

**THE SUPREME COURT OF APPEAL OF SOUTH AFRICA
JUDGMENT**

Not Reportable
Case no: 696/2023

In the matter between:

SANOJ JEEWAN

APPELLANT

and

TRANSNET SOC LIMITED

FIRST RESPONDENT

ERNEST & YOUNG (EY)

SECOND RESPONDENT

Neutral citation: *Sanoj Jeewan v Transnet SOC Limited and Another* (696/2023)
[2024] ZASCA 108 (4 July 2024)

Coram: MOLEMELA P and WEINER and MOLEFE JJA and KOEN and
SEEGOBIN AJJA

Heard: 3 May 2024

Delivered: This judgment was handed down electronically by circulation to the parties' representatives by email, publication on the Supreme Court of Appeal website and released to SAFLII. The date and time for hand-down of the judgment is deemed to be 11h00 on 4 July 2024.

Summary: Civil procedure – prescription – whether the high court was correct in finding that the appellant's claim for contractual and delictual damages had prescribed – whether s 39(2) read with s 34 of the Constitution should be invoked in order to re-interpret the Prescription Act 69 of 1969 – whether the *Biowatch* principle on the issue of costs should apply in this case.

ORDER

On appeal from: Gauteng Division of the High Court, Pretoria (Mabuse J sitting as a court of first instance):

- 1 The appeal is dismissed, save to the extent set out below.
- 2 The appeal in relation to the orders upholding the special pleas of jurisdiction and *res judicata* is upheld.
- 3 The order of the High Court is set aside and replaced with the following order:
 - ‘3.1 The special plea of prescription is upheld.
 - 3.2 The special pleas of jurisdiction and *res judicata* are dismissed.
 - 3.3 The plaintiff’s claim is dismissed.
 - 3.4 There is no order as to costs.’
- 4 There is no order as to costs in this Court.

JUDGMENT

Seegobin AJA (Molemela P and Weiner and Molefe JJA and Koen AJA concurring):

Introduction

[1] This appeal lies against the judgment and order of the Gauteng Division of the High Court, Pretoria, (the high court) (per Mabuse J). The high court upheld three special pleas in respect of jurisdiction, prescription and *res judicata* raised by the first respondent against the appellant’s claim for damages arising out of his alleged unfair dismissal which occurred on 14 May 2010. Leave to appeal was refused by the high court on 14 March 2023 but granted by this Court on 13 June 2023.

Background facts

[2] The appellant, Mr Sanoj Jeewan (Mr Jeewan), was employed by the first respondent, Transnet SOC Limited (Transnet), as a Corporate Governance Manager, in terms of a written contract of employment (the employment contract) which came into effect on 2 October 2006. Transnet had a Fraud Prevention Plan which included such

policies as a Code of Ethics, a Policy on Declaration of Interest and Related Disclosures, a Gift Policy and an Anti-Fraud Policy.

[3] As Corporate Governance Manager, Mr Jeewan was regarded as the forensic champion of Transnet. His duties included the co-ordination of investigations, forensic fraud prevention and detection, the taking of remedial and corrective action, reporting non-compliance with the Fraud Prevention Plan to Transnet's Forensic Working Group and ensuring that everyone in his division was familiar with the contents of the plan and all concomitant policies. Mr Jeewan also oversaw the internal control and compliance functions at Transnet. Following a forensic investigation conducted by the second respondent, Ernest & Young (EY), Transnet preferred charges of misconduct against Mr Jeewan. The essence of the charges was that he had breached his contract of employment and code of ethics by establishing and participating in a fraudulent scheme with an external recruitment service provider.

[4] After interviewing him in connection with such charges on 20 April 2010, Transnet suspended Mr Jeewan on 21 April 2010. On the same date he submitted a letter of resignation. Despite the letter of resignation, Transnet decided to institute disciplinary proceedings against him. Mr Jeewan was notified on 7 May 2010 that he was required to attend a disciplinary hearing on 14 May 2010. The hearing commenced on 14 May 2010 and was thereafter postponed to 17 May 2010. Mr Jeewan was subsequently found guilty. He was dismissed with immediate effect in terms of a letter signed by Transnet on 14 May 2010.

