if 30 days or any further period as agreed between the parties have expired since the council or the Commission received the referral and the dispute remains unresolved-
- (a) the council or the Commission must arbitrate the dispute at the request of the employee if -
- (i) the employee has alleged that the reason for dismissal is related to the employee's conduct or capacity, unless paragraph (b)(iii) applies;
 - (ii) the employee has alleged that the reason for dismissal is that the employer made continued employment intolerable or the employer provided the employee with substantially less favourable conditions or circumstances at work after a transfer in terms of section 197 or 197A, unless the employee alleges that the contract of employment was terminated for a reason contemplated in section 187;
 - (iii) the employee does not know the reason for dismissal; or
 - (iv) the dispute concerns an unfair labour practice; or
- (b) the employee may refer the dispute to the Labour Court for adjudication if the employee has alleged that the reason for dismissal is -
- (i) automatically unfair;
 - (ii) based on the employer's operational requirements;
 - (iii) the employee's participation in a strike that does not comply with the provisions of Chapter IV; or
 - (iv) because the employee refused to join, was refused membership of or was expelled from a trade union party to a closed shop agreement.
- (5A) Despite any other provision in the Act, the council or Commission must commence the arbitration immediately after certifying that the dispute remains unresolved if the dispute concerns-
- (a) the dismissal of an employee for any reason relating to probation;
 - (b) any unfair labour practice relating to probation;
 - (c) any other dispute contemplated in subsection (5)(a) in respect of which no party has objected to the matter being dealt with in terms of this subsection. ...
- (12) An employee who is dismissed by reason of the employer's operational requirements may elect to refer the dispute either to arbitration or to the Labour Court if-
- (a) the employer followed a consultation procedure that applied to that employee only, irrespective of whether that procedure complied with section 189;
 - (b) the employer's operational requirements lead to the dismissal of that employee only; or
 - (c) the employer employs less than ten employees, irrespective of the number of employees who are dismissed.
- (13) (a) An employee may refer a dispute concerning an alleged unfair labour practice to the Labour Court for adjudication if the employee has alleged that the employee has been subjected to an occupational detriment by the employer in contravention of section 3 of the Protected Disclosures Act, 2000, for having made a protected disclosure defined in that Act.
- (b) A referral in terms of paragraph (a) is deemed to be made in terms of subsection (5)(b).
- ¹³⁷ *FAWU obo Gaoshubelwe and Others v Pieman's Pantry (Pty) Ltd* 2017 38 ILJ 132 (LAC) at para 1.

interruption is because the referral is considered to be an event as per section 15(1)¹³⁸ of the *Prescription Act*.¹³⁹

The employer argued that the *Prescription Act* does apply to all litigation under the *LRA* and that the prescription starts to run from when the certification of non-resolution is issued, rather than the date of dismissal.¹⁴⁰

The Labour Court's judgment concluded that the *Prescription Act* is applicable to labour legislation and agreed with the employer's argument. The Labour Court therefore concluded that the Applicant's claim did prescribe because their statement of claim was filed three years, six months and two weeks after the certificate of non-resolution was issued.¹⁴¹

Before we can proceed with the reasons for the judgment, it is necessary to take all relevant facts into consideration. This will assist in understanding how the Court arrived at its judgment. The following facts were all common cause. The workers were dismissed on 1 August 2001. The reason for their dismissal was for participation in an unprotected strike. FAWU, on behalf of the Applicants, referred an unfair dismissal dispute to the CCMA on 7 August 2001. The CCMA issued a certificate of non-resolution on 3 September 2001. FAWU referred the matter for arbitration. The Arbitrator ruled that the CCMA does not have jurisdiction to adjudicate the dispute on 15 March 2002. FAWU subsequently lodged a review application. The Labour Court dismissed the review application on 9 December 2003. FAWU filed a statement of claim on 16 March 2005. On 19 April 2005, the employer filed a statement of response and pleaded prescription. The union further failed to apply for condonation for their late filing. They subsequently applied and condonation for the late filing was granted. On 28 May 2014, the

¹³⁸ 15. Judicial interruption of prescription.—(1) The running of prescription shall, subject to the provisions of subsection (2), be interrupted by the service on the debtor of any process whereby the creditor claims payment of the debt.

¹³⁹ *FAWU obo Gaoshubelwe and Others v Pieman's Pantry (Pty) Ltd* 2017 38 ILJ 132 (LAC) at para 2.

¹⁴⁰ *FAWU obo Gaoshubelwe and Others v Pieman's Pantry (Pty) Ltd* 2017 38 ILJ 132 (LAC) at para 3.

¹⁴¹ *FAWU obo Gaoshubelwe and Others v Pieman's Pantry (Pty) Ltd* 2017 38 ILJ 132 (LAC) at para 4.

prescription was argued in the Labour Court. The Labour Court upheld the plea of prescription.¹⁴²

The Court dealt with the relationship between the *LRA* and the *Prescription Act*. It held that litigation under the *LRA* may be excluded from the application of the *Prescription Act* based on two provisions. The first provision is section 16(1) of the *Prescription Act* and the second provision is section 210 of the *LRA*. Section 16(1) of the *Prescription Act* states that:¹⁴³

(1) Subject to the provisions of subsection (2)(b), the provisions of this chapter shall, save in so far as they are inconsistent with the provisions of any Act of Parliament which prescribes a specified period within which a claim is to be made or an action is to be instituted in respect of a debt or imposes conditions on the institution of an action for the recovery of a debt, apply to any debt arising after the commencement of this Act.

