IN THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Of Interest to Other Judges

Case No: JS 133/16

In the matter between:

TEBOGO BRIAN MONARE **Applicant**

and

SOUTH AFRICAN TOURISM **Respondent**

Delivered: 2 May 2019

JUDGMENT

TLHOTLHALEMAJE, J

Introduction:

[1] In his statement of claim, the applicant seeks the following relief;

1) Payment in the amount of R87 529.54, being the amount that he was short-paid in respect of an arbitration award issued in his favour and *mora* interest thereon, in respect of which claim the respondent had tendered to pay him on or before 28 February 2018.

2) An order declaring the termination of his contract of employment and his dismissal on 30 September 2010 to be unlawful.

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3) Payment of the amount of £257, 550.42 for damages suffered in respect of salaries owed to him for the period 1 October 2010 to 31 January 2015, together with interests at 15.5% *per annum* from the date on which payment of each of his salary payments during the aforesaid period fell due until the date of the final payment.

Background:

[2] The applicant's claim emanates from protracted litigation between the parties that started with the termination of his five year- fixed term contract on 30 September 2010 and ended with a judgment of the Labour Appeal Court on 11 November 2015.

[3] The respondent is a statutory body and has various offices abroad. It entered into a five-year fixed term contract of employment with the applicant on 23 December 2009, in terms of which the latter was appointed as Finance and Administration Manager based at its offices in the United Kingdom. The employment relationship was to take effect from 1 February 2010 until 31 January 2015. The applicant's gross remuneration package was set at £5 674.23 per month.

[4] Some seven months into the employment relationship, the applicant was subjected to a disciplinary enquiry and dismissed from the respondent's employ on 30 September 2010 on account of allegations of misconduct related to dishonesty and fraud. He subsequently referred an unfair dismissal dispute to the Commission for Conciliation Mediation and Arbitration (CCMA) on 17 November 2010.

[5] When attempts at conciliation failed, the dispute was referred for arbitration. In an arbitration award issued on 31 August 2011, Commissioner Faizel Mooi of the CCMA found that the dismissal of the applicant was procedurally fair, but substantively unfair. The respondent was ordered to reinstate the applicant with no loss of salary in the sum of £37, 509.54 from 23 February 2011, to be paid by no later than 23 September 2011. The reinstatement was to take effect from 13 September 2011.

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[6] In response to the applicant's attorneys' enquiry as to when the applicant should report for duty in terms of the arbitration award, the respondent's attorneys advised on 12 September 2011 that no reinstatement would take place as review proceedings were to be instituted.

[7] The review application under case number JR 2298/11 was served and filed on or about 13 October 2011. The matter came before the Court, and in his judgment delivered on 31 March 2014, Van Niekerk J found that the CCMA lacked jurisdiction to determine the dispute, and accordingly, the arbitration award was reviewed and set aside.

[8] The applicant then lodged an appeal under case number JA 45/11 against the judgment and order of Van Niekerk J. In a judgment delivered on 11 November 2015, the Labour Appeal Court upheld the applicant's appeal and substituted Van Niekerk J's order with one dismissing the respondent's review application with costs.

[9] The effect of the Labour Appeal Court's order was to retrospectively restore the employment relationship between the parties. However, at the time that the Labour Appeal Court's judgement was delivered, the fixed term contract of employment had already expired.

[10] On 19 December 2015, the parties agreed that the amount payable to the applicant in respect of the arbitration award and *mora* interests thereon was £69 172.52.

[11] Payment of the amount of R1 582 986.83 was made to the applicant on 11 January 2016, being back-pay due to him in terms of the arbitration award as well as *mora* interest thereon.

<u>The nature of proceedings before the Court.</u>

[12] The applicant's statement of claim was filed and served on 18 February 2016. The respondent had filed and served its response and raised a special plea of prescription. The applicant had filed a replication in response to the special plea. The parties having concluded and signed pre-trial minutes, the matter

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was initially set-down for trial for three days. On the first day of the trial, the parties had agreed that the dispute be determined by way of a stated case in the light of the special plea of prescription.

[13] A joint stated case was filed, and subsequent thereto, the parties had filed their heads of argument. Upon receipt of the applicant's heads of argument, the respondent held the view that the applicant had raised issues that were inconsistent with what was contained in the stated case. It then filed supplementary heads of argument and the applicant did likewise.

