

Employment Law



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SOUTH AFRICA

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Reinstatement - Does arrear remuneration prescribe?

The Labour Appeal Court (LAC) in *Potgieter v Samancor Chrome Limited t/a Tubatse Ferrochrome (JA91/22)* (10 March 2025) was again called upon to consider the question of prescription in the context of employment law, this time in respect of arrear remuneration.

Background

Potgieter was dismissed on 24 October 2006. He then challenged his dismissal before a bargaining council. On 25 June 2008, an arbitration award was issued finding the dismissal procedurally and substantively unfair and granting him 12 months' compensation.

Potgieter filed a review of the award in the Labour Court, challenging it on the basis that he sought retrospective reinstatement and not compensation. The review application was dismissed. This went on appeal and on 12 June 2014, the LAC found that at arbitration, Potgieter should have been retrospectively reinstated (reinstatement order). Samancor appealed the reinstatement order to the Constitutional Court (CC) and on 3 September 2014, the appeal was dismissed. Potgieter then effected the reinstatement order by reporting for duty and he was accepted back into Samancor's employ on 23 July 2015. However, by 30 November 2015, the parties terminated the employment relationship by entering into a mutual separation agreement.

A second round of litigation between the parties then commenced. This is when a dispute arose regarding Potgieter's entitlement to back pay under the reinstatement order. In particular, the parties were in dispute regarding whether Potgieter was entitled to back pay for the entire period from:

- the date of the award (June 2008) until the reinstatement order (June 2014) – a period of eight years; or
- Potgieter's dismissal date (October 2006) until the date of the award was issued (June 2008) – a period of 20 months.

On 23 July 2018, Potgieter instituted a claim for the payment of his outstanding remuneration arising from the reinstatement order. In the Labour Court on 29 May 2020, the parties reached agreement regarding, among other things, the withdrawal of the proceedings and time periods within which the parties were to agree to a stated case regarding the effect of the reinstatement order. This agreement was made an order of court.

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However, when the parties were unable to agree on a stated case, Samancor delivered an application on 10 July 2020 to consider whether the effect of the reinstatement order was that Potgieter was entitled to his full salary for the entire eight-year period, despite having engaged in alternative employment during this period. In a judgment on 16 February 2021, the Labour Court distinguished between: (i) Potgieter's right to a judgment debt for the period between his dismissal and the issuing of the award; and (ii) a contractual claim for payment of Potgieter's remuneration for the period between the date of the award and the reinstatement order. Importantly, the Labour Court found that the second (contractual) claim "... must still be determined and is subject to moderation and adjustment depending on the damages that [Potgieter] is able to prove, and any defences raised by [Samancor]". The Labour Court then allowed Potgieter 90 days to institute such a claim.

On 2 August 2021, Potgieter instituted a claim for arrear remuneration for the period between the date of the award and the reinstatement order. It was in these proceedings that Samancor contended that Potgieter's claim had prescribed. In its judgment, the Labour Court:

- confirmed that monies owing pursuant to a reinstatement order constitute a debt under the Prescription Act 68 of 1969 (Act) and accordingly, such a debt prescribed after three years;
- found that prescription began to run in respect of any claims pertaining to the reinstatement order either on the date of the LAC's judgment (i.e. on 12 June 2014) or when the CC dismissed Samancor's appeal (i.e. on 3 September 2014), and was completed three years after either of these dates;

- found that Potgieter's claim of 23 July 2018 (which was withdrawn by agreement) and his claim of 2 August 2021 were both instituted more than three years after the debt became due and enforceable;
- rejected Potgieter's contention that his claim emanated from the Labour Court's judgment of 16 February 2021, which granted him leave to institute his claim for the arrear remuneration and held that this order by the Labour Court could not be construed as precluding Samancor from raising prescription as a defence; and
- found that Potgieter did not serve any "process" to interrupt prescription and as a result, the debt prescribed in either June 2017 or September 2017.

In the end, the Labour Court found that Samancor was not liable to Potgieter for any further remuneration.



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The Labour Appeal Court

The LAC differed with the Labour Court.

Potgieter argued that a debt can only be claimed once a creditor has acquired the right to institute an action for the recovery of the debt., Based on this, Potgieter argued that his claim partly arose on the date of his actual reinstatement, being 23 July 2015. Potgieter also contended that the running of the period of prescription was interrupted on 20 July 2018, when he instituted an action for recovery of the debt, which claim was ultimately withdrawn by agreement. His alternative argument was that prescription only commenced after the Labour Court's judgment of 16 February 2021, which clearly distinguished between his two separate claims and, therefore, it was only on this date that he came to a full awareness of his contractual claim. Samancor persisted that the claim prescribed three years after the reinstatement order, namely on 13 June 2017.

