CONTEMPORARY LABOUR LAW
your monthly online journal & library
Volume 25 No. 6 January 2016

Prescription of debt between employers and employees

Current law and the legal effect of new s145(9) of the Labour Relations Act

by A.A. Landman

Courts continue to emphasise the vital role time limits play in bringing certainty and stability to social and legal affairs, and maintaining the quality of adjudication. See *Road Accident Fund and Another v Mdeyide* 2011 (2) SA 26 (CC) at para 8 where the Constitutional Court remarked that without prescription periods, legal disputes would have the potential to be drawn out for indefinite periods of time bringing about prolonged uncertainty to the parties to the dispute. The quality of adjudication by courts is likely to suffer as time passes, because evidence may have been lost, witnesses may no longer be available to testify, or their recollection of events may have faded. See also *Mohlomi v Minister of Defence* 1997 (1) SA 124 (CC) at para 11 and *Engelbrecht v Road Accident Fund and Another* 2007 (6) SA 96 (CC) at para 29.

Two recent decisions of the Labour Appeal Court (LAC) have dealt with the issue of prescription in the context of the enforcement of arbitration awards. In *Hendor Mining Supplies (a Division of Marschalk Beleggings (Pty) Ltd) v National Union of Metalworkers of South Africa and Others* (Unreported JA 55/2014 26/11/ 2015) The Labour Appeal Court clarified, for the purposes of prescription, the nature of debts (wages) owed to employees after an order of reinstatement. The decision in *Sizwe Myathaza v Johannesburg Metropolitan Bus Service (Soc) Limited t/a Metrobus* (JA 122/14); *Daniel Mazibuko v Concor Plant* (JA 39/14) and *Cellucity (Pty) Ltd v CWU obo Peters* (CA 3/14) [2015] ZALAC 45 (6 November 2015) the LAC dealt with important aspects of the prescription of debts created by arbitration awards made in terms of the Labour Relations Act 66 of 1995 (LRA) before the 2015 amendments to the Act. In the Namibian decision in *Lisse v Minister of Health and Social Services* (SA 75/2011) [2014]

Managing Editor:
P.A.K. le Roux
Hon. Consulting Editor:
A.A. Landman

Published by
Gavin Brown & Associates
INDUSTRIAL RELATIONS

Box 31380 Tokai 7966
Tel: +27 21 788 5560
ISSN-1995-218X
e-mail: cll@workplace.co.za
www.workplace.co.za

NASC 24 (12 December 2014) the Court made it clear that the service of an application for review by a creditor, who is obliged to review some act or omission as a step to enforcing a debt, interrupts the running of prescription.

As from 1 January 2015 an application to review and set aside an award made in terms of the LRA will have the effect of interrupting the running of prescription. The above-mentioned decisions as well as the legal effect of the newly introduced section 145(9) of the LRA will be discussed in this contribution.

The prescription of debts (wages) due after an order of reinstatement has been made

In *Hendor Mining Supplies (a Division of Marschalk Beleggings (Pty) Ltd) v National Union of Metalworkers of South Africa and Others* (Unreported JA 55/2014 26/11/2015) the LAC was confronted with a case where the employer had dismissed the employees on 18 August 2003 for participating in an unprotected strike. The Labour Court found that the dismissals were unfair and ordered that the employees be reinstated from 1 January 2007 and report for duty on 23 April 2007. An appeal against this order was dismissed by the LAC. The employer petitioned the Supreme Court of Appeal for leave to appeal. But the petition was refused on 15 September 2009.

On 29 September 2009 the employer reinstated the employees but failed to pay them arrear wages from 1 January 2007 until the date of reinstatement. The employees tried to secure the arrear wages by issuing a writ of execution but the writ was subsequently set aside.

On 19 September 2012 the employees applied to the Labour Court for an order quantifying the arrear wages due to them. In addition, they sought the substitution of the names of deceased respondents with the names of the executors of their respective estates. The employer conceded that the arrear wages due for the period from 1 January 2007 until 23 April 2007 amounted to a judgment debt that had not prescribed. It also conceded that the claims for arrear wages from 19 September 2009 until reinstatement on 29 September 2009 had not prescribed. However, the employer contended that the employees' claim for the payment of arrear wages from 23 April 2007 until 28 September 2009 did not relate to a judgment debt but were claims in contract which accrued weekly under the contract of employment; and that such claims were therefore 'debts due' within the meaning of section 11(d) of the Prescription Act 68 of 1969 (the Prescription Act) and subject to a three-year prescription period.

