# ARBITRATION AWARD

**IN THE GENERAL PUBLIC SERVICE SECTORAL BARGAINING COUNCIL**
**HELD AT DURBAN**

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| Panellist/s: | P JAIRAJH |
| Case No.: | GPBC2237/2019 |
| Date of Award: | 16 April 2020 |

**In the ARBITRATION between:**

H M NTULI APPLICANT

and

DEPARTMENT OF CORRECTIONAL SERVICES RESPONDENT

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| **Union/Applicant's representative**: | MR L. NAIDOO |
| Union/Applicant's address: | |
| Telephone: | 082 394 7964 |
| Telefax/e-Mail: | 086 692 4093 |

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| **Respondent's representative**: | MR M.C.L. DLADLA |
| Respondent's address: | |
| Telephone: | 034 972 9340 |
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## ARBITRATION AWARD

### DETAILS OF HEARING AND REPRESENTATION:

[1] The matter was scheduled for arbitration hearing on the 4 March 2020. The applicant was represented by Mr L. Naidoo from PSA and the respondent by Mr M.C.L. Dlamini. The proceedings were conducted in English and recorded electronically.

[2] The parties entered into an agreement that no oral evidence will be tendered, and they will submit written Heads of Arguments. The common cause issues, issue in dispute, relief sought, as well as issue to be decided by the commissioner were recorded in a written agreement.

[3] The parties agreed that the applicant/employee will serve its Heads of Arguments on the Council and respondent on or before 10 March 2020. The respondent/employer will serve its Heads of Argument (answering) on the Council and applicant on or before the 20 March 2020 and the applicant will serve its replying Heads of Arguments on or before the 30 March 2020.

### BACKGROUND TO THE DISPUTE

[4] The applicant is employed by the respondent and lodged an unfair labour practice dispute relating to benefits in respect overtime worked.

### ISSUE TO BE DECIDED

[5] Whether or not the applicant is entitled to overtime payment and if so the appropriate relief.

### APPLICANT'S SUBMISSIONS

The salient aspects of the applicant's submissions are recorded below.

[6] The applicant's dispute relates to the respondent's failure to compensate him for overtime worked for the period referred to as per Annexure "A" attached herein. The amount claimed by the applicant for the said period is R45 180,10.

[7] It is undisputed that the Applicant had worked for the said period and was entitled to payment of overtime.

[8] Significantly the amount stipulated in Annexure "A" has been certified and signed off by the Head of the Correctional Centre Mr M. Sigamoney (HCC Youth Centre) who is in charge of the prison where the applicant works.

[9] The said amounts were verified by the respondent's Human Resource Department and arising from a grievance lodged by the applicant, the respondent committed itself in a response addressed to the applicant dated 2018.07.18 and indicates that all outstanding overtime payments including the applicant's claim will be consolidated and forwarded to Head Office for payment. Annexure "B"

[10] Despite the above commitment on the 2018.07.18, the respondent failed to make any payment to the applicant which is owing, due and payable to the applicant for overtime work performed by the applicant at the respondent’s instance.

**RESPONDENTS SUBMISSIONS**

The salient aspects of the applicant’s submissions are recorded below.

[11] According to applicants' annexure A, applicant’s claim is justifiable by him having worked overtime during the period April 2010 to May 2016. This is not in dispute.

[12] It is important to note that the date of dispute is specified in the referral form as 2018/08/29 and that applicant signed the referral form only on the 26 November 2018.

[13] The amount claimed for June 2015 reached the prescriptive period of 3 years in June 2018. If the referral form was only signed and possibly filed on the 26 November 2018, the claim for overtime in question was already 3 years and 4 months outside the prescriptive time frame.

[14] It is the employer's case that the lapse of a period of almost 3 years and 4 months to date of referral is not an unimportant consideration taking into account the principles which has found fertile soil in our courts as spelt in:

[14.1] Umgeni Water & Others v Moshing (2010) 31 1188 (SCA) at para 5 & 6;
[14.2] Road Accident Fund and Another v Mdeyide 2011 (2) SA 26 (CC) at para 8;
[14.3] Pathescoper (Union) of South Africa Ltd v Mallinick 1927 AD 292;

[14.4] Khumalo and Another v Member of the Executive Council for Education: Kwa-Zulu Natal (2014) 35 IU 613 (CC) at para 42;

[14.5] Aviation Union of SA Another v SA Airways (Pty) and Others (2011) 32 ILI 2861 (CC) at para 76;

[14.6] Autopax Passenger Services (Pty) Ltd v Transnet Bargaining Council and Others (2006) 27 IL] 2574 (LC) at para 14;

[14.7] Karan t/a Beef Feedlot and Another v Randall (2009) 30 IU 2937 (LC) at para 14;

[14.8] BP Southern Africa (Pty) Ltd v National Bargaining Council for the Chemical Industry and Others (2010) 31 IU 1337 (LC) at para 10.