Whereas section 210 of the *LRA* states that:¹⁴⁴

If any conflict, relating to the matters dealt with in this Act, arises between this Act and the provisions of any other law save the Constitution or any Act expressly amending this Act, the provisions of this Act will prevail.

If Section 16(1) of the *Prescription Act* is interpreted, it means that the *Prescription Act* will be applicable to every debt except if it is excluded by the qualifications in section 16(1) of the *Prescription Act*.¹⁴⁵

The Court further noted that it is important to look at the provisions that deal with the running of prescription. Section 10(1) of the *Prescription Act* states that a debt shall be extinguished after the elapse of the period which in terms of the relevant law applies in respect of the prescription of such debt.¹⁴⁶ Section 12(1) of the *Prescription Act* states that prescription shall commence to run as soon as the

¹⁴² *FAWU obo Gaoshubelwe and Others v Pieman's Pantry (Pty) Ltd* 2017 38 ILJ 132 (LAC) at para 6.

¹⁴³ *FAWU obo Gaoshubelwe and Others v Pieman's Pantry (Pty) Ltd* 2017 38 ILJ 132 (LAC) at para 8.

¹⁴⁴ *FAWU obo Gaoshubelwe and Others v Pieman's Pantry (Pty) Ltd* 2017 38 ILJ 132 (LAC) at para 8.

¹⁴⁵ *FAWU obo Gaoshubelwe and Others v Pieman's Pantry (Pty) Ltd* 2017 38 ILJ 132 (LAC) at para 9.

¹⁴⁶ Section 10(1) of the *Prescription Act*.

debt is due.¹⁴⁷ Section 15(1) of the *Prescription Act* further stipulates that the running of prescription shall, subject to the provisions of subsection (2), be interrupted by the service on the debtor of any process whereby the creditor claims payment of the debt.¹⁴⁸ The term 'process' is defined in section 15(6) of the *Prescription Act* and states that it includes a petition, notice of motion, a rule nisi, third party notice referred to in a rule of the court and any other document where legal proceedings are started.¹⁴⁹

The Labour Appeal Court and Labour Court has dealt with the extent to which the *Prescription Act* applies to litigation matters in terms of the *LRA*.¹⁵⁰ One of the biggest debates emanating from these judgments is whether the *Prescription Act* applies to arbitration awards of the CCMA and Bargaining Councils.¹⁵¹ This question was addressed in the earlier discussed matter of *Myathaza v Johannesburg Metropolitan Bus Service (SOC) Ltd t/a Metrobus / Mazibuko v Concor Plant Cellucity (Pty) Ltd v Communication Workers Union on behalf of Peters*.¹⁵²

The factors to take into consideration is whether there is a correct interpretation of the *LRA* that will construe the provisions in such a way that will have the outcome that certain parts of the litigation process will be subject to the *Prescription Act*. According to acting Judge Sutherland, the fact that the *Prescription Act* is applicable to awards is also an indication that all litigation in general, under the *LRA*, will be subject to the *Prescription Act*.¹⁵³

¹⁴⁷ Section 12(1) of the *Prescription Act*.

¹⁴⁸ Section 15(1) of the *Prescription Act*; *FAWU obo Gaoshubelwe and Others v Pieman's Pantry (Pty) Ltd* 2017 38 ILJ 132 (LAC) at para 11.

¹⁴⁹ Section 15(6) of the *Prescription Act*; *FAWU obo Gaoshubelwe and Others v Pieman's Pantry (Pty) Ltd* 2017 38 ILJ 132 (LAC) at para 46.

¹⁵⁰ *FAWU obo Gaoshubelwe and Others v Pieman's Pantry (Pty) Ltd* 2017 38 ILJ 132 (LAC) at para 13.

¹⁵¹ *FAWU obo Gaoshubelwe and Others v Pieman's Pantry (Pty) Ltd* 2017 38 ILJ 132 (LAC) at para 14.

¹⁵² 2016 37 ILJ 413 (LAC); *FAWU obo Gaoshubelwe and Others v Pieman's Pantry (Pty) Ltd* 2017 38 ILJ 132 (LAC) at para 15.

¹⁵³ *FAWU obo Gaoshubelwe and Others v Pieman's Pantry (Pty) Ltd* 2017 38 ILJ 132 (LAC) at para 16.

It is important to note that the matter of *Myathaza v Johannesburg Metropolitan Bus Service (SOC) Ltd t/a Metrobus / Mazibuko v Concor Plant Cellucity (Pty) Ltd v Communication Workers Union on behalf of Peters*¹⁵⁴ is not considered to be authority that constitutes that litigation before the issuing of the award falls under the *Prescription Act*.¹⁵⁵

It was argued by the Applicant (FAWU) that section 39(2) of the *Constitution*¹⁵⁶ should be the drive force for the interpretation. This section requires that the Court should balance the law with the constitutional values. The Court considered this to be correct and further stated that the decision in *Myathaza v Johannesburg Metropolitan Bus Service (SOC) Ltd t/a Metrobus / Mazibuko v Concor Plant Cellucity (Pty) Ltd v Communication Workers Union on behalf of Peters*¹⁵⁷ was wrong because it did not comply with section 39(2). If the court applied the provisions of section 39(2) correctly, it would have been concluded that arbitration awards are not subject to the *Prescription Act*.¹⁵⁸

The second argument by the Applicant is that should section 210 of the *LRA* be taken into consideration, the *Prescription Act* will be excluded from applications under the *LRA*.¹⁵⁹

The Court further referred to two Labour Court judgments. The first being *Coetzee and Others v MEC, Western Cape* (herein after referred to as the "*Coetzee matter*").¹⁶⁰ The question in this matter construed the applicability of the

¹⁵⁴ 2016 37 ILJ 413 (LAC).