[5] The termination letter further informed Mr Jeewan that he had the right to refer his dismissal to either the Commission for Conciliation, Mediation and Arbitration (CCMA) or to the Transnet Bargaining Council (TBC) within thirty days of his dismissal. Mr Jeewan indeed referred a dispute of unfair dismissal to the TBC in terms of s 191 of the Labour Relations Act 66 of 1995 (LRA) on the grounds that his dismissal was procedurally and substantively unfair. The relief he sought before the TBC was reinstatement to his former employment.

[6] Arbitration of the dispute between Mr Jeewan and Transnet took place before the TBC on 1 and 2 September 2011, and thereafter on 24 and 25 January 2012 before Commissioner, Ms Esther van Kerken (Ms Van Kerken). On the last day of the hearing, Mr Jeewan withdrew the ground predicated on substantive unfairness, but persisted with the ground that his dismissal was procedurally unfair. On 1 February 2012 Ms Van Kerken issued an award in terms of which she held that Mr Jeewan's dismissal was procedurally fair. Neither Mr Jeewan nor Transnet sought to review the arbitration award or make it an order of court.

[7] On 29 January 2015, Mr Jeewan served summons on Transnet and EY claiming damages in the amount of R57 374 996.02 for breach of his employment contract, alternatively, for delictual damages in the same amount in terms of the common law. The damages claimed were calculated to run from 2010 to 2034, the latter date being the year when Mr Jeewan would have retired upon turning sixty-three years of age as provided for in clause 15.1.3.¹ In essence, Mr Jeewan's delictual claim against Transnet was premised on the fact that Transnet had acted wrongfully and unlawfully when it dismissed him prematurely on 14 May 2010. In response, Transnet delivered a detailed plea which incorporated three special pleas. The first concerned an absence of jurisdiction on the part of the high court to entertain the matter, the second was that Mr Jeewan's claim had prescribed in terms of s 11(d) of the Prescription Act 68 of 1969 (Prescription Act), and the third related to *res judicata*.

[8] The parties subsequently agreed that the three special pleas should be adjudicated by the high court before all else. This was achieved through a special case based on an agreed set of facts in terms of rule 33(1) of the Uniform Rules. As alluded to already, the high court upheld each of Transnet's special pleas and dismissed Mr

¹ Clause 15 of the employment contract deals with termination of employment. It provides as follows:

'15. TERMINATION OF EMPLOYMENT

15.1 This contract of employment will terminate:

15.1.1 At the instance of the employee (resignation); or

15.1.2 At the instance of Transnet if Transnet terminates the Employee's employment for reasons relating to the employee's conduct, capacity or the operational requirements of Transnet or any other reason that is recognised by law as being sufficient; or

15.1.3 At the end of the month in which he turns sixty-three years of age, unless the Employee and Transnet agree otherwise in writing, or the Employee's employment has been terminated for any other lawful reason.'

Jeewan's claim with costs. EY, although cited as a second defendant in the action, did not participate in the special case before the high court, nor does it participate in this appeal. In this Court Mr Jeewan represents himself as he did in the high court.

Issues on appeal

[9] In the heads of argument filed in this Court, Transnet conceded, correctly, that it could no longer defend the high court's judgment on the special pleas of jurisdiction and *res judicata*. In oral submissions before us, counsel for Transnet effectively abandoned the high court's judgment on these two issues. What effect this late abandonment will have on the issue of costs in this appeal, will be dealt with below. In the result, the central issue to be determined herein is whether Mr Jeewan's claim against Transnet had prescribed within a period of three years from his alleged unfair dismissal on 14 May 2010 in terms of s 11(d) of the Prescription Act, as contended for by Transnet, or whether, the debt which Mr Jeewan relies on for the relief claimed in his action against Transnet, only arose on 1 February 2012 when the arbitration award was issued, as contended for by Mr Jeewan.