The LAC emphasised that it was important to determine was the date when the debt fell due. The court reiterated that a reinstatement order merely revives an employment contract, and it is only thereafter that reciprocal obligations arise. In other words, in order for a reinstatement order to take effect, an employee must tender their services, and an employer must accept the tender, place the employee back into their previous position and pay wages to the employee.

Therefore, the LAC held that it followed that any contractual claim arising from a reinstatement order can only accrue once an employee is actually accepted back into their previous position. This is because an employee who is granted retrospective reinstatement is not entitled to any of the contractual benefits of reinstatement, including back pay, without the contract being restored through actual reinstatement.

In other words, the reinstatement order did not entitle Potgieter to contractual claims – instead, it merely granted him the right to restore the contract through a tender and a reciprocal acceptance. The consequence of this, the LAC held, was that Potgieter's claim for arrear remuneration only became due and payable once he was reinstated to his prior position on 23 July 2015 and therefore, the three-year period for him to have instituted his claim would have only lapsed on 24 July 2018.

The LAC then considered whether any of the steps Potgieter had taken to enforce his claim for arrear remuneration interrupted the running of prescription.

In coming to its conclusion on the interruption of prescription, the LAC considered the CC's judgment in *FAWU obo Gaoshubelwe v Pieman's Pantry (Pty) Ltd* (2018) 39 ILJ 1213 (CC). The LAC held that the Act does not require instituted proceedings to culminate in a judgment in the same proceedings. Rather, it is sufficient for a party

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to approach the recovery of a debt in a staggered fashion. Therefore, even though Potgieter's claim that was initiated on 23 July 2018 was ultimately withdrawn, it still constituted "process" interrupting prescription under the Act. The LAC further found that these "aborted" proceedings were "intertwined" with the proceedings that led to the Labour Court's judgment of 16 February 2021, which allowed Potgieter to pursue his contractual claim. Accordingly, it was held that Potgieter's claim had not prescribed.

So, the LAC found that Potgieter had a valid claim against Samancor.

Key takeaways

An arbitration award issued against an employer granting an employee reinstatement does not automatically entitle the employee to any backpay other than what is provided in the award itself. A tender by the employee is required which must be accepted by the employer.

Employers must be aware back pay is than a live claim for three years from the date of actual reinstatement. In other words, once an employee has been accepted back into their prior position, the employee has three years to pursue a claim for payment of back pay falling which the claim prescribes.

Although not dealt with in this leg of the litigation between the parties, employers also ought to have regard to the CC's judgment in *Maroveke v Talane* [2021] 9 BLLR 851 (CC), where it was held that the purpose of a back pay award, in the context of reinstatement, is to offset an employee's financial loss suffered as a result of their unfair dismissal, and to restore the employee to the position that they would have been in, but for their unfair dismissal. As a result, the actual extent of an employee's loss must be calculated in determining the back pay due to them. Where an employee has found alternative employment after their dismissal, this can serve to reduce the back pay amount owing to the employee after reinstatement.

Whilst not an issue in the Potgieter case, we point out, as an aside that it is always important to pay particular attention to the terms of the "full and final settlement" clause in separation agreements.

Imraan Mahomed and Lee Masuku



How inspectors should conduct inspections under the OHSA

The recent Labour Court decision in *Truworths Limited v The Chief Inspector: Occupational Health and Safety, Department of Employment and Labour and Another Case Number: J1597/21* has provided clarification on the authority of labour inspectors and the correct application of the “*reasonably practicable*” standard under the Occupational Health and Safety Act 85 of 1993 (OHSA). The court’s decision considered whether inspectors issuing contravention notices were properly certified, and whether their interpretation of workplace seating requirements under the Facilities Regulations 2004 (Facilities Regulations) was legally sound. The court also clarified what is meant by an appeal in terms of section 35(3) of the OHSA and how a court should approach such an appeal where an aggrieved party challenges the findings of an inspector.

Brief facts of the case

The case arose from inspections *in loco* conducted by certain inspectors of the Department of Employment and Labour at two of Truworths’ retail stores. Following these inspections, contravention notices were issued to Truworths, indicating non-compliance with section 8(b) of the Facilities Regulations. In the notices, the inspectors found that Truworths was in contravention of these regulations because of a lack of seats at the cash desks so that cashiers could sit down while doing their work. The inspectors directed Truworths to provide seats with backrests at the cash desk in one instance and to provide

for cashiers in the other. Truworths appealed these notices to the Chief Inspector, arguing that placing seats behind the cash desks was not a reasonably practicable measure, and could cause a risk if positioned behind the cashier counters, and that seating facilities were available elsewhere at the workplace. The Chief Inspector dismissed both appeals, stating that Truworths had not proven that it was not reasonably practicable to provide such seating at the cashiers’ stations and that the risk assessment did not address the hazard of employees standing for long periods. Consequently, Truworths approached the Labour Court in terms of section 35(3) of the OHSA.

