

DOES THE RIGHT TO REFER AN UNFAIR DISMISSAL PRESCRIBE?

In terms of 191 of the Labour Relations Act (LRA), a dispute regarding an unfair dismissal must be referred to a bargaining council or the CCMA:

- For conciliation, within 30 days of the date of dismissal
- For arbitration or adjudication at Labour Court, within 90 days after the matter remained unresolved.

Food and Allied Workers' Union obo Gaoshubelwe v Pieman's Pantry (Pty) Limited [2018] ZACC 7 begged the question whether such a right prescribes and, effectively, does the Prescription Act 68 of 1969 apply to litigation under the LRA.

The Food and Allied Workers Union (FAWU) referred an unfair dismissal dispute to the CCMA on behalf of its members on 7 August 2001. On 15 March 2002, the CCMA ruled that it did not have jurisdiction and the parties were directed to the Labour Court (LC). FAWU launched a review application which was dismissed by the LC on 9 December 2003. FAWU then filed an unfair dismissal claim at the LC in March 2005.

The Respondent pleaded that the claim had prescribed and same was upheld by the LC at trial, in May 2014. FAWU then decided to turn to the Labour Appeal Court (LAC), which rejected FAWU's contention that the referral of the dispute to the CCMA interrupts prescription. The LAC concluded that FAWU's claim had indeed prescribed as prescription began running from the date of dismissal.

On 20 March 2018, the Constitutional Court considered two primary issues:

- Whether the Prescription Act applies to litigation under the LRA
- Whether the unfair dismissal dispute referred by FAWU had prescribed.

In the first judgment, the court holistically assessed the LRA and the Prescription Act and found the Prescription Act to be inconsistent with section 191 of the LRA in that the two Acts make reference to two different time periods in which to institute litigation.

The Court held that there would be no need to apply the Prescription Act where LRA time frames had been complied with, and neither would they apply where condonation had been refused by the CCMA, as it would signal the end of the matter.

The Court stated that the provision for condonation stipulated in the LRA is an alien concept to the Prescription Act as the delay in question may extend beyond the three-year prescription period contemplated. The Court further stated that if the Prescription Act were to apply to litigation under the LRA, it would limit the CCMA's and LC's power to permit late referral of disputes, thus depriving employees of their right to refer disputes to these fora. In light of the inconsistency between the two statutes, the Court concluded that the Prescription Act does not apply to litigation under section 191 of the LRA.

In a separate judgment concurring with the first judgment, the Court pointed out that the dispute resolution system created by the LRA is a self-standing system, adding that applying the Prescription Act to

unfair dismissal disputes under the LRA would enable employers to use both the LRA and the Prescription Act to avoid liability for unfair dismissal claims, whereas, if the LRA is interpreted so as to exclude the Prescription Act, both workers and employers would be confined to the LRA in dealing with unfair dismissal disputes.

The Court held that section 210 of the LRA provides that, when there is a conflict between the LRA and any other Act of Parliament, the provisions of the LRA prevail and for these reasons upheld FAWU's appeal.

In a third judgment, the Court held that, although the debt became due on 1 August 2001, it was interrupted by the referral to conciliation on 7 August 2001 and continued to be interrupted until the review proceedings on 9 December 2003. It was further concluded that when the dispute was referred to the Labour Court on 16 March 2005, it had not prescribed and for these reasons the appeal was upheld

In essence, the Constitutional Court upheld FAWU's claim on the basis that:

- 1) The Prescription Act 68 of 1969 does not apply to claims for unfair dismissal under section 191 of the Labour Relations Act 66 of 1995
- 2) FAWU's referral to the CCMA and other subsequent referrals interrupted the prescription of the claim

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