The special case

[10] After a brief introductory paragraph, the agreed special case placed before the high court for adjudication, was the following:

'A. THE PARTIES

1. The plaintiff is **SANOJ JEEWAN (aka MARK)**, an adult male whose residential address is at 1[...] W[...] E[...] Street, A[...] C[...], R[...] N[...], C[...], PRETORIA.
2. The first defendant is **TRANSNET SOC LIMITED**, a state-owned company, duly established in terms of the Legal Succession to the South African Transport Services Act 9 of 1989 and incorporated with share capital in accordance with the company laws of the Republic of South Africa, and operating through its **TRANSNET ENGINEERING** division, with its principal place of business at 160 Lynette Street, Kilner Park, PRETORIA.
3. The second defendant is **ERNEST & YOUNG ('EY')**, South Africa, a registered firm of accountants and auditors with full legal capacity, with its principal place of

business at 1[...] R[...] Road, S[...], JOHANNESBURG. At all material [times] hereto EY rendered internal audit and forensic services to the first defendant.

B. AGREED FACTS

Plaintiff's employment until dismissal on 14 May 2010

4. The plaintiff was employed by the first defendant as Corporate Governance Manager and the related contract of employment came into effect on 2 October 2006.

5. At all material times hereto, the first defendant had a Fraud Prevention plan which included such policies as Code of Ethics, Policy on Declaration of Interest and Related Disclosures, Gift Policy and Anti-Fraud Policy.

6. As Corporate Governance Manager the plaintiff was the forensic champion of the first defendant and his duties included the coordination of Investigations, forensic fraud prevention and detection, taking remedial and corrective action, reporting to the first's defendant's Forensic Working Group and ensuring that everyone in his division knew the contents of the Fraud Prevention Plan and all the concomitant policies. The plaintiff also oversaw the internal control and compliance function at the first defendant.

7. Following a forensic investigation conducted by the second defendant, the first defendant laid charges of misconduct against the plaintiff. The charges against the plaintiff were mainly that he had breached his contract of employment and the Code of Ethics in that he had established and participated in a fraudulent scheme with an external recruitment service provider.

8. Subsequent to the disciplinary hearing, the plaintiff was found guilty and was summarily dismissed on 14 May 2010.

Dispute at Transnet Bargaining Council

9. The plaintiff referred a dispute of unfair dismissal to the Transnet Bargaining Council in terms of section 191 of the Labour Relations Act 66 of 1995 ("LRA") on the grounds that his dismissal was procedurally and substantively unfair.

10. Arbitration of the dispute between the plaintiff and the first defendant took place at the Transnet Bargaining Council on 1 and 2 September 2011 and on 24 and 25 January 2012 before Commissioner Ms Esther Van Kerken ("**Van Kerken**").

11. With regard to his allegation that his dismissal was procedurally unfair, the plaintiff raised five objections but dropped two and persisted with three, namely

11.1. Lack of impartiality on the part of the chairperson of the disciplinary hearing evidenced by statements he had made during the course of the disciplinary hearing;

11.2. Inadequate time given to the plaintiff to prepare for the disciplinary hearing; and

11.3. Failure on the part of the first defendant to call *viva voce* evidence at the disciplinary hearing, thereby depriving the plaintiff of any opportunity to cross-examine witnesses.

12. On the last day of the arbitration, namely 25 January 2012, the applicant withdrew the dispute as regards substantive unfairness of his dismissal, and remained with procedural unfairness. The plaintiff did not testify.

Award of Commissioner

13. On 1 February 2012, Commissioner Van Kerken issued an award in terms of which she held, amongst others, that the first defendant effected the dismissal of the plaintiff with a fair procedure. Copy of the award is attached hereto duly marked as “SC1”.

14. Neither the plaintiff nor the first defendant made application for the review of the arbitration award nor application to make the award an order of the Court.

Plaintiff's current civil action

15. On 29 January 2015, the plaintiff served summons on the first defendant, claiming damages in the amount of R57 374 996.02 for breach of his contract of employment, alternatively a delictual claim for the same amount of money in terms of common law. Copy of the amended particulars of claim is attached hereto duly marked as Annexure “SC2”.

16. The essence of the plaintiff's claim in delict against the first defendant is that the first defendant acted wrongfully when it prematurely dismissed him on 14 May 2010.