¹⁵⁵ *FAWU obo Gaoshubelwe and Others v Pieman's Pantry (Pty) Ltd* 2017 38 ILJ 132 (LAC) at para 17.

¹⁵⁶ 39(2) When interpreting any legislation and when developing the common law or customary law, every court, tribunal or forum must promote the spirit, purport and objects of the Bill of Rights.

¹⁵⁷ 2016 37 ILJ 413 (LAC).

¹⁵⁸ *FAWU obo Gaoshubelwe and Others v Pieman's Pantry (Pty) Ltd* 2017 38 ILJ 132 (LAC) at para 23.

¹⁵⁹ *FAWU obo Gaoshubelwe and Others v Pieman's Pantry (Pty) Ltd* 2017 38 ILJ 132 (LAC) at para 24.

¹⁶⁰ 2013 34 ILJ 2865 (LC).

Prescription Act to the *LRA*.¹⁶¹ The Court referred to the *Coetzee* matter in paragraph 8 of *Cellucity (Pty) Ltd v CWU obo Peters*.¹⁶² The Court stated that:¹⁶³

The matter before me provides a further and a clear illustration of why the Prescription Act should not be applied to unfair dismissal disputes under the LRA. Over and above the considerations raised in the matter above, the question of public policy comes strongly into focus in this case. Public policy and the *boni mores* are now deeply rooted in the Constitution and its underlying values. The application of the Prescription Act to LRA claims can be used to frustrate the realization of employees' rights to fair labour practices. This is particularly so in cases where such dismissed employees are members of vulnerable groups in our society. Many of these individuals may struggle to afford the means to execute on an award in their favour, or are unable timeously to pursue their rights because of a lack of resources.

The third argument by the Applicant was that the litigation regime under section 191 of the *LRA* constitutes an inconsistency of the *Prescription Act* and therefore the *LRA* should be triumphant over the *Prescription Act*. The provisions of the *LRA* that stipulate that a dispute should be referred within 30 or 90 days and if unsuccessfully conciliated be referred to arbitration or the Labour Court, depending on the matter, within a further 90 days, should be triumphant over the provisions in the *Prescription Act*. The result is that labour disputes, despite the three-year prescription period, should remain litigable should good cause be shown to the Labour Court.¹⁶⁴

The Court stated that section 191 of the *LRA* does specify and regulate periods within which a claim should be submitted as well as conditions that should be met. The important issue is whether the other provisions constitute an inconsistency compared to the *Prescription Act*. It is further noted by the Court that a mere alternative procedure is necessary but will not be considered to be sufficient. In simple terms, section 191 of the *LRA* will not extinguish a claim but will rather regulate a process and provide the Labour Court with discretion to intervene in the

¹⁶¹ *Coetzee and Others v MEC, Western Cape* 2013 34 ILJ 2865 (LC) at para 17; *FAWU obo Gaoshubelwe and Others v Pieman's Pantry (Pty) Ltd* 2017 38 ILJ 132 (LAC) at para 27.

¹⁶² 2014 35 ILJ 1237 (LC).

¹⁶³ *Cellucity (Pty) Ltd v CWU obo Peters* 2014 35 ILJ 1237 (LC) at para 8; *FAWU obo Gaoshubelwe and Others v Pieman's Pantry (Pty) Ltd* 2017 38 ILJ 132 (LAC) at para 27.

¹⁶⁴ *FAWU obo Gaoshubelwe and Others v Pieman's Pantry (Pty) Ltd* 2017 38 ILJ 132 (LAC) at para 30.

process. If the aforementioned is considered then it is difficult to come to the conclusion that the *LRA* should be triumphant over the *Prescription Act*.¹⁶⁵

The Court held that sections 10(1), 11(d), 12(1) and 15(1) of the *Prescription Act* are not inconsistent with section 191 of the *LRA*.¹⁶⁶

Inconsistency rather lies in the appropriate interpretation and to consider that both the *LRA* and the *Prescription Act* are regimes that constitute concentric circles. The *LRA* will be the inner circle that stipulates that disputes should be referred within 30 or 90 days for conciliation and thereafter either refer it to arbitration or the Labour Court within a further 90 days. The *Prescription Act* is considered to be the outer circle that stipulates that debts will be extinguished after three years. In the current matter, the next step was to file a statement of case. The fact that it was filed late and the discretion given to the Labour Court to condone the late filing, operates in conjunction with the periods of the *Prescription Act*.¹⁶⁷

The Respondent argued that section 191 of the *LRA* is not an alternative to the *Prescription Act* but rather imposes a time-bar. This section is not inconsistent with the *Prescription Act*. These time-bars should however be compliant with the *Constitution*. This was addressed in *Brümmer v Minister for Social Development and Others*.¹⁶⁸ The Court held that:¹⁶⁹

The principles that emerge from these cases are these: time-bars limit the right to seek judicial redress. However, they serve an important purpose in that they prevent inordinate delays which may be detrimental to the interests of justice. But not all time limits are consistent with the Constitution. There is no hard-and-fast rule for determining the degree of limitation that is consistent with the Constitution. The "enquiry turns wholly on estimations of degree". Whether a time-bar provision is consistent with the right of access to court depends upon

¹⁶⁵ *FAWU obo Gaoshubelwe and Others v Pieman's Pantry (Pty) Ltd* 2017 38 ILJ 132 (LAC) at para 31.