Nature of an appeal in terms of section 35(3) of the OHSA

The court held that such an appeal is an appeal in the “*wide sense*”, meaning the court had the power to reconsider the entire matter *de novo* rather than being restricted to reviewing the Chief Inspector’s decision for correctness. The court relied on legal precedent, distinguishing between different types of appeals – specifically, a narrow appeal, which only assesses whether the original decision was right or wrong based on existing evidence, and a wide appeal, which allows for a full rehearing with the opportunity to present new evidence and arguments. The court concluded that section 35(3) of the OHSA clearly grants it the power to substitute its own decision, confirming that this appeal fell within the wide appeal category.

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The court justified this broad approach by emphasising its role in supervising and monitoring the enforcement powers of the OHSA inspectorate. Given that inspectors have extensive authority to issue directives and impose compliance measures, their decisions must be subject to thorough judicial scrutiny. A key implication of this classification was that Truworths was allowed to introduce a new argument on appeal, namely that the inspectors who issued the contravention notices lacked the required certification under the OHSA.

The Labour Court's approach to certification under section 28 of the OHSA

A central ground of Truworths' appeal concerned whether the inspectors who issued the contravention notices had been properly designated and certificated in terms of sections 28(1) and (2) of the OHSA. The Labour Court emphasised that the respondents had failed to produce the certificates of designation for the inspectors, despite undertaking to do so. The court found that the identity cards provided by the respondents, which indicated their appointment as inspectors under the Basic Conditions of Employment Act 75 of 1997 (BCEA), were not issued under the OHSA and hence were irrelevant. In the absence of these certificates issued in terms of the OHSA and any reasonable explanation for their absence, the court drew the inference that the inspectors were not acting lawfully.

The court firmly held that the requirement of a certificate for inspectors is peremptory and not a mere administrative formality. It reasoned that the certificate serves as conclusive proof of proper designation and establishes the inspector's *locus standi* to exercise the wide-ranging powers granted under sections 29 and 30 of the OHSA. The court highlighted that affected persons have the right under section 28(3) to demand production of this certificate. Without a valid certificate, the court concluded that the inspections conducted by the inspectors were invalid and unauthorised, rendering the subsequent contravention notices equally invalid and of no force and effect. The Labour Court underscored the importance of adhering to statutory requirements, citing the principle that the legislature does not enact superfluous statutory provisions. On this ground alone, the court ruled in favour of Truworths and set aside the contravention notices.



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The Labour Court's approach to what is considered a "reasonably practicable" standard under the OHSA

The Labour Court also considered the concept of "reasonably practicable" as defined in section 1 of the OHSA and its application to section 8 of the Facilities Regulations. In this instance, the court emphasised that determining what is "reasonably practicable" involves a balanced assessment of the interests of both the employer and employee. While the primary focus is on employee health and safety, the employer's operational constraints, costs and resources, and the feasibility of alternative measures, must also be considered. The court held that the central test was whether what has been "feasibly considered", can be said to ensure the health and safety of the employees when regard is had to what has been implemented by the employer. The court found that the inspectors had misconstrued section 8(b) of the Facilities Regulations by dictating precisely where seating had to be provided (behind the cash desks), without properly considering whether this was reasonably practicable for Truworths. The inspectors also failed to take into account that employees had opportunities to rest by sitting elsewhere, when a break was scheduled, and assess whether seating had been provided in such other areas.

The Labour Court criticised the Chief Inspector for placing the onus on Truworths to prove that it was not reasonably practicable to provide seating at the cash desks. The court clarified that the obligation on the employer is to implement measures that are reasonably practicable to provide seating for employees to rest, which

Truworths had indicated it had been doing by providing seating facilities elsewhere in the store. Furthermore, the Chief Inspector's reliance on the lack of a specific hazard assessment for standing at the cash desk was deemed irrelevant as it was not the basis of the contravention notices. The court concluded that the inspectors had made findings based on their personal preferences rather than a proper application of the "reasonably practicable" standard.

Key takeaways

Employers should be aware that the Labour Court has affirmed the peremptory nature of section 28(2) of the OHSA, requiring inspectors to be furnished with a certificate of designation signed by or on behalf of the Minister. Inspections conducted by uncertified individuals would be deemed invalid and unauthorised, potentially leading to the setting aside of any contravention notice. Employers have the right under section 28(3) of the OHSA to demand to see an inspector's certificate.

Compliance with the OHSA is not a one-size-fits-all determination. Inspectors must assess whether an employer's existing measures effectively mitigate risks, taking into account feasibility, cost and operational requirements.

Inspectors must establish a failure to comply with any relevant regulations before requiring an employer to justify its practices. Employers should challenge enforcement steps actions where inspectors incorrectly shift the burden of proof to them.