[14] To the extent that the applicant had in his heads of argument submitted that his claim for salaries arose on a monthly basis on the date that each salary payment fell due, the respondent had contended that on that version, a substantial portion of his claim would have prescribed as outlined in its Annexure '**A**' to the supplementary heads of argument. The respondent further held the view that the applicant's claim for salary on a monthly basis was pertinent to the overall question for determination, which necessitated a rejoinder application as well as an application to amend its case. The applicant had refused to accede to the request in the light of the agreed stated case. The matter was then set down for the hearing of oral arguments.

<u>The dispute and issues for determination:</u>

[15] The respondent conceded that the termination of the applicant's fixed term contract was unlawful. That effectively disposed of prayer 2 of the applicant's claim. The central issues for determination are therefore;

a) Whether the applicant's claim in respect of prayer 3 has prescribed.

b) Whether the award of reinstatement was suspended during the period between the Labour Court judgment being handed down on 31 March 2014 and the Labour Appeal Court judgment being handed down on 11 November 2015.

c) Whether prescription in respect of the contractual claim was interrupted for this period by virtue of the said suspension.

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The parties' submissions:

[16] In raising a special plea of prescription, the respondent's primary contentions are that;

16.1 It is not competent for the applicant to claim (Prayer 3) in the manner he did. He could only claim for a globular amount being the salaries owed to him in terms of his fixed term employment contract, and that he would only be entitled to such salaries in as far as his claim hereto had not prescribed.

16.2 The claim for damages for the balance of the fixed term contract has prescribed in terms of Chapter 3, section 11 of the Prescription Act[1] based on the following;

[1] Act 68 of 1969

CHAPTER III PRESCRIPTION OF DEBTS (ss 10-16)

10. Extinction of debts by prescription

(1) Subject to the provisions of this Chapter and of Chapter IV, a debt shall be extinguished by prescription after the lapse of the period which in terms of the relevant law applies in respect of the prescription of such debt.

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

(3) Notwithstanding the provisions of subsections (1) and (2), payment by the debtor of a debt after it has been extinguished by prescription in terms of either of the said subsections, shall be regarded as payment of a debt.

11 Periods of prescription of debts

The periods of prescription of debts shall be the following:

(a) thirty years in respect of-
  (i) any debt secured by mortgage bond;
  (ii) any judgment debt;
  (iii) any debt in respect of any taxation imposed or levied by or under any law;
  (iv) any debt owed to the State in respect of any share of the profits, royalties or any similar consideration payable in respect of the right to mine minerals or other substances;

(b) fifteen years in respect of any debt owed to the State and arising out of an advance or loan of money or a sale or lease of land by the State to the debtor, unless a longer period applies in respect of the debt in question in terms of paragraph (a);

(c) six years in respect of a debt arising from a bill of exchange or other negotiable instrument or from a notarial contract, unless a longer period applies in respect of the debt in question in terms of paragraph (a) or (b);

(d) save where an Act of Parliament provides otherwise, three years in respect of any other debt.

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16.2.1 The dismissal took place on 30 September 2010, and the applicant's cause of action arose on that date. His statement of claim was only served on the respondent on 18 February 2016, more than three years after the cause of action arose, and accordingly, his claim in accordance with the provisions of section 11 of the Prescription Act had prescribed.

16.2.2 Prescription may be interrupted under the provisions of sections 14 and 15 of the Act.[2] However, under the provisions of section 14, no acknowledgement of liability was made on the facts of this matter.

16.2.3 In regards to the provisions of section 15 of the Prescription Act, the essence of the meaning *'judicial interruption'* is that

[2] **14 Interruption of prescription by acknowledgement of liability.—**

(1) The running of prescription shall be interrupted by an express or tacit acknowledgement of liability by the debtor.

(2) If the running of prescription is interrupted as contemplated in subsection (1), prescription shall commence to run afresh from the day on which the interruption takes place or, if at the time of the interruption or at any time thereafter the parties postpone the due date of the debt, from the date upon which the debt again becomes due.

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.

(2) Unless the debtor acknowledges liability, the interruption of prescription in terms of subsection (1) shall lapse, and the running of prescription shall not be deemed to have been interrupted, if the creditor does not successfully prosecute his claim under the process in question to final judgment or if he does so prosecute his claim but abandons the judgment or the judgment is set aside.

(3) If the running of prescription is interrupted as contemplated in subsection (1) and the debtor acknowledges liability, and the creditor does not prosecute his claim to final judgment, prescription shall commence to run afresh from the day on which the debtor acknowledges liability or, if at the time when the debtor acknowledges liability or at any time thereafter the parties postpone the due date of the debt, from the day upon which the debt again becomes due.