¹⁶⁶ *FAWU obo Gaoshubelwe and Others v Pieman's Pantry (Pty) Ltd* 2017 38 ILJ 132 (LAC) at para 35.

¹⁶⁷ *FAWU obo Gaoshubelwe and Others v Pieman's Pantry (Pty) Ltd* 2017 38 ILJ 132 (LAC) at para 36.

¹⁶⁸ 2009 6 SA 323 (CC) at para 51; *FAWU obo Gaoshubelwe and Others v Pieman's Pantry (Pty) Ltd* 2017 38 ILJ 132 (LAC) at para 37.

¹⁶⁹ *Brümmer v Minister for Social Development and Others* 2009 6 SA 323 (CC) at para 51.

the availability of the opportunity to exercise the right to judicial redress. To pass constitutional muster, a time-bar provision must afford a potential litigant an adequate and fair opportunity to seek judicial redress for a wrong allegedly committed. It must allow sufficient or adequate time between the cause of action coming to the knowledge of the claimant and the time during which litigation may be launched. And finally, the existence of the power to condone non-compliance with the time-bar is not necessarily decisive.

The question however is whether a debt arose at all and whether the *Prescription Act* will be applicable. According to the Applicant in the current matter, the debt that arose and that should be enforced is the Applicant's claim for reinstatement.

In light of the aforementioned question the court referred to the matter of *Makate v Vodacom* (herein after referred to as the "*Makate*" matter).¹⁷⁰ In the *Makate* matter, the claim by the employee was that there was an obligation on the employer to negotiate fair compensation with the employee for an idea that he thought of and which the employer adopted and made a profit from. The employer contended that the claim prescribed because it was made outside the stipulated three-year period. The question was also whether the claim can be considered to be a debt as envisaged in the *Prescription Act*. The Constitutional Court held that a debt cannot be considered to be as wide and include an obligation to do or not to do something.¹⁷¹ The principle emanating from the *Makate* matter was that a claim cannot be considered to be a deliverable as envisaged in the *Prescription Act* and therefore it cannot prescribe.¹⁷²

In the current matter the case relates to an unfair dismissal. The question however is what is considered to be the debt, if there is indeed any concept of debt and what will bring it within the parameters of the *Prescription Act*. According to Judge Sutherland, the debt can be described as the employee's claim of right. An example will be when the employee claims that his job was unfairly terminated and that it should be remedied. According to him, this concept does not fall within the ambit of the *Makate* matter because it is clear what the

¹⁷⁰ 2016 4 SA 121 (CC).

¹⁷¹ *Makate v Vodacom* 2016 4 SA 121 (CC) at para 81-93 and 185-199 the concept of prescription was dealt with.

¹⁷² *Makate v Vodacom* 2016 4 SA 121 (CC) at para 190; *FAWU obo Gaoshubelwe and Others v Pieman's Pantry (Pty) Ltd* 2017 38 ILJ 132 (LAC) at para 42.

employer has to do to dismiss the employee. The claim for an unfair dismissal constitutes a specific demand together with a special right to compensation.¹⁷³

The Court further stated that it will be odd if the *Prescription Act* applies to some types of debts and not others. There can be no distinction made between the types of debts that would fall within the ambit of prescription.¹⁷⁴ The Court concluded that the *Prescription Act* will apply to all litigation under the *LRA*.¹⁷⁵

The Applicant's main contention was that the debt arose on dismissal and that the unfair dismissal dispute referral to the CCMA interrupted prescription. Therefore it does not matter how long thereafter the statement of case was filed at the Labour Court.¹⁷⁶ The Respondent argued that the referral could not have interrupted the running of prescription as no cause of action has existed yet. The cause of action only arose when the certificate of non-resolution was issued by the CCMA. The cause of action could not arise at the time of dismissal as one of the elements of the cause of action was not present, namely that conciliation was exhausted. The Respondent contended that the prescription was running from the date that the certificate of non-resolution was issued and could only be interrupted once the statement of case was filed with the Labour Court.¹⁷⁷

The court held that the Applicant's view is correct and that the Respondent's contention is misconceived. The Labour Appeal Court therefore disagreed with the view of the Labour Court.¹⁷⁸

The concepts of 'debt' and 'cause of action' are not the same thing. It was held in *Drennan Maud & Ptrs v Pennington Town Board*¹⁷⁹ that the concept of 'debt' as

¹⁷³ *FAWU obo Gaoshubelwe and Others v Pieman's Pantry (Pty) Ltd* 2017 38 ILJ 132 (LAC) at para 43.

¹⁷⁴ *FAWU obo Gaoshubelwe and Others v Pieman's Pantry (Pty) Ltd* 2017 38 ILJ 132 (LAC) at para 4.

¹⁷⁵ *FAWU obo Gaoshubelwe and Others v Pieman's Pantry (Pty) Ltd* 2017 38 ILJ 132 (LAC) at para 45.

¹⁷⁶ *FAWU obo Gaoshubelwe and Others v Pieman's Pantry (Pty) Ltd* 2017 38 ILJ 132 (LAC) at para 47.

¹⁷⁷ *FAWU obo Gaoshubelwe and Others v Pieman's Pantry (Pty) Ltd* 2017 38 ILJ 132 (LAC) at para 48.