The Labour Court rejected the employer's reliance on prescription saying, inter alia, that the employer bore –

> *'the risk of additional financial obligations which become fully executable at the date of the order of the highest court that pronounces on it, as a judgment debt rather than a contractual claim'.*

See *National Union of Metal Workers of South Africa obo Fohlisa and others v Hendor Mining Supplies A Division of Marschalk Beleggings (Pty) Ltd* [2014] 2 BLLR 185 (LC) at para 16).

On appeal the LAC confirmed its earlier decision in *Coca Cola Sabco v Van Wyk* [2015] 8 BLLR 774 (LAC) to the effect that the LRA does not cater for prospective relief

beyond the date of reinstatement and that the retrospective operation of a reinstatement order should not be conflated with an employer's contractual duty to pay wages. In its restoration of an employment contract, an order of reinstatement does not constitute an order for the payment of prospective remuneration from the date of the order until the date of its actual implementation. This is so because consequent to the restoration of the employment contract, an employee holds a contractual claim for the payment of any arrear wages which accrued weekly or monthly under the contract. The employer may raise any contractual defences available to it in opposing this claim. The order of reinstatement does not encompass an order quantifying the arrear wages payable for the entire period from the date of the order of reinstatement to date of compliance with that order.

The LAC held that the employees' claims for wages from 23 April 2007 until date of reinstatement on 29 September 2009 were therefore founded on a cause of action distinct from that of unfair dismissal. These wage claims were claims for payment under the terms of the employment contract which had been reinstated by the Labour Court with effect from 1 January 2007.

The Court said that while the reinstatement award creates a debt that is due it does not constitute an order for the payment of arrear wages prospective from the date of the Court order. The Court therefore concluded that the employees' claims for arrear wages from 23 April 2007 until 19 September 2009 (when they instituted their claims for payment of arrear wages) had prescribed and the appeal was upheld.

The LAC resolves conflicting decisions on prescription

Prescription in the context of an arbitration award has given rise to conflicting judgments in the Labour Court. The LAC has now had the opportunity to clarify the law when hearing three appeals, all dealing with the issue of prescription of arbitration awards made under, and in terms of, the LRA. See *Sizwe Myathaza v Johannesburg Metropolitan Bus Service (Soc) Limited t/a Metrobus* (JA 122/14); *Daniel Mazibuko v Concor Plant* (JA 39/14) and *Cellucity (Pty) Ltd v CWU obo Peters* (CA 3/14) [2015] ZALAC 45 (6 November 2015).

In *Myathaza* Van Niekerk J, set aside the award obtained by the employee after concluding that the Prescription Act applies to arbitration awards made in terms of the LRA and that the award made in favour of the employee had prescribed after three years. In *Mazibuko* Banks AJ came to the same conclusion. In *Cellucity* Rabkin-Naicker J dismissed the employer's application for a declarator to the effect that the award made in favour of the employee had prescribed, holding that the Prescription Act was not applicable to arbitration awards made in terms of the LRA.

The LAC noted that all of these matters involved arbitration awards made before 1 January 2015 and were to be decided in terms of the LRA as it stood before the amendment of section 145 by the insertion of subsection (9) into that section; this amendment only applies to arbitration awards made after 1 January 2015.

The issues that arose for determination were the following:

- Does the Prescription Act apply to arbitration awards made in terms of the LRA?
- What period of prescription is applicable to such arbitration awards?
- When is the debt 'due' in respect of an arbitration award made under the LRA?
- Does the issue of a warrant of execution on the strength of a certified award interrupt the running of prescription in respect of the award?
- Does an application to review and set aside an arbitration award interrupt the running of prescription, or does such an application, otherwise, constitute an impediment to the running of prescription as contemplated in section 13(1) of the Prescription Act?
- Does the certification of an award, as contemplated in section 143(3) of the LRA, have an effect on the running of prescription?
- In respect of the *Cellucity* appeal, does the issue of a warrant of execution on the strength of a certified arbitration award have an effect on the running of prescription?

Does the Prescription Act apply to arbitration awards made in terms of the LRA?