(4) If the running of prescription is interrupted as contemplated in subsection (1) and the creditor successfully prosecutes his claim under the process in question to final judgment and the interruption does not lapse in terms of subsection (2), prescription shall commence to run afresh on the day on which the judgment of the court becomes executable.

(5) If any person is joined as a defendant on his own application, the process whereby the creditor claims payment of the debt shall be deemed to have been served on such person on the date of such joinder.

(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.

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there is service on the debtor of any process whereby the creditor claims payment of the debt. In this case however, it was argued that this did not happen within the three year period. To this end, it was submitted that there was simply no basis to allege in respect of the applicant's contractual claim, that proceedings based on the unfairness regime under the LRA interrupted the prescription of the civil claim.

16.2.4 To the extent that the applicant had alleged that the contract was repudiated, or unlawfully terminated and that the respondent had committed a material breach of the contract, it was submitted the events happened on 30 September 2010, and it was inexplicable that the applicant would suggest that the cause of action arose on any other date other than 30 September 2010, as no other breach was pleaded.

16.2.5 The status of the award between the review and appeal was irrelevant for the purposes of determining whether the contractual claim had prescribed or not.

[17] In summary, the applicant's contentions were that he was entitled to payment of salaries for the balance of his fixed term contract for the period 1 October 2010 until 31 January 2015, together with interest at 15.5% *per annum* from the date that each salary payment fell due, and that the respondent had in effect repudiated the contract. In the alternative, he seeks an amount that the Court finds to be due to him. He further denied that his claim had prescribed based on the following;

17.1 His cause of action did not arise on 30 September 2010 and prescription did not commence to run from that date;

17.2 This Court had reviewed and set aside the arbitration award on 31 March 2014, and the judgment of the Labour Appeal Court on 11 November 2015 had the effect of reviving the arbitration award to reinstate him.

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17.3 The award of reinstatement was suspended during the period of 31 March 2014 (with the judgment of Van Niekerk J) and 11 November 2015 (with the judgment of the Labour Appeal Court), and during that period, prescription was interrupted.

17.4 The amount of £257 550.42 claimed was damages in respect of salaries owed to him for the period 1 October 2010 to 31 January 2015. The claim is a common law contractual claim and not located in the LRA, and to that end, the date on which the cause of action for an unfair dismissal claim arose was irrelevant to the present enquiry.

17.5 There was no factual or legal basis to support the respondent's contention that the total claim for salary for the unexpired portion of the contract became due on 30 September 2010.

17.6 A debt could only become due when the creditor's cause of action was complete. Prescription therefore began to run not necessarily when the debt arose but when it became due. In this case, the fact that the debt may have arisen on 30 September 2010 was not determinative of the enquiry as something more, *i.e*., a complete cause of action to recover the debt, was required.

17.7 Prescription in respect of the claim did not commence on 30 September 2010 whether based on a construction of cancellation or specific performance of the contract.

17.8 Having sought and obtained a reinstatement, and further to the extent that he had tendered his services, this was a clear intention that he had elected to enforce the contract, and such a tender was inconsistent with an election by him to cancel the contract.

17.9 His claim for arrear salaries could not be instituted during the period prior to reinstatement of the fixed term contract of employment, which only happened on 11 November 2015 when the judgment of the Labour Appeal Court was delivered. In this regard, prescription in respect of a claim for such salaries accordingly was not interrupted or

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delayed, and only commenced to run from 11 November 2015. To the extent that his statement of claim was served on 18 February 2016, this was well within the prescription period of three years[3].

[18] In the supplementary heads of argument, the respondent's further submissions were that;

18.1 In circumstances where the applicant sought to obtain specific performance of the fixed term contract, that claim could only have arisen on 30 September 2010 when the respondent allegedly repudiated or purported to repudiate the contract of employment.

18.2 In either event, the *'debt'* in accordance with section 12 of the Prescription Act became due on 30 September 2010 and that is the period from which prescription began to run. Since that period and for three years, the applicant had a cause of action against the respondent in terms of which he could have compelled it to perform its obligations in terms of the fixed term contract, alternatively, he could have been awarded appropriate damages. It was therefore incorrect for the applicant to contend that specific performance only arose well after the termination of the fixed term contract.

18.3 Reliance on the Judgment of Zondo J (as he then was) in *Hendor* was misplaced, as that case dealt with matters located squarely in the fairness regime under the LRA, reliance upon which the applicant had specifically disavowed. In this case, there was no restoration of a contract as in *Hendor*, and the entire legal matrix within which that matter is located was labour related and could not be applied in this case.