Fiona Leppan, Onele Bikitsha and Goitsemodimo Litheko

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Workplace disputes and legal parameters in relation to defamation, contractual interference, and repudiation

In *Sephton v Anglo Operations Pty Ltd* (A2024/113960) [2025] ZAGPJHC 239, the High Court considered several key factors in its judgment. The appeal was brought against a prior ruling that granted absolution from the instance for the primary and alternative claims against the first, second, and third respondents while dismissing defamation and contractual interference claims. The court focused on whether the appellant had established a legal basis for defamation, wrongful interference with a contract, and repudiation. It examined the facts surrounding an alleged workplace harassment incident, the investigation that followed, and the contractual implications of the appellant's exclusion from the site.

Brief facts of the case

The appellant, John Ross Sephton, was a hydrologist engaged as a subcontractor by the fourth respondent, Piteau Associates, to provide services at a mining operation managed by Anglo Operations (Pty) Ltd and Anglo American Platinum Limited (the Anglo parties). On 9 September 2019, an incident occurred in which Sephton swung his lunch bag, making contact with the buttocks of the third respondent, a colleague at the mine. The third respondent perceived this conduct as inappropriate and lodged a complaint under Anglo's Harassment Policy.

Following the complaint, an internal investigation was conducted, during which the appellant was temporarily restricted from accessing the site. The inquiry ultimately concluded that the conduct did not constitute sexual

harassment, and the appellant was permitted to return to work. However, upon his return, the third respondent experienced distress, reportedly in the form of a panic attack, which led to further workplace concerns. Consequently, the appellant's access to the site was denied, which resulted in the effective termination of his subcontract with the fourth respondent.

The High Court

The appellant alleged that he had been wrongfully accused of sexual harassment and that Anglo had endorsed this accusation, thereby causing reputational harm. However, the court found that the third respondent had merely reported the facts of the incident without explicitly alleging sexual misconduct. Furthermore, Anglo had not made any defamatory statements but had conducted a workplace investigation in accordance with their policies. Given that defamation requires a demonstrably false statement that harms an individual's reputation, and no such statement was proven, the claim was dismissed.

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Another issue before the court was the alleged wrongful interference with the appellant's subcontract. The appellant argued that by barring him from the site, Anglo had effectively prevented him from fulfilling his contractual obligations, leading to the termination of his subcontract. However, the court emphasised that access to a workplace is generally at the discretion of the entity controlling the premises. There was no legal obligation on Anglo to permit the appellant's continued access, nor was there evidence to suggest that their actions were unlawful or intended to cause him harm.

Without proof of wrongful conduct, the claim for contractual interference could not succeed.

The final legal issue concerned the alleged repudiation of the subcontract by the fourth respondent. The appellant contended that the fourth respondent had pressured him to agree to an early termination of the contract, which he refused, asserting that this constituted repudiation entitling him to damages. However, the court found that merely requesting a mutual termination does not amount to repudiation, as it does not indicate an unequivocal intention to abandon the contract. Additionally, since the appellant was unable to access the site through no fault of the fourth respondent, performance of the contract had become impossible. In such circumstances, contractual obligations were deemed extinguished, and the claim for repudiation was not upheld.

Findings and conclusion

The High Court found no basis for the defamation claim, concluding that the third respondent had not falsely accused the appellant of sexual harassment but had merely reported her experience. Additionally, Anglo had lawfully conducted an internal investigation in accordance with their policies.

The claim for wrongful interference with contract was also dismissed, as Anglo had no legal obligation to grant the appellant access to the site. Their decision to restrict access fell within their rights as the property controllers.

Furthermore, the court rejected the repudiation claim, holding that merely proposing an early cancellation of the contract did not constitute repudiation. This was particularly relevant given that the appellant's exclusion from the site rendered contract performance impossible.

Ultimately, the court upheld the previous ruling, granted absolution from the instance, and dismissed the appeal with costs.

This case highlights important legal and employee relations principles. It highlights the significance of professionalism in the workplace having clear workplace policies; and what adherence to contractual obligations entails.

The decision reinforced that workplace conduct is assessed from the recipient's perspective (victim-centric), meaning that even unintended actions may be perceived as inappropriate. It affirmed that internal workplace investigations, when conducted fairly and in accordance with established policies, do not constitute defamation or wrongful interference with contractual relationships. Additionally, the judgment clarified that property owners have the legal right to control site access, and restricting entry does not amount to unlawful interference with a contract.

**Yvonne Mkefa, Kgodisho Phashe, and
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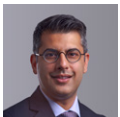
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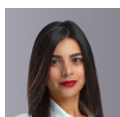
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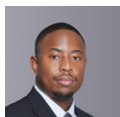
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