¹⁷⁸ *FAWU obo Gaoshubelwe and Others v Pieman's Pantry (Pty) Ltd* 2017 38 ILJ 132 (LAC) at para 50.

envisaged in section 15(1) of the *Prescription Act* does not refer to the cause of action but rather the claim.¹⁸⁰ Although, in order to formulate the 'claim', it is necessary to exhaust the conciliation phase, the existence of a 'debt' does not rely on the existence of the procedural requirement.¹⁸¹

The contention that the referral interrupts prescription is also wrong and relates to reasons as to why the certificate of non-resolution cannot interrupt prescription. A referral can be considered to be a process preceding to approaching the Court, but the process is not the reason of the 'debt' that is sought to be enforced.¹⁸²

Section 15(1) of the *Prescription Act* requires a process whereby legal proceedings are commenced to interrupt prescription. A referral does not commence legal proceedings. It rather places an obligation on the CCMA to intervene in a dispute. The purpose of the CCMA is to conciliate the matter and attempt to avoid legal proceedings. The referral is merely a condition that should be met in order to obtain access to the CCMA to adjudicate the dispute.¹⁸³

The Applicant contended that, if section 191(5A) of the *LRA*¹⁸⁴ applies, it means that a referral automatically pushes the referral into the arbitration phase and therefor it is considered to be a process that starts legal proceedings. This argument is however misconceived and section 191(5A) may provide that probation disputes can immediately be arbitrated and in all other disputes a party may object to the matter immediately commencing with arbitration. These

¹⁷⁹ 1998 3 SA 200 (SCA) at 212 F – J.

¹⁸⁰ *FAWU obo Gaoshubelwe and Others v Pieman's Pantry (Pty) Ltd* 2017 38 ILJ 132 (LAC) at para 51.

¹⁸¹ *FAWU obo Gaoshubelwe and Others v Pieman's Pantry (Pty) Ltd* 2017 38 ILJ 132 (LAC) at para 53.

¹⁸² *FAWU obo Gaoshubelwe and Others v Pieman's Pantry (Pty) Ltd* 2017 38 ILJ 132 (LAC) at para 54.

¹⁸³ *FAWU obo Gaoshubelwe and Others v Pieman's Pantry (Pty) Ltd* 2017 38 ILJ 132 (LAC) at para 55.

¹⁸⁴ (5A) Despite any other provision in the Act, the council or Commission must commence the arbitration immediately after certifying that the dispute remains unresolved if the dispute concerns-

(a) the dismissal of an employee for any reason relating to probation;

(b) any unfair labour practice relating to probation;

(c) any other dispute contemplated in subsection (5)(a) in respect of which no party has objected to the matter being dealt with in terms of this subsection.

provisions however do not perform an additional role. The fact that there is no objection to a con-arb process does not mean that there is no request. The concept of con-arb is not considered to be a process that commences legal proceedings.¹⁸⁵

The Court concluded that a referral does not interrupt prescription.¹⁸⁶ Accordingly, prescription was running from the date of dismissal, the Applicant attempted to have the dispute arbitrated and this attempt was ill-conceived. By the time that the Applicant filed the statement of case, prescription already took place. Section 15(2) of the *Prescription Act* provides that *bona fide* steps to institute proceedings in the wrong forum does not constitute a process as envisaged by section 15(1) of the *Prescription Act*. Therefore, the Applicant's debt prescribed.¹⁸⁷

4.3 Food and Allied Workers Union obo Gaoshubelwe and Others v Pieman's Pantry (Pty) Ltd 2018 ZACC 7

4.3.1 Judgment by Acting Judge Zondi

Two important issues are raised in this matter. The first being whether the *Prescription Act* will be applicable to unfair dismissal claims and secondly whether the referral of an unfair dismissal dispute that is referred to the Labour Court has prescribed. The aforementioned issues are important because previous findings by the Labour Court and Labour Appeal Court found that the *Prescription Act* does apply to unfair dismissal disputes and that the claim subsequently prescribed.¹⁸⁸

The Court had to determine whether the *Prescription Act* will be applicable to litigation under the *LRA* and whether the unfair dismissal claim prescribed. In

¹⁸⁵ *FAWU obo Gaoshubelwe and Others v Pieman's Pantry (Pty) Ltd* 2017 38 ILJ 132 (LAC) at para 58-59.

¹⁸⁶ *FAWU obo Gaoshubelwe and Others v Pieman's Pantry (Pty) Ltd* 2017 38 ILJ 132 (LAC) at para 60.

¹⁸⁷ *FAWU obo Gaoshubelwe and Others v Pieman's Pantry (Pty) Ltd* 2017 38 ILJ 132 (LAC) at para 61-62.

¹⁸⁸ *FAWU obo Gaoshubelwe and Others v Pieman's Pantry (Pty) Ltd* 2018 ZACC 7 at para 1.

order to determine the aforementioned, the Court had a look at the relevant sections of the *Prescription Act* and the *LRA*.¹⁸⁹

The starting point will be section 16(1) of the *Prescription Act* that states as follows:¹⁹⁰

Subject to the provisions of subsection (2)(b), the provisions of this chapter shall, save in so far as they are inconsistent with the provisions of any Act of Parliament which prescribes a specified period within which a claim is to be made or an action is to be instituted in respect of a debt or imposes conditions on the institution of an action for the recovery of a debt, apply to any debt arising after the commencement of this Act.