18.4 To the extent that the applicant's claim for salary arose on a monthly basis, a substantial part of the claim would have in any event have prescribed.

[3]In reference to *National Union of Metalworkers of SA on behalf of Fohlisa & others v Hendor Mining Supplies (A Division of Marschalk Beleggings (Pty) Ltd* [2017] 6 BLLR 539 (CC) (*Hendor*) at paras 177 - 178

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[19] In his supplementary heads of argument, the applicant's submissions were *inter alia* that;

19.1 His claim for specific performance, even if it is found that reliance on *Hendor* was misplaced, had not prescribed.

19.2 Since the unlawful termination of the contract took place on 30 September 2010, which constituted a repudiation thereof, the general rule was that where one party had repudiated, the injured party had a right to elect to accept the repudiation and sue for damages, or to ignore the repudiation and hold the other party to contract and sue for specific performance.

19.3 Even if the respondent was not contractually obliged to provide him with work during the period of the contract, it was contractually obliged to remunerate him during the period of the contract, which in this case represents arrear salaries.

19.4 An employee was entitled to claim specific performance in the form of an order to compel the employer to receive him/her into its employ and comply with its obligations in terms of the contract, or he/she can simply claim remuneration that would have been earned for the period that he/she would have been employed.

19.5 In the light of the history of litigation, he was compelled to wait for the dispute between the parties to be finalised and then claim arrear salaries. Since he was prevented from rendering his services, and further since his tender was not accepted prior to the expiry of the contract, he was entitled to claim arrears salaries that would have been payable to him for the remaining period of the fixed term contract

<u>The legal framework and evaluation:</u>

[20] In *Lancelot Stellenbosch Mountain Retreat (Pty) Ltd v Gore N.O. and Others*[4], it was held that the onus was upon the person asserting prescription, to allege

[4] (108/2014) [2015] ZASCA 37 (25 March 2015)

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and prove the date from which prescription commenced to run. In this regard, the Court held that;

> '…As I have pointed out above, the first question is whether it was established that the debt on which the liquidators' *locus standi* was based, had prescribed. It is a determination that must precede the question whether or not the running of the prescription had been interrupted. Depending on the outcome of the enquiry on the first question, the determination of the latter question may or may not arise at all. This is so because when a debtor raises the defence of prescription he bears the full evidentiary burden to prove it. And that burden shifts to the creditor only if the debtor has established a *prima facie* case. In that event, a creditor bears the onus to allege and prove the interruption of prescription through either an express or tacit acknowledgement of liability by the debtor, in terms of s 14 of the Prescription Act.[5]

[21] Insofar as the provisions of section 12 of the Prescription Act[6] are concerned, it is accepted that the phrase *"debt*" is not defined in that Act. The term however has been given its ordinary meaning, to mean a debt owing and already payable or immediately claimable or exigible at the election of the creditor[7].

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[5] At para 10; See also *Makate v Vodacom (Pty) Ltd* [2016] ZACC 13; 2016 (6) BCLR 709 (CC); 2016 (4) SA 121 (CC) at para 185; *Macleod v Kweyiya* (365/12) [2013] ZASCA 28; 2013 (6) SA 1 (SCA) (27 March 2013) at para 10; *Kelbrick and Others v Nelson Attorneys and Another* (307/2017) [2018] ZASCA 55 (16 April 2018), it was held that at para 9, where it was held that;

> " …It is trite that the respondent, as the debtor who invoked the special defence of prescription, bore the onus of establishing 'both the date of the inception and the date of the completion of the period of prescription'. See Gericke v Sacks 1978 (1) SA 821 (A) at 6 827H-828A; Van Staden v Fourie 1989 (3) SA 200 (A) at 216B; Santam Ltd v Ethwar 1999 (2) SA 244 (SCA) at 256G."

[6] **12. When prescription begins to run.—**

(1) Subject to the provisions of subsections (2) and (3), prescription shall commence to run as soon as the debt is due.

(2) If the debtor wilfully prevents the creditor from coming to know of the existence of the debt, prescription shall not commence to run until the creditor becomes aware of the existence of the debt.

(3) A debt shall not be deemed to be due until the creditor has knowledge of the identity of the debtor and of the facts from which the debt arises: Provided that a creditor shall be deemed to have such knowledge if he could have acquired it by exercising reasonable care.