First defendant's plea

17. The first defendant delivered a plea, comprising of three special pleas and a plea-over to the plaintiff's claim, copy whereof is attached hereto and duly marked as Annexure “SC3”. The first defendant's three special pleas, which appear in paragraphs 1 to 14 of its plea, are the following: –

17.1. Absence of Jurisdiction of this Honourable Court;

17.2. Prescription of the claim; and

17.3. *Res judicata*

18. The parties have agreed that the three special pleas which the first defendant has raised be decided separately by this Honourable Court as each of them has the potential to dispose of this case, thereby saving the Court time and the parties time and costs. Accordingly, the parties have also agreed that the determination of the merits of the plaintiff's claim be stayed pending the determination of the three special pleas.

C. QUESTIONS OF LAW IN DISPUTE

19. The questions of law in dispute to be adjudicated by this Honourable Court are the following:

19.1. Whether this Honourable Court has jurisdiction to hear the claim of the plaintiff.

19.2. Whether the claim of the plaintiff has become prescribed in terms of sections 11(d) of the Prescription Act 68 of 1969.

19.3. Whether the plaintiff's claim stands to be dismissed on the basis of the principle of *res judicata*.

D. CONTENTIONS OF THE PARTIES

First defendant's contentions

20. As regards the special plea of **absence of jurisdiction**, the following are the contentions of the **first defendant**: –

20.1. This Honourable Court has no jurisdiction to hear the plaintiff's claim for damages because: –

20.1.1. The basis of the plaintiff's claim is that the first defendant dismissed him substantively and procedurally unfairly on 14 May 2010 (**Vide** paragraphs 3.6, 4.1.1, 4.21, 4.2.2, 5.2 and 5.7 of the plaintiff's particulars of claim).

20.1.2. In terms of section 191 of the Labour Relations Act 66 of 1995 ("**LRA**"), the power to determine whether a dismissal is procedurally or substantively unfair lies with the Commission for Conciliation, Mediation and Arbitration ("**CCMA**") or the relevant bargaining council.

20.1.3. In the case of the plaintiff the power lies with the Transnet Bargaining Council.

20.2. Accordingly, the first defendant contends that this Honourable Court does not have jurisdiction to hear the plaintiff's claim and that the plaintiff's claim be dismissed with costs.

21. With regard to the special plea of **prescription**, the first defendant contends as follows: –

21.1. The basis of the plaintiff's claim for damages against the first defendant is his alleged unfair dismissal from employment which took place on 14 May 2010.

21.2. The claim constitutes a debt for purposes of sections 11(d) and 12 of the Prescription Act 68 of 1969.

21.3. The debt was due and owing by the first defendant on 14 May 2010, the date on which the first defendant dismissed the plaintiff.

21.4. The plaintiff commenced action by means of summons which he served on the first defendant on 29 January 2015 which is more than three years after the date on which the debt arose.

21.5. In the premises the Plaintiff's claim has become prescribed in terms of section 11(d) of the Prescription Act 68 of 1969.

21.6. Accordingly, the first defendant contends that the plaintiff's claim be dismissed with costs.

22. With regard to the special plea of **res judicata** the first defendant contends as follows: –

22.1. The basis of the plaintiff's claim is that he was procedurally and substantively unfairly dismissed by the First Defendant from his employment on 14 May 2010.

22.2. The plaintiff referred a dispute to the Transnet Bargaining Council ("**Council**") in terms of section 191 of the Labour Relations Act 66 of 1995 ("**LRA**"), alleging that his dismissal was substantively and procedurally unfair. (**Vide paragraph 3.7 of the plaintiff's particulars of claim**).

22.3. On 1 February 2012 a Commissioner of the Council issued an award to the effect that the dismissal of the plaintiff was procedurally and substantively fair.

22.4. In terms of section 143 of the LRA the arbitration award issued by the Commissioner is final and binding on the parties.

22.5. The plaintiff's current claim for payment of damages suffered as a result of his alleged unfair dismissal by the first defendant is a claim for the same thing on the same ground and against the same party.

22.6. The first defendant accordingly pleads that the plaintiff's claim was finally adjudicated by the Council, a forum of competent jurisdiction and should therefore be dismissed with costs.

Plaintiff's contentions

23. The contentions of the plaintiff appear in paragraphs 1 to 9 his replication to the first defendant's plea, copy whereof is attached hereto duly marked as Annexure "**SC4**".