Section 210 of the *LRA* is applicable to applications where the *LRA* is in conflict with any other laws. The section states as follows:¹⁹¹

If any conflict, relating to the matters dealt with in this Act, arises between this Act and the provisions of any other law save the Constitution or any Act expressly amending this Act, the provisions of this Act will prevail.

In light of the aforementioned the general rule is that the *Prescription Act* will be applicable to all debts unless the provisions are conflicting with the provisions of another Act.¹⁹² It should therefore be determined whether there is a conflict as provided in section 210 of the *LRA* or a conflict as provided in section 16(1) of the *Prescription Act*.¹⁹³

In order to answer the two issues, it is necessary to start with the matter of *Myathaza v Johannesburg Metropolitan Bus Services (SOC) Limited t/a Metrobus and Others* (hereinafter referred to as '*Myathaza*').¹⁹⁴ Myathaza delivered three judgments resulting in a split decision deeming it as no binding authority. It is however a good starting point in answering the issues before the Court in this matter.

¹⁸⁹ *FAWU obo Gaoshubelwe and Others v Pieman's Pantry (Pty) Ltd* 2018 ZACC 7 at para 31.

¹⁹⁰ *FAWU obo Gaoshubelwe and Others v Pieman's Pantry (Pty) Ltd* 2018 ZACC 7 at para 39. Section 16 of the *Prescription Act*.

¹⁹¹ *FAWU obo Gaoshubelwe and Others v Pieman's Pantry (Pty) Ltd* 2018 ZACC 7 at para 40. Section 210 of the *LRA*.

¹⁹² *FAWU obo Gaoshubelwe and Others v Pieman's Pantry (Pty) Ltd* 2018 ZACC 7 at para 41.

¹⁹³ *FAWU obo Gaoshubelwe and Others v Pieman's Pantry (Pty) Ltd* 2018 ZACC 7 at para 42.

¹⁹⁴ 2016 ZACC 49.

Acting Judge Zondi held in this matter that the *Prescription Act* and the *LRA* are inconsistent because there are material differences between the two. These inconsistencies are because of the different time periods provided for. The conclusion therefore is that the *Prescription Act* does not apply to matters under section 191 of the *LRA*.¹⁹⁵

In the event that a creditor fails to institute action to enforce his debts within the necessary prescribed period and is not excused by the debtor's acknowledgement of liability or in terms of section 13, the debt will prescribe. Once the debt prescribed, the claim cannot be revived. A prescribed claim cannot be condoned.¹⁹⁶

The aforementioned does not bar a creditor from instituting legal action for a prescribed claim. The Court is not allowed to raise prescription but the debtor is allowed to raise prescription at any stage. Once the debtor raises prescription, the creditor will not be able to proceed with its claim and it will be irrecoverable.¹⁹⁷

Acting Judge Zondi held that the Labour Appeal Court was wrong in concluding that the *Prescription Act* will be applicable to matters under the *LRA*. His reason for this averment was that the different time periods of the *Prescription Act* to commence litigation proceedings are not applicable to matters under the *LRA*. One of the objects of the *LRA* is to amend the law that is governing labour relations and to give effect to section 23 of the *Constitution*.¹⁹⁸ The *LRA* and the *Constitution* is linked to each other.¹⁹⁹ The *LRA* is interpreted in the same manner as the *Constitution*.²⁰⁰

Difficulties are created when the *Prescription Act* is applied to disputes in terms of section 191 of the *LRA*. One of these difficulties include whether a

¹⁹⁵ *FAWU obo Gaoshubelwe and Others v Pieman's Pantry (Pty) Ltd* 2018 ZACC 7 at para 49.

¹⁹⁶ *FAWU obo Gaoshubelwe and Others v Pieman's Pantry (Pty) Ltd* 2018 ZACC 7 at para 57.

¹⁹⁷ *FAWU obo Gaoshubelwe and Others v Pieman's Pantry (Pty) Ltd* 2018 ZACC 7 at para 58.

¹⁹⁸ Long title of the *LRA*.

¹⁹⁹ *Department of Land Affairs v Goedgelegen Tropical Fruits (Pty) Ltd* 2007 ZACC 12 at para 53.

²⁰⁰ *FAWU obo Gaoshubelwe and Others v Pieman's Pantry (Pty) Ltd* 2018 ZACC 7 at para 64.

debt prescribed or not. The power to decide the aforementioned does not vest with the CCMA. The only power the CCMA does have, is to condone a delay in terms of section 191(2).²⁰¹

Further to the CCMA's power to condone late referrals, the Labour Court may also condone conciliated matters that were referred late.²⁰² The Labour Court may condone a matter even in the event that the delay was more than three years. The concept of condonation in terms of the *LRA* is something foreign to the scheme of the *Prescription Act*.²⁰³

The fact that effect is not given to section 39(2) of the *Constitution*, impedes the effective resolution of labour disputes. This also limits the CCMA's and Labour Courts powers to condone late referrals. There is clearly a conflict between the two Acts and in terms of section 210 of the *LRA*, the *LRA* should prevail.²⁰⁴

This matter clearly indicates that the *Prescription Act* cannot be applicable together with the *LRA*. It can therefore not be applicable to matters under the *LRA*. The differences between the two Acts are material enough to conclude that the two Acts are inconsistent with each other. The order of the Labour Appeal Court was set aside.²⁰⁵

4.3.2 Judgment by Deputy Chief Justice Zondo

Deputy Chief Justice Zondo concurred with the judgment of Acting Judge Zondi but provided additional reasons for why the *Prescription Act* does not apply to unfair dismissal claims.²⁰⁶

It is clear by now that the *LRA* provides timeframes in which an unfair dismissal dispute should be referred. If it is not referred within this

²⁰¹ *FAWU obo Gaoshubelwe and Others v Pieman's Pantry (Pty) Ltd* 2018 ZACC 7 at para 68.