The LAC analyzed the decisions of the Labour Court on this issue and then cited, with the approval, the dictum in *Moloi and Others v Road Accident Fund* 2001 (3) SA 546 (SCA) at para 13 that:

> *'Although section 16 of the Prescription Act is not drafted as clearly as it might be it is reasonably plain that what is intended is that the provisions of Chapter III will apply to all debts save where they are ousted by the provisions of an Act of Parliament which is inconsistent and then only to the extent of the inconsistency.'*

It then said that in order to determine the applicability issue, it was necessary to consider whether an arbitration award is a 'debt' as contemplated in section 16 of the Prescription Act and whether the LRA has specified a period within which the arbitration award is to be paid or satisfied. And if so, whether the provisions of the Prescription Act are inconsistent with any of those provisions in the LRA.

The LAC investigated the purpose of prescription and concluded that it is clear that every debt contemplated in section 16 must, in our law, prescribe within a certain period. If the Act of Parliament under which the debt resides does not prescribe that period, then the Prescription Act is applicable and the debt prescribes within the period set by the Prescription Act. Prescription is based on considerations of fairness and equity and it is therefore not correct to argue that prescription is inconsistent with such considerations.

The LAC noted that the term 'debt' is not defined in the Prescription Act, but that the courts have held that the term should be given a broad and general meaning. In *Electricity Supply Commission v Stewarts and Lloyds of SA (Pty) Ltd* 1981 (3) SA 340 (A) at 344F-G a 'debt' was said to mean 'that which is owed or due; anything as money, goods or services which one person is under an obligation to pay or render to another'.

In *Leviton and Son v De Klerk's Trustee* 1914 CPD 685 at 691 'debt' was held to be 'whatever is due – debitum – from any obligation'. In a more recent decision, *Desai NO v Desai* 1996 (1) SA 141 (A) at 146H-147A, it was held that the term 'debt' has a wide and general meaning and includes an obligation to do something or refrain from doing something.

The LAC concluded that:

> *'[41] ... any arbitration award that creates an obligation to pay or render to another, or to do something, or to refrain from doing something, does meet the definitional criteria of a "debt" as contemplated in the Prescription Act.'*

The LAC also thought it would be erroneous, in light of the wide general meaning to be given to the term 'debt', to treat a compensation award differently from a reinstatement award. Both these kinds of award impose obligations on the person or entity against whom the award is made so that, generally, arbitration awards pertaining to unfair dismissals, in which compensation and/or reinstatement, with or without back pay is awarded, constitute 'debts' as contemplated in the Prescription Act.

The LAC considered that even though the LRA stipulates timeframes in relation to arbitration awards, those timeframes are primarily of application to the stage prior to the making of the award.

There is no provision in the LRA which prescribes a time limit within which the arbitration award is to be executed, or within which the 'debt' embodied in, or represented by, the award is to be recovered or enforced. Therefore there is nothing inconsistent between the LRA and the Prescription Act regarding the imposition of a prescriptive period in respect of the execution or enforcement of arbitration awards. In the circumstances Chapter III of the Prescription Act applied to such arbitration awards.

What prescriptive period is applicable to such 'debts'?

The period of prescription is dependent on whether an arbitration award constitutes 'a judgment debt', in which case a 30 year prescription period would be applicable, or a simple 'debt', in which case a three year prescriptive period would apply.

The LAC rejected the submission that an arbitration award constitutes a 'judgment', saying that there are significant differences between judgments (and orders of court) and arbitration awards. Using these terms interchangeably does not make one into the other.

The LRA clearly distinguishes between arbitration awards and court orders made in terms of this Act. Although section 143(1) of the LRA provides that an arbitration award issued by a commissioner is final and binding and may be enforced as if it were an order of court (unless it is an advisory arbitration award) and although if it is for the payment of a sum of money it attracts interest as in a judgment debt, section 143(3) provides that an award may only be enforced as if it were a court order, if the director has certified that it is an award as contemplated in section 143(1).

An arbitration award in terms of the LRA is not subject to an appeal like a judgment or order of the Labour Court: it is subject to review. An order or judgment of the Labour Court is not subject to review. A court order or a judgment also does not require certification before it may be executed.