[15] Furthermore, in his work, Extinctive Prescription (Juta: 1996), M Loubser states the following at page 33: -

> "The main object of <u>extinctive prescription</u> is to create legal certainty and finality in the relationship between the parties after the lapse of a period of time, and the emphasis is on the protection of the defendant against a... claim that has existed for such a long time that it becomes unfair to require the defendant to defend himself against it. <u>The emphasis is on the protection of the defendant because the claimant is responsible for enforcing his right timeously and must suffer the consequence of failure in this regard</u>. Essentially extinctive prescription embodies a desire for finality and serves the common good by creating legal certainty in individual cases"

[16] It is the respondent's submission that the applicant has failed to insist on and pursue his right to payment of a monetary claim timely. It is respondent's argument that applicant no longer has the right to payment of the amount claimed for the period from April 2010 to June 2015 because of prescription.

[17] Respondent admits that in terms of their stated case agreement, the only issue in dispute is whether the amount claimed by the applicant in this case is correctly quantified or not.

[18] Ordinarily the issue of prescription now relied upon by respondent in this matter would not have been allowed taking into account what was agreed to as indicated in aforesaid paragraph.

[19] However, the Supreme Court of Appeal in FILTA-Matix (PTY) Ltd v Freudenberg and others (258/96) (1997) ZASCA held at paragraph: “19 To allow a party, without special circumstances, to resile from an agreement deliberately reached at a pre-trial conference would be to negate the object of Rule 37, which is to limit issues and to curtail the scope of litigation”

[20] The test for allowing deviation from the pre-agreed terms is that deviation is only permissible if there are special circumstances compelling that such deviation be granted as stated by the SCA in the FILTA-MATIX case referred to above.

[21] It is the employer's submission that the issue of prescriptive prescription should find application in this matter because it will not be correct that the respondent should be held liable for payment of a monetary "claim" whose time frame has long expired.

[22] In this instance, prescription is the special circumstance forcing that such deviation from the agreed scope of the case in this matter be allowed.

[23] In *Pathescope (Union) of South Africa Ltd v Mallinick*, Stratford AJA said the following: “That a plaintiff may, in certain circumstances, be debarred from obtaining relief to which he would ordinarily be entitled because of unjustifiable delay in seeking it is a doctrine well recognised in English law and adopted in our own Courts”.

It is an application of the maxim: 'vigilantis non dormientibus lex subvenit.' The very nature of the doctrine necessitates its being stated in general terms. I take the following apt extract from the judgement in *Lindsay Petroleum Company v Hurd (L.R. 5 PC 239)* quoted in the court below: "The doctrine of laches in Courts of Equity is not an arbitrary or a technical doctrine. Where it would be practically unjust to give a remedy, either because the party has by his conduct done that which might fairly be regarded as equivalent to a waiver of it or where, by his conduct and neglect he has, though perhaps not waiving that remedy yet put the other party in a position in which it would not be reasonable to place him if the remedy were afterwards to be asserted, in either of these cases lapse of time and delay are most material."

[24] The respondent prays for a finding in in respondent's favour that all the claims submitted by applicant in this case for the period April 2010 until June 2015 has prescribed and that applicant is not entitled to any payment in relation thereto; and

for a reasonable finding with regards to the amount of R1 747.52 claimed by the applicant in respect of the period May 2016.

**APPLICANT'S REPLYING SUBMISSIONS**

The salient aspects of the applicant's replying submissions are recorded below.

[25] The respondent correctly pointed out that one cannot resile from an agreement reached at a pre-trial which basically narrows and limits the issues for the Commissioner to decide. The respondent cannot seek to raise the issue of prescription at this stage when it was not one of the issues in dispute between the parties

[26] Outstanding overtime pay in practice is generally outstanding for years before payment is made. This is because of budgetary constraints placed on the respondent due to there being no specific budget for overtime.

[27] Annexure "B" attached to applicant's Heads of Argument illustrates at paragraph 5 that the grievance states that the applicant "can refer the matter for external remedies if he is not satisfied". The letter is dated 2018.08.31.

[28] A proper reading of the respondent's response to the applicant's grievance illustrates that the documents were consolidated and sent to Head Office for payment.

[29] At all material times the respondent acknowledged that the applicant had worked the overtime claimed for and they were going to make payment. Therefore, there was no dispute between the parties.