[7] *Delloitte Haskins & Sells Consultants (Pty) Ltd v Bowthorpe Hellerman Deutsche (Pty) Ltd* 1991 (1) SA) 525 (A) at 532H

[22] In *Makate*, the meaning that the Constitutional Court unanimously attributed to the word 'debt' as contemplated in sections 10, 11 and 12 of the Prescription Act is the meaning ascribed to it in the *Shorter Oxford English Dictionary*, namely:

> '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.'[8]

[23] In *Makate*, Wallis AJ, in the second of the two judgments stated the following:

> 'The correlative of a debt in this sense is a right of action vested in the creditor in which the payment of money, or the delivery of goods, or the rendering of services is claimed. And, when payment, delivery or the rendering of services extinguishes the debt, the right of action is likewise extinguished. That is why s12(1) of the Prescription Act provides that prescription will commence to run once the debt is due. If the debt is not due then prescription cannot run. Debts become due when they are immediately claimable and recoverable.'[9]

[24] Under the provisions of section 12 (1) of the Prescription Act, prescription begins to run as soon as the debt is due. These provisions were interpreted in *Truter & another v Deysel*[10] as follows;

> 'For the purposes of the Act, the term 'debt due' means a debt, including a delictual debt, which is owing and payable. A debt is due in this sense when the creditor acquires a complete cause of action for the recovery of the debt, that is, when the entire set of facts which the creditor must prove in order to succeed with his or her claim against the debtor is in place or, in other words, when everything has happened which would entitle the creditor to institute action and to pursue his or her claim'. (Footnote omitted.)

[25] In *Duet and Magnum Financial Services CC (In Liquidation) v Koster ,* Nugent JA held that;

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[8] *Makate v Vodacom (Pty) Ltd* [2016] at paras 85-86, 93 and 187
[9] At para 188
[10] 2006 (4) SA 168 (SCA) at para 15

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> '…Prescription is about rights that have come into existence but have ceased to exist by the passage of time. If a right has not come into existence then there is nothing that is capable of expiring. That is why prescription is raised in a plea. If no existing right has been alleged in the particulars of claim then the particulars of claim are excipiable and will not attract a plea. It is only once facts have been alleged that establish the existence of a right that the question whether that right has expired is capable of arising'[11].

[26] In this case, a determination needs to be made as to the nature of the claim advanced by the applicant. He primarily seeks damages in the form of arrear salary consequent upon the termination of his fixed term contract of service, and his cause of action is founded in that contract.

[27] To the extent that that debts in terms of the 1969 Prescription Act become due when they are immediately claimable and recoverable, in the sense that there has to be a debt in respect of which the debtor is under an obligation to perform immediately[12], the principal question in the determination of the dispute is when did the cause of action arise in the light of the history of litigation between the parties.

[28] There are certain similarities between the facts of this case and those in *Hendor* which the applicant relied upon. In *Hendor*, the Constitutional Court handed down two Judgments on whether the prescription period in respect of unpaid remuneration owing in terms of a Labour Court reinstatement order was three or 30 years. In the first Judgment (Madlanga J with Froneman J, Khampepe J and Mbha AJ concurring), it was found that the there was no distinction between the period before the reinstatement order and the period thereafter until the employees were in fact reinstated. It found that the claim for arrear wages arose from the reinstatement order and constituted a judgment debt. The claim therefore prescribed after 30 years.

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[11] [2010] ZASCA 34; 2010 (4) SA 499 (SCA) ; [2010] 4 All SA 154 (SCA) at para 9
[12] See D*eloitte Haskins & Sells Consultants (Pty) Ltd v Bowthorpe Hellerman Deutsch (Pty) Ltd* [1990] ZASCA 136; 1991 (1) SA 525 (A) at 532G-H

[29] In the second Judgment, Zondo J (with Mogoeng CJ, Jafta J and Mhlantla J concurring), the court agreed, *albeit* for different reasons, that the reinstated employees' claim had not prescribed. Central to that Judgment was that the claim for arrear wages for the purposes of the Prescription Act had to be separated into two distinct periods, *i.e.*, the claim before the reinstatement order, which was a judgment debt and in regard to which the 30-year prescriptive period applied, and the claim after the order, which constituted a contractual debt in regard to which the three-year period of prescription applied.

[30] In relying on *Hendor,* the applicant's contentions were that his claim for arrear salaries could not be instituted during the period prior to reinstatement of the fixed term contract of employment which happened on 11 November 2015 when the judgment of the Labour Appeal Court was delivered, and to that end, prescription in respect of his claim for arrear salaries only commenced to run from 11 November 2015.