Unequivocal confirmation that an arbitration award is not the equivalent of an order or judgment of the Labour Court is provided by section 158(1)(c) of the LRA. This section empowers the Labour Court to make 'any arbitration award an order of court'. If they were the same thing, section 158(1)(c) would be totally superfluous.

The Court concluded that to give the term

'judgment debt' in the Prescription Act a meaning which includes arbitration awards made under the LRA, would unduly strain the language of the Prescription Act. An arbitration award under the LRA, however, satisfies the definitional criteria of a mere 'debt' under that Act. A three year prescription period therefore applies.

When is the debt 'due' in respect of an arbitration award made under the LRA?

Section 12 of the Prescription Act stipulates when prescription begins to run and provides, in essence, in section 12(1) that prescription commences to run as soon as the debt is 'due'. The LAC noted the general rule that a debt is due 'when the time arises for the performance by the debtor of the obligation'.

After stating that the inception of prescription in respect of awards depends on the wording of the award, the LAC at para 59, went on to make two general observations.

- The debt embodied in, or represented by the award, is generally due, unless the award provides otherwise, upon the issue or handing down of the award.
- Generally a person or entity in whose favour an award is made may immediately claim satisfaction of the debt embodied in the award, unless the award provides otherwise.

However, the LAC remarked that there was one problem that needed consideration. Section 143(3) of the LRA provides that an arbitration award may only be enforced as if it were an order of the Labour Court if the director of the CCMA has certified that it is an arbitration award as contemplated in that section. This gives rise to question: what effect does certification have on the inception of prescription in respect of the award, or, conversely, does the lack of certification of an award means that the 'debt' embodied in the award, is not due?

The Court answered these question by stating that the certificate is merely required to enforce arbitration awards; compliance with the award is not delayed pending certification. Performance by the debtor of the obligation embodied in the award is not dependent upon, or subject to, the certification process. Certification therefore has nothing to do with whether the debt contained in the award is due or not.

Does the issue of a warrant of execution on the strength of a certified award interrupt the running of prescription in respect of the award?

In terms of section 143 of the LRA a warrant of execution may be issued on the strength of an award for the payment of money (i.e. *ad pecuniam solvendam*). Although this may be a necessary step to obtain satisfaction of the award, it does not interrupt the running of prescription in respect of the award, because it is not a 'process' as envisaged in section 15 of the Prescription Act, which deals with the judicial interruption of prescription.

In order for it to constitute a 'process' as envisaged in this section, it must result in a 'final judgment'. This is because the section provides that in order for the process to effectively interrupt prescription, the creditor must 'successfully prosecute his claim under the process in question to final judgment'.

Does an application to make an arbitration award made in terms of the LRA, an order of court, interrupt prescription?

An application to make an arbitration award an order of court could be construed as a 'process whereby the creditor claims payment of the debt'. It is the substance rather

than the form of the application that matters. By bringing such an application, the creditor is in effect asking the Court to order the debtor to pay the debt represented by the award. The LAC said that the application to make an award a court order will interrupt prescription when it is served on the debtor. But for it to actually and effectively interrupt prescription, the creditor will have to prosecute his claim under that process to final judgment.

The LAC took cognizance of the fact that where a review is pending, the Labour Court is not likely to make the award an order of court. But the LAC said that there is nothing preventing a debtor, at any time after the issue of the arbitration award, and before its prescription, to bring an application to make such an award an order of court. The review application is not a bar to the bringing of an application to make the award an order of court. In addition, it is also important to note that it is not the granting of the order that will trigger the deemed interruption of prescription, but the mere service of the application for such an order, although the final granting of the order is necessary for the interruption to be successful in the end.

The court also correctly pointed out that section 13(1) of the Prescription Act is not applicable to debts created by an award. This section deals with delayed prescription, inter alia, where the debt is the object of a dispute referred to arbitration.

Does an application to review an arbitration award made and in terms of the LRA before 1 January 2015 interrupt the prescription of the arbitration award?

The LAC noted that section 15(1) of the Prescription Act provides that the running of prescription shall, subject to the provisions of section 15(2),

> *'be interrupted by the service on the debtor of any process whereby the creditor claims payment of the debt'.*

It is important to note that for the prescription to actually be interrupted, the creditor must 'successfully prosecute his claim under the process in question to final judgment'. If the creditor does not do so, and the debtor does not acknowledge liability, prescription is not be deemed to have been interrupted.