[30] The dispute only arose when applicant had received the letter dated 2018-08-31 in which the respondent indicated that the applicant could refer the matter using external remedies if he was not satisfied that he should wait for payment, hence the applicant referred the matter to the GPSSBC.

[31] At the pre-trial concluded with the respondent as well as all documents received by the applicant from the respondent, indicates that the respondent had never denied that overtime was due to the applicant and therefore it was not necessary to raise a dispute as he was going to receive payment.

[32] The respondent cannot raise prescription as the dispute only arose on 2018-08-31 when the employer indicated that if the applicant is not satisfied, he can refer the matter externally.

[33] The respondent's policies required all employees of the respondent to first exhaust internal remedies before invoking external remedies which the applicant had complied with. Had the applicant not raised the matter internally, then the respondent would have raised a jurisdictional point.

[34] In the premises the dispute is not prescribed as the dispute only arose on the 2018-08-31 because prior to this date the respondent committed itself to making payment to the applicant in terms of Annexure "A" which also states that " amounts owing to the Official for double shifts " which was compiled by the respondent and signed by the Head of the Correctional Centre on the 2019-07-27.

[35] Prior to the compilation of the above letter from the Head of the Correctional Centre the applicant would not have officially known of the amounts that was owing to him over the number of years for overtime worked by him.

[36] Save for the respondent raising prescription in its Heads of Argument they do not deny the substantive issues raised by the applicant in his Heads of Argument. In other words, the applicant's version remains unchallenged.

**ANALYSIS OF EVIDENCE AND ARGUMENT**

I have considered all the arguments of the parties as well as the documentary evidence submitted.

[37] The Applicant claims that the Respondent committed an unfair labour practice relating to benefits by failing to pay him overtime payment in respect of overtime worked. The relief that the applicant seeks is to be paid his overtime in the amount of R45 180,10.

[38] This matter was referred for arbitration in terms of section 186(2)(a) of the Labour Relations Act 66 of 1995 ("the LRA").

[39] In terms of section 186(2)(a) of the Labour Relations Act 66 of 1995, Unfair Labour Practice means any unfair act or omission that arises between an employer and an employee involving-

(a) unfair conduct by the employer relating to the promotion, demotion, probation [excluding disputes about dismissal for a reason relating to probation] or training of an employee or relating to the provision of benefits to an employee.

[40] In *Sidumo & another v Rustenburg Platinum Mines Ltd & others (2007) 28 ILJ 2405 (CC)* the court held at par [79] “A commissioner is not given the power to consider afresh what he or she would do, but simply to decide whether what the employer did was fair. In arriving at a decision a commissioner is not required to defer to the decision of the employer. What is required is that he or she must consider all relevant circumstances.”

[41] The onus is on the applicant to show that the employer’s conduct in not paying him the overtime payment was unfair. It is not in dispute that the applicant had worked overtime for the said period.

[42] The respondent does not deny that the applicant has a valid and legitimate claim for overtime worked but contends that his claim has prescribed.

[43] In POPCRU obo Sifuba v Commissioner of the South African Police Services and Others [2009] 12 BLLR 1236 (LC) (5 December 2008) the court held at para [44]: “The Prescription Act does not give the Court discretion. If the requirements for a plea of prescription has been established by the party taking the point then that party is entitled as a matter of right to have that plea upheld. Although this court is a court of equity, in my view considerations of equity do not come into play when all the requirements for a successful plea of prescription are established. Extinctive prescription renders unenforceable a right by the lapse of time.”

[44] The Prescription Act 68 of 1969 provides as follows: -

[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.

(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."

[45] In *Umgeni Water and Others v Mshengu (03/09) [2009] ZASCA 148*, the court held at par [6]: "A debt can only be said to be claimable immediately if a creditor has the right to

institute an action for its recovery. In order to be able to institute an action for the recovery of a debt a creditor must have a complete cause of action in respect of it. The expression 'cause of action' has been held to mean: 'every fact which it would be necessary for the plaintiff to prove, … in order to support his right to judgment of the Court. It does not comprise every piece of evidence which is necessary to prove each fact, but every fact which is necessary to be proved'; or slightly differently stated 'the entire set of facts which give rise to an enforceable claim and includes every fact which is material to be proved to entitle a plaintiff to succeed in his claim. It includes all that a plaintiff must set out in his declaration in order to disclose a cause of action. Such cause of action does not "arise" or "accrue" until the occurrence of the last of such facts and consequently the last of such facts is sometimes loosely spoken of as the cause of action."