[31] It was submitted on behalf of the respondent that reliance on *Hendo*r by the applicant was misplaced, as reinstatement in terms of the LRA was not specific performance in terms of the common law contract, and that retrospective back-pay in terms of an award made in the labour milieu was not common law specific performance. It was further argued that since there was no question of restoration of a contract as in *Hendor*, and since the applicant sought specific performance, prescription began to run immediately the contract was repudiated, and thus the cause of action for specific performance occurred on 30 September 2010.

[32] The difficulty with the respondent's contentions is that once it had conceded that the termination of the applicant's fixed term contract was unlawful, it cannot divorce that concession from the overall principle that a contract of employment for a fixed term is enforceable in accordance with its terms, and an employer is liable for damages if it is breached on ordinary principles of the common law[13]. In *Masetlha v President of the Republic of South Africa and*

[13] *Fedlife Assurance Ltd v Wolfaardt* [2001] ZASCA 91; [2002] 2 All SA 295 (A) at para 22 and 24, where it was held that;

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Another[14], the Constitutional Court, (per Moseneke DCJ), held that when a fixed term contract of employment is terminated, the applicant may claim re-instatement or full payment of benefits for the remaining period of the contract.

[33] Whether a claim for specific performance in terms of that contract is sustainable in the light of that contract having expired at the time of the delivery of the Labour Appeal Court judgment is neither here nor there, as specific performance is defined as, *inter alia*, an order to perform a specific act or to pay money in pursuance of a contractual obligation[15].

[34] Of the two Judgments in *Hendor*, the Judgment of Zondo J is more in point in respect of the facts of this case, particularly to the extent that the applicant's claim is based on contract, which is a factor for consideration in the second leg of an enquiry alluded to in that judgment.

[35] The contention on behalf of the respondent that the facts in *Hendor* and the issues to be determined therein fell squarely within the ambit of the fairness jurisdiction of the LRA is clearly correct, but only insofar as the first leg of the enquiry referred to in that judgment is concerned. However, in the light of the conclusions reached in respect of what constituted a contractual debt emanating from a court order that arose in that case, the second leg of the enquiry is clearly on point and applicable to the facts of this case. In any event, a civil claim for damages as provided for in the BCEA has nothing to do with a claim for an unfair dismissal in terms of the LRA[16].

[36] As already indicated, the starting point with the Zondo J's judgment is its emphasis in regard to such claims that the Court ought to make a distinction

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'If an employee, as here, accepts repudiation and cancels, the Labour Court would not order reinstatement or re-employment (see s 193 (2)). That would leave compensation under s 194. S 194(1) allows punitive compensation only and s 194 (2) is limited to a year's remuneration. Having deliberately set those restrictions, it seems difficult, if not impossible, to infer that the legislation intended (notwithstanding the apparently limitless scope of s 158 (1)(a)(vi) and s 193 (3)) that the 1995 Act itself should nevertheless provide the employee with the full balance of the common law damages as well. Absent such intention, s 195 must surely contemplate that for such balance (recovery of which it, in terms, allows) an employee is free to sue in the civil courts. No doubt s 77 (3) of the Basic Conditions of Employment Act 75 of 1997 subsequently conferred concurrent jurisdiction on the Labour Court but that is not what is in issue in the present case.'

[14] [2007] ZACC 20; 2008 (1) SA 566 (CC); 2008 (1) BCLR 1 at paras 88 and 91

[15] Christie: *The Law of Contract* 4 ed (Butterworths, Durban 2001) at 606

[16] [2016] ZALAC 35; [2016] 11 BLLR 1135 (LAC); (2016) 37 ILJ 2581 (LAC) at para 36

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between the nature of the claims made between a pre-judgment period and a post-judgment period[17]. The claim in respect of the post-judgment period is a contractual claim in respect of a contractual debt, and not a judgment debt, which is a new dispute or cause of action[18].

[37] In this case, and in applying the approach followed by Zondo J, the applicant, as correctly pointed out by the respondent, has disavowed any reliance on the provisions of the LRA and his claim is a contractual one, emanating from the Judgment of the Labour Appeal Court, which effectively revived the arbitration award in respect of the fixed term contract. The effect of that revival however in the light of the contract having expired at the time of the delivery of the judgment of the Labour Appeal Court could only have been up to 31 January 2015 and not beyond that date.

[38] The launching or service of an application for review in this case only had the effect of suspending the operation of the arbitration award order sought to be reviewed. It did not in any way have the effect of amending the terms of that award[19]. Accordingly, the applicant's fixed term contract of employment was deemed to have been in operation (although suspended) for the whole time since the arbitration award of 31 August 2011 until set aside by the Van Niekerk J's order. The implications thereof are that but for the review application and the expiry of the fixed term contract, the respondent would have been contractually liable for its obligations under that contract, in so far as the applicant had tendered his services on 12 September 2010. Thus, when the Labour Appeal Court overturned the judgment of Van Niekerk J on 11 November 2015, it is accepted that the fixed term contract could only have been restored up to 31 January 2015.

