WERKSMANS
ATTORNEYS

DISPUTES

When do arbitration awards prescribe?

5 July 2023 *6 min read*

When does an arbitration award prescribe? Does an award even attract its own period of prescription? The short answer is that it depends on the nature of the award. Judgments of court carry a 30-year prescription period in terms of the Prescription Act[1], regardless of any jurisprudential hair-splitting regarding the nature of the judgment. For arbitration awards, however, there is no specific statutory prescription period, and the nature of the award itself is crucial to determining when the debt prescribes.

Prior to the 2018 judgment of the SCA in *Brompton Court Body Corporate SS119/2006 v Khumalo*[2], the view that an arbitration award constitutes a totally new debt, thus starting a fresh three-year prescription period, had gained increasing traction both in academic writing and in case law. But in a short, sharp judgment, the SCA in *Brompton Court* put an end to that trend, overruling the two leading reported judgments that had come to constitute authority for that view.[3] It cannot, so the SCA held, "*be accepted as a principle of general application*" that a new debt arises when a binding arbitral award is made. Indeed, *"[the] converse will generally be true. Even a judgment of a court of law generally does not create a new debt. It serves to affirm and/or liquidate an existing debt which was disputed."*

The SCA qualified its pronouncement with the word "generally", obviously intending to leave scope for those situations where an arbitration award does indeed constitute a new cause of action. That such instances exist has long been recognised in a clear line of cases. Unfortunately, however, some subsequent courts appear to have misunderstood *Brompton Court* as being founded upon a blanket rule that an arbitration award *never* creates a new debt, but always affirms an existing one[4] – which is no more correct than the previous misconception. The true position was set forth as follows in an article by Malcolm Wallis JA[5]:

> *"An arbitration award, like a judgment, gives rise to a novatio necessaria: a novation of necessity. In some instances that strengthens the underlying claim by rendering it enforceable by way of execution... without extinguishing the underlying claim on which the judgment was based. In others, it extinguishes the underlying claim, creating a new and wholly independent claim.* ***Both possibilities are open and which applies depends on the nature of the proceedings and the judgment or award.****"*

The authority for this view is well established. In *Trust Bank of Africa Ltd v Dhooma*[6], it was held to be "somewhat artificial" to regard a judgment as having the effect of a novation in all circumstances, although in some cases it does have precisely that effect. The Court gave the example of a plaintiff obtaining judgment for cancellation of a contract and damages. In such a case, the original cause of action (i.e. contractual) was not affirmed or strengthened by the judgment, but entirely novated and replaced by new rights arising from the judgment itself rather than from the cancelled contract. This approach was referred to with approval in *Swadif (Pty) Ltd v Dyke NO*[7]. The debt in dispute was a liquid amount owing under a mortgage bond, and the judgment was therefore regarded not as novating the obligation, but rather as strengthening or reinforcing the pre-existing claim. In *Zygos Corporation v Salen Rederierna AB*[8], it was held that a debt is not actually extinguished or replaced by a judgment for damages for breach of a contract which is not cancelled, but rather is strengthened and rendered more permanent, and that the same holds true for an arbitration award.

Recently, in *Blacher v Josephson*[9], the Court dealt with the enforceability of an arbitration award that was based upon a compromise between the parties in respect of debts purportedly outstanding under unlawful loan agreements.[10] In doing so, it considered whether the award purported to "transform and replace" the original underlying cause of action, or to preserve and strengthen it. The Court concluded that it was clearly the latter, since the award was based on a compromise in respect of money purportedly owed under the unlawful loan agreements. The award did not seek to replace the parties' purported contractual obligations but rather to affirm and enforce them. This being the case, the unlawfulness of the loan agreements flowed through to the award, which the Court therefore declined to enforce on public policy grounds.

Reading *Brompton* in light of these principles, the SCA did not intend to say that arbitration awards never give rise to a new cause of action. Some awards clearly do, and it follows that such awards initiate a new period of prescription of three years commencing on the date of publication of the award. A common example of such an award is damages pursuant to the cancellation of a contract.[11] An award encapsulating a settlement agreement that includes rights and obligations extraneous to the dispute would arguably also give rise to an entirely new cause of action.

In the case of an award that strengthens and affirms its underlying cause of action, the prescription enquiry has two stages: first, calculate when the debt would ordinarily have prescribed, and second, apply section 13(1)(f) of the Prescription Act, which delays the completion of prescription by a year commencing on the day when the debt ceases to be the object of a dispute subjected to arbitration, where the debt would ordinarily have prescribed on or before or within one year after that date. Any award upholding a claim in contract would fall into this category, including a claim for damages for breach of a contract that was not cancelled.

Footnotes

[1] Section 11(a)(ii), Act 68 of 1969
[2] 2018 (3) SA 347 (SCA)
[3] ***Primavera Construction SA v Government, NorthWest Province, and Another*** 2003 (3) SA 579 (B) at 604 paras 13 and 14; and ***Prime Fund Managers (Pty) Ltd v Rowan Angel (Pty) Ltd and Another*** [2014] 2 All SA 227 (GNP) paras 44 and 45.
[4] ***Matatiele Local Municipality v Lubbe Construction (Pty) Ltd*** 2021 JDR 3196 (GJ); ***Group Five Construction (Pty) Ltd v Constantia Insurance Company and others*** 2023 JDR 0773 (GJ)
[5] ***"The Common Law's Cool Ideas for dealing with Ms Hubbard"*** 2015 (4) SALJ 940, p 949
[6] 1970 (3) SA 304 (N)
[7] 1978 (1) SA 928 (A)
[8] 1984 (4) SA 444 (C)
[9] 2023 (3) SA 555 (WCC)
[10] The loan agreements were unlawful and unenforceable due to non-compliance with the requirement of the National Credit Act (Act 34 of 2005).
[11] The Court in ***Matatiele Local Municipality,*** cited in footnote 4 above, misunderstood ***Brompton Court*** to mean that an arbitration award never creates a new debt, and therefore failed to appreciate that an award for damages after cancellation of a contract amounted to a new debt. The Court thus arrived at the wrong result.

@werksmans

Keep us close