[46] It is common cause that the applicant lodged a grievance pertaining to his overtime payments and received an outcome letter dated the 31 August 2018. This letter informed him that the Durban Management Area had consolidated all outstanding overtime payments and had sent it to Head Office for authorisation and payment. It is clear from the letter that the respondent has acknowledged that the applicant is owed overtime payment which they had forwarded for authorisation and payment.

[47] The respondent's correspondence dated the 27 November 2019 indicates the overtime amount per month as follows:

| MONTH | AMOUNT |
|---|---|
| APRIL 2010 | R101,60 |
| MAY 2010 | R914,40 |
| JUNE 2010 | R508,00 |
| JULY 2010 | R218,44 |
| AUGUST 2010 | R218,44 |
| JULY 2012 | R1 271,99 |
| NOVEMBER 2012 | R7 229,12 |

| | |
|---|---|
| DECEMBER 2012 | R10 175,89 |
| FEBRUARY 2015 | R3 276,60 |
| MARCH 2015 | R3 891,47 |
| MAY 2015 | R2 548,47 |
| JULY 2015 | R2 839,72 |
| AUGUST 2015 | R3 446,50 |
| SEPTEMBER 2015 | R1 674,71 |
| EKUSENI JUNE 2014 | R3 005,64 |
| EMPANGENI JUNE 2015 | R2 111,59 |
| MOTHER/SON EVENT MAY 2016 | R1 747.52 |
| TOTAL OWING TO OFFICIAL | R45 180,10 |

[48] In Greta Joanne Smart v Bytes Managed Solutions, a Division of Bytes Technology Group of South Africa (Pty) Ltd, Case No. JS 986/10 (delivered 29 April 2013), Lagrange J found that the applicant was not entitled to claim the shortfall at any time in the future as and when she became aware of it. The court further held at para [35]: "In this instance, Smart conceded that with the information available on her pay slip she could have determined if the hourly rate of pay used for her overtime and standby remuneration was the same as her actual hourly rate of pay. Even if she had not conceded it, arithmetic logic dictates that Smart had the means at her disposal to work these figures out. Consequently, she had the deemed knowledge which is sufficient for the activation of clause 12 (3) of the Prescription Act. Accordingly, even though I accept that Smart probably did not actually realise she had been short paid until March 2010, in terms of section 11(d) of the Prescription Act all amounts due three years prior to her demanding payment of the debt when she referred this dispute to court had prescribed."

[49] In Food & Allied Workers Union on behalf of Gaoshubelwe v Pieman's Pantry (Pty) Ltd (2018) 39 ILJ 1213 (CC), the court found that the referral of disputes to the

CCMA for conciliation constitutes the service of a process commencing legal proceedings.

The court held at para "[169] Thus, once a debt becomes due, prescription begins to run and provided that prescription is not interrupted by the circumstances set out in sections 13, 14 and 15 of the Prescription Act, the debt shall, in terms of section 10, be extinguished after the lapse of time set out. Once a debt has prescribed, there is no basis upon which a creditor can seek to have non-compliance with the time periods provided for in the Prescription Act condoned. The debt has been extinguished and no after-life or a resuscitation of the debt is possible. Such an outcome is consistent with providing the certainty and predictability that prescription periods are intended to introduce into the law relating to the enforcement of debts. The circumstances under which prescription begins to run, as well as those that may interrupt its running are all intended to provide a balance between fairness and flexibility, on the one hand, and certainty and predictability, on the other."

The court further noted that the flexibility in the LRA is not of the open-ended kind and a failure by a party to comply with time frames requires an application for condonation where good cause must be shown. The court found that condonation, was not for the asking and, in each case, a litigant who is out of time and who seeks condonation must demonstrate facts and circumstances that justify such relief.

[50] It is not in dispute that the applicant specified the date of dispute in his referral as 29 August 2018 and signed the referral form on the 26 November 2018. The applicant's cause of action dates back to April 2015. It is apparent that the applicant's claim for the period April 2010 to September 2015 has prescribed.

[51] Section 11(d) of the Prescription Act provides that the period of prescription in respect of a debt shall be 3 years. Based on extinctive prescription under the Prescription Act and having regard for the aforementioned judgments I find that the respondent is only liable to pay the applicant for the period of May 2016, the amount of R1 747, 52.

**AWARD**

[52] The applicant's claim in respect of the periods before November 2015 has prescribed.

[53] The respondent, Department of Correctional Services, is hereby ordered to pay the applicant remunerative overtime for the period of May 2016 in the amount of R1 747, 52.

[54] Payment is to be effected within (30) days of receipt of this award.

[55] There is no order as to costs.

GPSSBC Commissioner: P. Jairajh

DATED: 16 April 2020