It is further important to note what the LAC said in regard to section 15(1) of the Prescription Act. It said that this section is unambiguous and it is plain that an application to review and to set aside an award is not a 'process whereby the creditor claims payment of the debt'. On the contrary, it is a process whereby the debtor seeks to set aside the debt. Such a review, therefore, does not interrupt prescription. In any event, said the Court, it has long been recognised in our law that a creditor cannot 'by his conduct postpone the commencement of prescription.' Thus before 1 January 2015 a creditor could not by his own conduct in bringing a review application, interrupt or postpone the running of prescription in respect of the award.

The final outcome

After setting out the basic principles the LAC turned its attention to each of the appeals.

In the *Sizwe Myathaza* appeal the Court was satisfied that the employer's obligation, in terms of the award, was to reinstate the employee on the terms stated by the Court, including paying the back pay. The back pay was not a 'judgment debt', but merely a 'debt' in respect of which a three year prescriptive period applies. At the time the em-

ployee brought his application to enforce the debt, the period of prescription had already run, i.e. the debt (embodied in the award) had already been extinguished by prescription.

In the appeal of *Mazibuko* the commissioner of the CCMA issued an arbitration award on 24 September 2009. The commissioner found that his dismissal was substantively unfair. The commissioner did not order reinstatement but ordered the employer to pay the employee R21 000, this being the equivalent of seven months' salary, as compensation. Payment was to be made within 14 days of receipt of the award.

The employer delivered an application to review the award on 19 November 2009. An application for condonation for the late filing of the review application was brought and opposed. Eventually the date of 10 January 2013 was allocated for hearing. On 10 December 2012 the employer lodged an application to dismiss Mazibuko's application on the ground that the award had prescribed. Mazibuko did not oppose the application, but, instead, on 22 December 2012, delivered an application to make the arbitration award an order of the court.

After a postponement the various applications were heard on 25 January 2013 and judgment was handed down later. The Court a quo held that the arbitration award had prescribed on 8 October 2012 (three years after the debt had become payable on 8 October 2009; being 14 days after the award was delivered). The appeal was unsuccessful.

The appellant employer in the *Cellucity* appeal had dismissed an employee on 3 June 2009 for unauthorised absence from work. A commissioner of the CCMA arbitrated the matter and handed down an award on 9 September 2009 directing the employer to pay the dismissed employee R42 000 as compensation.

On 21 October 2009, the employer brought an application to review the arbitration award alleging that it had prescribed. The Labour Court dismissed the application. In the meantime, on 12 July 2010, the employee had caused a writ of execution to be issued against the employer. The employer then brought another application in the Labour Court in January 2013 for a declaration that the award had become prescribed and for the setting aside of the writ. The Labour Court dismissed the application.

The LAC held that the award was a debt and that a prescriptive period of three years applied. The award had prescribed by 9 September 2012.

An important Nambian decision

It sometimes happens that a commissioner of the CCMA hands down an award in which an employee is found to have been unfairly dismissed but the employee is dissatisfied with the award because he or she believes that the award awards insufficient compensation or fails to order his or her the reinstatement. The aggrieved employee then launches an application to review and correct the award. The legal proceedings may take some time to reach finality. In the meantime prescription runs. If the employer (debtor) raises a defence of prescription, would it be open to the employee to allege that his or her application for review interrupted the running of prescription within the meaning of s 15(1)? Section 15(1) states that prescription will be interrupted by 'the ser-

vice on the debtor of any process whereby the creditor claims payment of the debt'

This aspect was explored by the Namibian Supreme Court in *Lisse v Minister of Health and Social Services* (SA 75/2011) [2014] NASC 24 (12 December 2014). As our Prescription Act and the Namibian Prescription Act are identical, the case is highly persuasive. The appellant, a medical doctor, had been refused permission by the Minister of Health to practice in state hospitals. The appellant had successfully reviewed and set aside his decision. He then issued summons for the damages that he had suffered as a result of the unlawful refusal. The Minister pleaded that the debt had prescribed. The High Court upheld part of the special plea. The appellant noted an appeal to the Supreme Court.