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[17] At para 78
[18] At paras 81 and 155
[19] At para 132. See also at [167], where Zondo J stated that;

> 'What did Goldstone JA's statement in this passage that "an employer who appeals from [an order of reinstatement] knowingly runs the risk of any prejudice which may be the consequence of delaying the implementation of the order" relate to? It related to the prejudice that the employer's operations may suffer as a result of the fact that the employer may have to reinstate workers after a long time since the dismissal. It also relates to the fact that, if, ultimately, the employer has to reinstate the workers, it would be contractually liable for the remuneration that the workers would have earned had the employer complied with the reinstatement order and not pursued appeals.'

[39] In summary, and in line with the principles enunciated in *Coca Cola Sabco (Pty) Limited v Van Wyk,* which Zondo J in *Hendor* appears to have endorsed, the effect of a reinstatement order as upheld by the Labour Appeal Court was to revive the arbitration award and thus the contract of employment. Flowing from such an order, the rights and obligations of the parties would again be governed by the contract of employment. Thus, the applicant would have a contractual claim, which is a totally different cause of action against the respondent[20], which means a debt in respect of which the debtor is under an obligation to perform immediately[21].

[40] It follows from the above conclusions that the applicant's claim could not have arisen from the date of the dismissal being 30 September 2010 for the purposes of a debt under Chapter III of the Prescription Act as contended for by the respondent. Any debt could not have been due and claimable pending the review and appeal proceedings, as during that period, the fixed term contract as restored by the arbitration award was in suspension.

[41] Furthermore, it is difficult to appreciate how in the light of the facts of this case it could have been expected of the applicant to have referred an unfair dismissal dispute and a section 77 of the Basic Conditions of Employment Act claim at the same time as suggested by the respondent. This is so in that pending the appeal proceedings, there was no basis for the applicant to have either accepted the repudiation or cancelled the contract as it was suspended. Furthermore, in line with *Truter & another v Deysel* and *Duet and Magnum Financial Services CC (In Liquidation) v Koster,* the applicant prior to the Labour Appeal Court judgment and the restoration of the fixed term contract, could not have been said to have acquired a complete cause of action for the recovery of the debt, as not everything had happened which would have entitled him to institute action and to pursue his claim. In the absence of the

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[20] (2015) 36 ILJ 2013 (LAC) at paragraphs 16, 22, 24 and 30

[21] Reference was also made to *Truter and Another v Deysel* 2006 (4) SA 168 (SCA) at para 15, where it was held that;

> "…For the purposes of the Act, the term '*debt due'* means a debt, including a delictual debt, which is owing and payable. A debt is due in this sense when the creditor acquires a complete cause of action for the recovery of the debt, that is, when the entire set of facts which the creditor must prove in order to succeed with his or her claim against the debtor is in place or, in other words, when everything has happened which would entitle the creditor to institute action and to pursue his or her claim"

restored fixed term contract, any rights to claim a debt had not come into existence, and therefore, there was nothing that was capable of expiring. The same principles are equally applicable insofar as it was argued on behalf of the respondent that there was no requirement for a cancellation before damages could be claimed[22]. Any claim in that regard would still have been without any foundation pending the finalisation of review and appeal proceedings. It therefore follows that the provisions of section 14 and 15 of the Prescription Act had no role in the facts of this case.

[42] In the end, the respondent has not discharged the onus placed on it to prove that prescription in this case commenced to run prior to any time before the Labour Appeal Court's judgment. Prior to that judgment, there was no full cause of action for prescription to could have ran, and to the extent that the Prescription Act was applicable to the applicant's claims, prescription only started running from 11 November 2015, which is when the new cause of action arose, and not from 30 September 2010. These conclusions resonates with Froneman J's statement in *Myathaza v Johannesburg Metropolitan Bus Services (SOC) Limited t/a Metrobus and Others*[23] to the effect that;

> 'The manifest injustice of depriving the applicant of the arbitration award in his favour by first avoiding its implementation by way of instituting review proceedings and then crying prescription on the back of the time wasted by the review can be met by application of the principle that prescription should not run until court proceedings are finalised…'

Relief:

[43] In the light of a conclusion being reached that the applicant's claim in respect of arrear salary was contractual in nature, and only commenced to run from the date of the judgment of the Labour Appeal Court, it is also accepted in line with the exceptions pointed out by Zondo J in *Hendor* that an employer cannot be liable for payment of remuneration to an employee for a period when that

[22] In reference to *HMBMP Properties (Pty) Ltd v King* 1981 (1) SA 906 (n) at 912G-I
[23] [2016] ZACC 49; (2017) 38 ILJ 527 (CC); [2017] 3 BLLR 213 (CC); 2017 (4) BCLR 473 (CC); 2018 (1) SA 38 (CC) at para 67.