24. The following are the contentions of the plaintiff as regards the first defendant's special plea of **absence of jurisdiction**.

24.1. The plaintiff's claim is not for relief available to him in terms of the Labour Relations Act, Act 66 of 1995 ("the LRA"). The plaintiff seeks no relief in terms of the LRA.

24.2. The plaintiff's claim is premised on common law breach of his contract of employment, and alternatively delict.

24.3. Accordingly, this Honourable Court does have jurisdiction to hear the plaintiff's claim.

25. With regard to the first defendant's special plea of **prescription**, the plaintiff's contentions appear in paragraphs 4 to 6 of his replication to the first defendant's plea and are the following: –

25.1. It is denied that the debt was due and owing by the first defendant on 14 May 2010.

25.2. The plaintiff's claim arose on 1 February 2012 when the arbitration award was issued.

25.3. The plaintiff's claim is therefore not prescribed.

26. With regard to the first defendant's special plea of **re judicata**, the plaintiff's contentions appear in paragraphs 7 to 9 of his replication to the first defendant's plea and are the following:

26.1. The plaintiff's claim is for damages on the basis of his unlawful dismissal, and alternatively delict.

26.2. The plaintiff's cause of action in his present cases is different to the cause of action at the arbitration.

26.3. The plaintiff's present claim is, accordingly, not for the same thing, and on the same ground.

E. RELIEF SOUGHT BY THE PARTIES

27. The parties seek the following relief: –

27.1. The first defendant seeks an order upholding all or any of its three special pleas and dismissing the plaintiff's claim against it with costs.

27.2. The plaintiff prays for an order dismissing first defendant's three special pleas with costs in the cause.

F. HEADS OF ARGUMENT

28. For the purpose of the hearing of this Special Case, the first defendant is to deliver a paginated index and its heads of argument by **23 April 2021**.

29. The plaintiff is to deliver his heads of argument by **23 May 2021**.'

[11] As the special case indicates, the pleadings that formed the basis of the agreed facts and issues to be determined, were attached to the document. The pleadings included the amended particulars of claim, Transnet's plea and Mr Jeewan's replication to the special pleas.

High Court's findings on the special pleas raised by Transnet

[12] In summary, the high court made the following findings regarding the issue of jurisdiction. It held that the focal point of this matter relates to the unfair dismissal of Mr Jeewan by Transnet, which is in essence an employment related matter. In order for the high court to determine whether Transnet breached the employment contract, the court would have to apply the requirements found in the LRA to determine if Mr Jeewan was unfairly dismissed. Therefore, Mr Jeewan cannot distance himself from the application of the LRA. It further held that Mr Jeewan had misdirected himself by attempting to resolve his dispute with Transnet via the high court instead of making use of the mechanisms set out in the LRA. He should have, according to the high court, first started with the LRA instead of bringing the matter to the high court for adjudication as it did not have jurisdiction regarding this matter.

[13] Regarding the issue of prescription the high court made the following findings. It accepted that in respect of both of Mr Jeewan's contractual and constitutional rights, the high court retained its jurisdiction in terms of the Constitution. It further accepted that,

based on his particulars of claim, Mr Jeewan had two claims arising from the same set of facts. The one arises from an infringement of his rights in terms of the LRA over which the labour forums have exclusive jurisdiction to the exclusion of the high court. The other arises from an infringement of his common law rights or, since he was employed in the public sector, an infringement of his constitutional rights over which both the high court and the labour court have concurrent jurisdiction. The high court accordingly concluded that, having regard to the allegations contained in his particulars of claim, Mr Jeewan should have asserted his claim based on an infringement of his common law or constitutional rights, within three years of 14 May 2010. The fact that he did not do so meant that any claim he had was extinguished by prescription.

[14] On the issue of *res judicata*, the high court held that Transnet had managed to prove *res judicata* in that on 1 February 2012, the Commissioner of the TBC (a forum of competent jurisdiction) had delivered an award to the effect that the dismissal of Mr Jeewan was procedurally and substantively fair. Therefore, his current claim for payment of damages suffered as a result of his alleged unfair dismissal by Transnet, is a claim for the same relief based on the same ground and against the same party. The court further held that Mr Jeewan's matter had fully and finally been adjudicated upon. Furthermore, as held by the high court, Transnet managed to show that the matter brought before it constituted the same matter that Mr Jeewan had brought before the TBC and therefore Transnet's special plea of *res judicata* was upheld.