The Court began by noting that the Prescription Act displays a 'discernible looseness of language' and that the word 'debt' could be construed narrowly to refer only to obligations to pay liquidated sums of money. However, the courts have given the word 'debt' a wide meaning to include what is due or owed as a result of a legal obligation and it is clear that it extends beyond 'an obligation to pay a sum of money'. The Court held that a notice of motion in the review proceedings would fall within the meaning of 'process' in s 15 (1), as read with s 15(6) of the Prescription Act, as long as it meets the other requirements of s 15(1).

This brought the Court to the crucial question. Does the service of the notice of motion in the review proceedings constitute 'a process whereby the creditor claims payment of the debt' within the meaning of s 15(1)? After considering *Cape Town Municipality and Another v Allianz Insurance Co Ltd* 1990 (1) SA 311 (C), the Court accepted Howie J's (as he then was) reasoning that the process whereby the creditor claims payment of a debt may be a two-stage process. Howie J said at 334H–J:

> *'1. It is sufficient for the purposes of interrupting prescription if the process to be served is one whereby the proceedings begun thereunder are instituted as a step in the enforcement of a claim for payment of the debt.*
>
> *2. A creditor prosecutes his claim under that process to final, executable judgment, not only when the process and the judgment constitute the beginning and end of the same action, but also when the process initiates an action, judgment in which finally disposes of some elements of the claim, and where the remaining elements are disposed of in supplementary action instituted pursuant to and dependent upon that judgment.'*

After approving this reasoning the Court, which was confronted by a situation where the plaintiff had found it necessary to take administrative action on review in order to claim delictual and constitutional damages, asked itself, at para 31, three questions:

> *' ... firstly, whether the basis of the claim in the administrative review proceedings was the same or substantially the same as the basis of the claim in these proceedings; secondly, whether the administrative review proceedings were a "step in the enforcement of a claim for the payment of a debt", and, thirdly, whether the judicial review proceedings disposed of some elements of the claim in the delictual action.'*

The Court answered all three questions in favour of the appellant and concluded that the launch of the proceedings to review the administrative action had the effect of inter-

rupting the running of prescription as provided for in s 15 of the Prescription Act. Prescription only recommenced to run, in terms of s 15(4) of that Act, once the respondent's appeal had been dismissed and the mandatory order was given effect. Accordingly, appellant's claim had not prescribed on the date that summons for damages was issued.

It is highly likely that this approach will be followed in South Africa but its ambit will be restricted. It will apply to a debt created by an arbitrator acting in terms of the Arbitration Act 42 of 1965. It is unlikely that a creditor, whose debt is created by an award made by a commissioner in terms of the LRA, will need to reply on this decision in view of section 145(9) of the LRA which is discussed below.

The legal effect of the new section 145(9) of the LRA

The Labour Relations Amendment Act 6 of 2014 that came into operation on 1 January 2015, inter alia, amended section 145 by inserting various new subsections. The new dispensation differs from the pre-2015 dispensation. The following subsection are relevant:

> *'(5) Subject to the rules of the Labour Court, a party who brings an application under subsection (1) must apply for a date for the matter to be heard within six months of delivery of the application, and the Labour Court may, on good cause shown, condone a late application for a date for the matter to be heard.*
>
> *(6) Judgment in an application brought under subsection (1) must be handed down as soon as reasonably possible.*
>
> *(7) The institution of review proceedings does not suspend the operation of an arbitration award, unless the applicant furnishes security to the satisfaction of the Court in accordance with subsection (8).*
>
> *(8) Unless the Labour Court directs otherwise, the security furnished as contemplated in subsection (7) must—*
>
> *(a) in the case of an order of reinstatement or re-employment, be equivalent to 24 months' remuneration; or*
>
> *(b) in the case of an order of compensation, be equivalent to the amount of compensation awarded.*
>
> *(9) An application to set aside an arbitration award in terms of this section interrupts the running of prescription in terms of the Prescription Act, 1969 (Act No. 68 of 1969), in respect of that award.*
>
> *(10) Subsections (5) to (8) apply to an application brought after the date of commencement of the Labour Relations Amendment Act, 2014 and subsection (9) applies to an arbitration award issued after such commencement date.'*

This part explores the effect of these subsections in so far as they regulate or relate to the issue of prescription. The legislature has taken the view that employees (creditors) ought to be able to enforce awards made in their favour even if the employer (debtor) challenges the award by means of a review in the Labour Court. In tandem with this, the legislature sought to protect such employees against the prescription of an award.