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employee would no longer have been in its employment for any reason including *inter alia*, death or taking of retirement.

[44] In this case, it is accepted that the applicant had tendered his services, which tender was rejected on 12 September 2010 as the respondent sought a review of that arbitration award. The respondent's review application was successful with the judgment of Van Niekerk J on 31 March 2014. Effectively, the arbitration award was in operation from 31 August 2011 – 31 March 2014. When the Labour Appeal Court delivered its judgment on 11 November 2015, the arbitration award was revived in full, but only to the extent that or until that the fixed term contract was in place, being 31 January 2015. It follows that any remuneration due to the applicant could only have been for the exact duration and remainder of the fixed term contract.

[45] A further dispute that arose in these proceedings pertains to the exact nature of the applicant's claim, leading to the respondent to seek an applications for a rejoinder and condonation. This according to the respondent was necessitated by the applicant having contended in his heads of argument that his defence to the special plea of prescription was purportedly that his claim for salaries arose on a monthly basis on the date that each salary payment fell due. In response to the respondent's contentions, it was submitted on behalf of the applicant that the defence was merely based on the provisions of the fixed term contract.

[46] Clause 2 of the fixed term contract makes provision for the payment of an annual salary per annum, and it is not clear from that clause as to what 'monthly payments' the applicant could possibly have referred to as there is no such provision in that clause. The issue of monthly payments came about in the stated case. Furthermore, in regards to the relief he seeks, nowhere is it mentioned that his claim for salaries arose on a monthly basis, and only a total amount as calculated per his paragraph 32 of his statement of claim was claimed. In my view, the applications for a rejoinder and condonation were unnecessary, particularly since it was conceded that these applications did not change the facts, to the extent that it was found that prescription did not commence with the breach on 30 September 2010.

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[47] It therefore follows that in line with the common cause facts pertaining to the applicant's claim as restated in the joint stated case, he is entitled to a globular payment of salaries owed to him in terms of his fixed term contract of employment from 1 October 2010 to 31 January 2015.

[48] In regards to the claim in the amount of R87 529.53 which the applicant contends was tendered by the respondent flowing from the Labour Appeal Court judgment, these related to a shortfall in the light of applicable Rand/British Pound Sterling exchange rate as at 11 January 2016. For reasons that appear unclear, the respondent despite admitting liability for payment of that amount together with *mora* interest thereon has to date, failed to make such payment. In the absence of any reason as to why such payments were not made, there is no reason why this Court in the light of the claim having been pleaded should not make an order in that regards.

Costs:

[49] I have had regard to the circumstances of this case and the issues raised. The special plea of prescription cannot by any stretch of imagination be considered to have been ill-conceived in the light of the peculiar circumstances of this case. In regards to the further application lodged prior to the hearing of this matter in respect of the outstanding amounts flowing from the respondent's admission of liability, it is my view that such an application was indeed superfluous, as that claim had already been pleaded in the original statement of claim. To this end, it is my view that the requirements of law and fairness dictate that a costs order should not be made.

[50] The following order is therefore deemed to be appropriate;

Order:

1. The special plea of prescription as raised by the Respondent is dismissed.

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2. The Respondent is ordered to pay to the Applicant, an amount of R87 529.53, together with interest thereon at the rate of 9.75% *per annum* calculated from 11 January 2016 to the date of payment.

3. The Respondent is ordered to pay to the Applicant, an amount of £257 550.42 for damages suffered in respect of salaries for the period 1 October 2010 until 31 January 2015.

4. The amount mentioned in (3) above for the purposes of conversion from Rand/British Pound Sterling shall be at the exchange rate as applicable at 31 January 2015, together with interest rate as applicable as at that date, and from the date on which payment fell due until the date of final payment.

5. There is no order as to costs.

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E. Tlhotlhalemaje

Judge of the Labour Court of South Africa

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Appearances:

For the Applicant:	R Gundlingh, instructed by Bester & Rhoodie Attorneys
For the Respondent:	A Snider, instructed by Cliffe Dekker Hofmeyr INC

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