²⁰² Section 191(11) of the *LRA*.

²⁰³ *FAWU obo Gaoshubelwe and Others v Pieman's Pantry (Pty) Ltd* 2018 ZACC 7 at para 69.

²⁰⁴ *Sidumo v Rustenburg Platinum Mines Ltd* 2008 2 SA 24 (CC) at paras 97-100, *FAWU obo Gaoshubelwe and Others v Pieman's Pantry (Pty) Ltd* 2018 ZACC 7 at para 70.

²⁰⁵ *FAWU obo Gaoshubelwe and Others v Pieman's Pantry (Pty) Ltd* 2018 ZACC 7 at paras 74-75.

²⁰⁶ *FAWU obo Gaoshubelwe and Others v Pieman's Pantry (Pty) Ltd* 2018 ZACC 7 at para 78.

timeframe, good cause should be showed in order to condone the late referral. The aforementioned provisions are not as clear as the *Prescription Act* or the common law but they do provide flexibility to make sure that there is a balance between the employees and employers interest. If the judicial drafters wanted the *Prescription Act* to be included in the *LRA*, they would have drafted the provisions relating to condonation and good cause with the terms 'subject to the *Prescription Act*'. This was not done. It was a specific choice not to include the periods in the *LRA*.²⁰⁷

The problem with the applicability of the *Prescription Act* to unfair dismissal claims is that the prescription period starts to run from the date of dismissal and it will only be interrupted by the service of the referral document on the employer. In terms of the *Prescription Act*, the debt is due once it is enforceable and the creditor may proceed to institute court proceedings. Under the *LRA* no court proceedings may be instituted until the conciliation process was exhausted and failed.²⁰⁸

Another difficulty with the applicability of the *Prescription Act* to unfair dismissal disputes is that it will introduce a foreign rule that will tamper with an effective dispute resolution system. This will also be more beneficial to employers than to employees.²⁰⁹

Deputy Chief Justice Zondo concluded that it is not meant for the *Prescription Act* to apply to unfair dismissal disputes under the *LRA*.²¹⁰

4.3.3 Judgment by Acting Judge Kollapen

Time is the most important concept in this matter. The legal question in this matter is whether the *Prescription Act* applies to litigation of unfair dismissal disputes under the *LRA*.²¹¹

²⁰⁷ *FAWU obo Gaoshubelwe and Others v Pieman's Pantry (Pty) Ltd* 2018 ZACC 7 at paras 89-90.

²⁰⁸ *FAWU obo Gaoshubelwe and Others v Pieman's Pantry (Pty) Ltd* 2018 ZACC 7 at para 111.

²⁰⁹ *FAWU obo Gaoshubelwe and Others v Pieman's Pantry (Pty) Ltd* 2018 ZACC 7 at para 115.

²¹⁰ *FAWU obo Gaoshubelwe and Others v Pieman's Pantry (Pty) Ltd* 2018 ZACC 7 at para 137.

Acting Judge Kollapen concurred with the previous two judgments but did not agree that the *Prescription Act* is inconsistent with the *LRA*. According to him, there are certain compatibilities and consistencies between the two Acts. Both Acts deal with time as an issue, but they focus on different parts of its application to matters. The *LRA*'s time periods does not extinct a claim while the time periods in terms of the *Prescription Act* do result in the extinction of the claim. Although their consequences are different, Acting Judge Kollapen concluded that the time periods in the *Prescription Act* and in the *LRA* are consistent.²¹²

Section 16(1) of the *Prescription Act* makes provision for when the *Prescription Act* will apply. It should therefore be determined what is considered to be a debt. The term 'debt' is not defined in the *Prescription Act*.²¹³ The Court however took the approach of the Shorter Oxford Dictionary as already described in this study. If this approach is followed, the three possibilities against an employer, reinstatement, re-employment or compensation, falls within this definition as there is an obligation to pay or render something. He concluded that an unfair dismissal claim does fall within the ambit of section 16(1) of the *Prescription Act*.²¹⁴

Section 16(1) of the *Prescription Act* excludes the *Prescription Act*'s application in the event that its provisions are inconsistent with an Act that prescribes certain time periods. The time periods within which a matter should be referred to conciliation and arbitration may well be considered to be within a specified time period as prescribed in section 16(1) of the *Prescription Act*.

²¹¹ *FAWU obo Gaoshubelwe and Others v Pieman's Pantry (Pty) Ltd* 2018 ZACC 7 at para 138.

²¹² *FAWU obo Gaoshubelwe and Others v Pieman's Pantry (Pty) Ltd* 2018 ZACC 7 at paras 139-140.

²¹³ *FAWU obo Gaoshubelwe and Others v Pieman's Pantry (Pty) Ltd* 2018 ZACC 7 at paras 152-153.

²¹⁴ *FAWU obo Gaoshubelwe and Others v Pieman's Pantry (Pty) Ltd* 2018 ZACC 7 at paras 155-157.