As was the case prior to the amendment any party to a dispute who alleges a defect in any arbitration proceedings under the auspices of the CCCMA may apply to the Labour Court for an order setting aside the arbitration award. See section 145(1).

The legal effect of an application to enforce an award

An employee may seek, as before, to enforce an award even while an application to review the award is pending. As explained in the *Sizwe Myathaza* judgment, service of the process will interrupt the running of prescription provided the creditor prosecutes his or her claim under that process to final judgment. But regardless whether the creditor does so, prescription is interrupted. Exactly what is meant by this will be explored later.

The legal effect of an application to stay an award

A debtor who has brought an application to review an award and who is faced with, or believes that he or she may be faced with an action to enforce the award, may apply to the Labour Court to stay the enforcement of the award pending its decision on a review application. Section 145(3). The stay itself has no effect on prescription as the institution of a review interrupts prescription.

The legal effect of instituting review proceedings

The launch of review proceedings does not suspend the operation of an arbitration award. Section 145(7). However, the operation of the award is suspended if the applicant (the debtor) furnishes security to the satisfaction of the Court. The amount of security which must be furnished in the case of an order of reinstatement or re-employment, must be equivalent to 24 months' remuneration.

In the case of an order of compensation, the amount of security must be equivalent to the amount of compensation awarded. However, the Labour Court and the Court may direct otherwise; meaning that it may order security to be fixed in a lesser amount or even waive the provision of security.

But whether the debtor provides security or not it has no bearing on the running of prescription. This is because section 145(9) provides that:

> *'An application to set aside an arbitration award in terms of section 145 interrupts the running of prescription in terms of the Prescription Act 68 of 1969 in respect of that award.'*

Section 145(9) is a stark provision compared to section 15 of the Prescription Act. In order to explore the meaning and operation of section 145(9) it would be useful to detail how the judicial interruption of prescription (section 15(1) of the Prescription Act) operates. The judicial interruption of prescription requires:

- There to be a process whereby the creditor claims payment of the debt. ("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). Section 15(6) of the Prescription Act.
- The process must be served on the debtor (service is governed by the rules of court).
- The running of prescription is interrupted, but only if the creditor successfully prosecutes his claim under the process in question to final judgment.
- If the creditor does not prosecute his claim to final judgment, prescription does not resume but commences to run afresh (starts again) 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. See section 15(3) of the Prescription Act.

- If the creditor successfully prosecutes his claim under the process in question to final judgment and the interruption does not lapse, prescription commences to run afresh on the day on which the judgment of the court becomes executable. Section 15 (4) of the Prescription Act.

If any person is joined as a defendant on his own application, the process whereby the creditor claims payment of the debt is deemed to have been served on such person on the date of joinder. Section 15(5) of the Prescription Act.

The first point to notice about section 145(9) is that unlike the Prescription Act, which provides for the judicial interruption of the running of prescription if the creditor acts to enforce the debt, section 145 intends the running of prescription to be interrupted even where the debtor institutes review proceedings. It may also apply where the creditor initiates proceedings to review and set aside an award. It is considered that an application to vary an award will be regarded as an application to set aside an award because, if it is successful, it will have the effect of setting aside a portion of the award.

Secondly the subsection merely refers to the award and makes no mention of "debt" but it is clear that the debt established by the award is intended.

Thirdly the subsection merely states that an application to set aside the award interrupts prescription. This is likely to be interpreted to mean that service of the application on the debtor/creditor will be the act that interrupts the running of prescription. It is the actual service of the process and not merely the issuing thereof that serves to interrupt the running of prescription. See *Arendsnes Sweefspoor CC v Botha* 2013 (5) SA 399 (SCA) at para 10.

Fourthly while section 15 of the Prescription Act makes it clear what is meant by interruption, subsection (9) does not do so save, for a reference to the Prescription Act. The result is that the courts are likely to give the verb 'interrupt' the same meaning as in section 15 of the Prescription Act.

Fifthly the subsection is silent on when prescription will recommence but it seems clear that the provisions of the Prescription Act will govern this aspect.

Lastly, the subsection does not apply to awards made in terms of the Arbitration Act 42 of 1965.

A.A. Landman