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Is an unfair dismissal claim subject to prescription? If so, does the referral of a dispute to the ccma for conciliation interrupt the running of prescription?

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ISSUE

Are claims for unfair dismissal subject to the Prescription Act? Also, does a referral of a dispute to the CCMA for conciliation interrupt the running of prescription?

SUMMARY

Claims for unfair dismissals are subject to the Prescription Act. A referral of a dispute to the CCMA for conciliation does interrupt the running of prescription.

COURT'S DECISION

In the case of *Food and Allied Workers' Union obo J Gaoshubelwe v Pieman's Pantry (Pty) Ltd* [2018] ZACC 7, the Constitutional Court ("CC") had to assess whether the Prescription Act 68 of 1969 ("PA") applied to claims for unfair dismissals, and whether the referral of a dispute to the Commission for Conciliation, Mediation and Arbitration ("CCMA") interrupted the running of prescription. The employees, represented by the applicant, FAWU, were dismissed by Pieman's Panty, the employer, for allegedly participating in an unprotected strike. Three and a half years after the certificate of non-resolution was issued by the CCMA, FAWU referred the dispute to the Labour Court for adjudication. The employer filed a statement of defence, submitting that the employees' claim for reinstatement had prescribed. FAWU argued that the PA did not apply to unfair dismissal claims, and alternatively that the referral of the dispute to the CCMA for conciliation interrupted the running of prescription.

The majority of the CC noted that section 16(1) of the PA deals with the applicability of the Prescription Act and prescribes that its provisions apply to "any debt arising after the commencement of the Prescription Act". Despite the term 'debt' not being defined in the PA, our courts have considered the meaning of the term. The CC found that the meaning of the term 'debt' means something owed or due: something which one person is under an obligation to pay or tender to another. The CC held that a claim for dismissal, which seeks to enforce obligations against an employer, falls within the definition of 'debt' and activates proceedings for the recovery of a debt as provided in section 16(1) of the PA.

Section 16(1) of the PA excludes its application when its provisions are found to be inconsistent with the provisions of an Act of Parliament that prescribes a specified time period within which a claim is to be made or an action to be instituted in respect of a debt or imposes conditions on the institution of an action for the recovery of a debt. The CC held that the time periods specified in section 191 of the Labour Relations Act 66 of 1995 ("LRA"), which deals with disputes about unfair dismissals and unfair labour practices, constitutes both an Act and the "specified time period" contemplated in section 16(1) of the PA. The CC then had to assess whether the time periods referred to in section 191 of the LRA were inconsistent with the PA. The CC held

that the time periods in the LRA indicate when a litigant is expected to take the necessary steps in the dispute resolution process to effectively prosecute a claim, whilst the PA provides an outer limit when those steps are no longer available to a litigant on account of the claim having prescribed. The CC concluded that the time periods in the LRA and in the PA regulated distinct features of the litigation process, and were thus not inconsistent. The CC then considered whether a referral of the matter to conciliation interrupted the running of prescription.

Section 15(1) of the PA provides for the interruption of the running of prescription "by service on the debtor of any process whereby the creditor claims payment of the debt". The CC had to assess whether the commencement of proceedings before the CCMA constitutes the service of a process contemplated in section 15(1) of the PA, and if so, whether it constitutes a judicial process. Section 15(6) of the PA defines such a process to include "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". The CC accordingly considered whether a referral to the CCMA constituted a document commencing legal proceedings. The CC held that a referral to conciliation is a mandatory first step in the process that leads to adjudication. This occurs within the operations of the CCMA, which is an independent and impartial forum. The CC concluded that a referral to the CCMA constitutes a document commencing legal proceedings, thus the referral interrupts the running of prescription.

IMPORTANCE OF THIS CASE

Claims for unfair dismissals and unfair labour practices as contemplated in section 191 of the LRA are subject to the Prescription Act. Prescription of such claims are interrupted upon the employee's referral of the dispute to the CCMA for conciliation. A failure to timeously prosecute such claims will lead to them prescribing.

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