The question is rather whether there is an inconsistency between these provisions and that of the *Prescription Act*.²¹⁵

The inconsistency is not merely because the *Prescription Act* and *LRA* deal with time periods and set certain conditions. What should be demonstrated is that the relevant provisions of both Acts are inconsistent with each other. Further enquiry into the inconsistency is necessary.²¹⁶

While both the *Prescription Act* and section 191 of the *LRA* deals with time periods, they are both different and want to achieve different objectives. The *LRA* prescribes the time periods of when the litigant should take necessary steps while the *Prescription Act* stipulates cut-off points when the steps can no longer be taken by the litigant. It cannot be said that there are inconsistencies between the two Acts. If the *LRA* made provision for prescription periods it would have been another story. The time periods in both Acts regulate different things and can exist in harmony with one another.²¹⁷

If the *Prescription Act* is applied to matters under the *LRA* it will ensure speedy resolution of employment disputes. If these outer time limits are also applied, it will enhance the effectiveness of the dispute resolution process. This may however have a negative impact on the quality of the adjudication of the matters.²¹⁸

Acting Judge Kollapen concluded that there are no conflict and inconsistency between the *Prescription Act* and the *LRA*.²¹⁹

A further question is when the running of prescription will be interrupted. Section 15 of the *Prescription Act* makes it clear that it will be interrupted once

²¹⁵ *FAWU obo Gaoshubelwe and Others v Pieman's Pantry (Pty) Ltd* 2018 ZACC 7 at para 159.

²¹⁶ *FAWU obo Gaoshubelwe and Others v Pieman's Pantry (Pty) Ltd* 2018 ZACC 7 at paras 160-161.

²¹⁷ *FAWU obo Gaoshubelwe and Others v Pieman's Pantry (Pty) Ltd* 2018 ZACC 7 at paras 177-179.

²¹⁸ *FAWU obo Gaoshubelwe and Others v Pieman's Pantry (Pty) Ltd* 2018 ZACC 7 at para 180.

²¹⁹ *FAWU obo Gaoshubelwe and Others v Pieman's Pantry (Pty) Ltd* 2018 ZACC 7 at para 181.

there is service on the debtor whereby the creditor claims payment of the debt. The main element to determine is whether the proceedings before the CCMA constitute the service of a process and are considered to be a judicial process.²²⁰

The *LRA* makes it a requirement to first conciliate a matter before it can be arbitrated. Conciliation may not be adjudicative but it is necessary and within the operations of the CCMA. Acting Judge Kollapen stated that it will be an injustice to the *LRA* and the CCMA if the conciliation process is not characterised as a process that commences legal proceedings. That is why he concluded that a referral of a dispute to the CCMA or Bargaining Council will constitute the service of a legal process that commences legal proceedings.²²¹

5 Conclusion

In light of the new Constitutional Court judgment of *FAWU obo Gaoshubelwe and Others v Pieman's Pantry (Pty) Ltd*,²²² it is clear that the *Prescription Act* does not apply to unfair dismissal disputes. The reasons for this may be different. Each of the Judges concur in their judgments but for different reasons. Some of them find it is because the *LRA* and the *Prescription Act* are inconsistent with each other, while others find that it was not meant that the *Prescription Act* should apply to labour disputes.

The conclusion can still be made that the time periods in the *LRA* are inconsistent with that of the *Prescription Act*, although Acting Judge Kollapen disagrees and the time periods in the *LRA* are considered to be time constraints rather than prescription periods. In the event that a party fails to refer an unfair dismissal dispute within the prescribed 30-day period, it will not mean that their claim prescribed but rather that it was referred outside the prescribed time bar and that a condonation application should be lodged. There is no reason as to why the

²²⁰ *FAWU obo Gaoshubelwe and Others v Pieman's Pantry (Pty) Ltd* 2018 ZACC 7 at para 194.

²²¹ *FAWU obo Gaoshubelwe and Others v Pieman's Pantry (Pty) Ltd* 2018 ZACC 7 at para 199.

²²² 2018 ZACC 7.

prescription period in the *Prescription Act* and the time bars in the newly amended *LRA* should co-exist.

It is clear from the *Myathaza* judgment where Judges Jafta and Froneman concurred, that prescription will not be running in the event of a review application. The basis and outcome for their judgments are however different. According to Judge Jafta, the *Prescription Act* will not be applicable to labour matters, let alone review applications, because the *LRA* and the *Prescription Act* is inconsistent with each other. Judge Froneman holds that the *LRA* and *Prescription Act* is not inconsistent but once a matter is referred for review, the running of prescription is interrupted and prescription will only start to run from the moment that the appeal judgment is given. Because of the fact that there was no consensus amongst the majority in the *Myathaza* judgment, it cannot be considered to be a binding authority. The newest constitutional matter of *FAWU obo Gaoshubelwe and Others v Pieman's Pantry (Pty) Ltd*²²³ brought more certainty. This matter made it clear that the *Prescription Act* will not apply to an unfair dismissal dispute. This is also the most recent authority from the highest court in the country.

It is easy for one to be confused by the numerous case laws that deal with this problem, but it is however confirmed, very recently so, that the *Prescription Act* will not be applicable to unfair dismissal matters. The new question that may be asked is what should be done with matters that had been considered to prescribed before the certainty of *FAWU obo Gaoshubelwe and Others v Pieman's Pantry (Pty) Ltd*.²²⁴ Should employees be afforded the opportunity to proceed with their matter? What about the cost implications? In an attempt to answer the aforementioned questions, it is the writer's suggestion that these employees should be afforded the opportunity to proceed with their cases, the judgments of prescription be reconsidered and over turned. This will however open a new can of worms as the consequences hereof will be tremendous.

²²³ 2018 ZACC 7.

²²⁴ 2018 ZACC 7.

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