Mr Jeewan's case

[15] Mr Jeewan contends that his claim against Transnet became due only on 1 February 2012 when the arbitration award was issued, and not on 14 May 2010 when he was dismissed. He proffers three arguments in this regard. The first is that the debt was not immediately claimable by him on 14 May 2010. The second is that there was no immediate obligation on Transnet to perform, in relation to the debt, on 14 May 2010. The third is that the high court, in dealing with the issue of prescription, failed to apply the provisions of s 39(2)² read with s 34³ of the Constitution.

² Section 39(2) compels every court, tribunal or forum, when interpreting any legislation, and when developing the common law, to promote the spirit, purport and objects of the Bill of Rights.

[16] In advancing his first argument, Mr Jeewan relies on this Court's judgment in *Deloitte Haskins & Sells Consultants (Pty) Ltd v Bowthorpe Hellerman Deutsch (Pty) Ltd*⁴ (*Deloitte Haskins*) which held, with regard to s 12(1)⁵ of the Prescription Act, that 'prescription shall commence to run as soon as the debt is due. This means that there has to be a debt immediately claimable by the creditor or, stated in another way, that there has to be a debt in respect of which the debtor is under an obligation to perform immediately. It follows that prescription cannot begin to run against a creditor before his cause of action has fully accrued ie before he is able to pursue his claim'.

[17] With regard to s 12(1) of the Prescription Act, Mr Jeewan contends that no debt was due on 14 May 2010 because he was advised by Transnet to refer his dismissal for arbitration to either the CCMA or the TBC. He contends that by referring the dispute to the TBC, prescription of his claim was not interrupted but merely delayed or postponed until the proceedings before the TBC were finalised. As authority for that proposition, he relied on a dictum in *Chirwa v Transnet Limited and Others*⁶ (*Chirwa*) which held that '[w]here an alternative cause of action can be sustained in matters arising out of an employment relationship, in which the employee alleges unfair dismissal or an unfair labour practice by the employer, it is in the first instance through the mechanisms established by the LRA that the employee should pursue her or his claims'. Relying on *Deloitte Haskins*, he argued that since the proceedings before the TBC were finalised on 1 February 2012, this was the date when Transnet became under an immediate obligation to perform. In other words, this was when all the necessary elements of his cause of action came into existence, thus entitling him to enforce his claim.

³ Section 34 accords to every person the right to have any dispute that can be resolved by the application of law decided in a fair public hearing before a court or, where appropriate, another independent and impartial tribunal or forum.

⁴ *Deloitte Haskins & Sells Consultants (Pty) Ltd v Bowthorpe Hellerman Deutsch (Pty) Ltd* [1990] ZASCA 136; 1991 (1) SA 525 (A); [1991] 1 All SA 400 (A) at 532H-I.

⁵ Section 12(1) of the Prescription Act provides that 'subject to the provisions of subsection (2), (3), and (4), prescription shall commence to run as soon as the debt is due'.

⁶ *Chirwa v Transnet Limited and Others* [2007] ZACC 23; 2008 (4) SA 367 (CC); 2008 (3) BCLR 251 (CC); [2008] 2 BLLR 97 (CC); (2008) 29 ILJ 73 (CC) para 41.

[18] With regard to the third argument advanced by Mr Jeewan, he contends that since the provisions of the Prescription Act limit rights guaranteed by s 34 of the Constitution, the high court was obliged to invoke the provisions of s 39(2) of the Constitution when interpreting the Prescription Act, as was done by Froneman J in *Myathaza v Johannesburg Metropolitan Bus Services (SOC) Limited t/a Metrobus and Others*⁷ (*Myathaza*). One of the findings made by Froneman J was that since arbitrations under the LRA were in fact adjudicative proceedings as contemplated by s 34 of the Constitution, prescription would commence to run only on finality of such proceedings. On this basis, Mr Jeewan argues that the referral of his dismissal to the TBC for arbitration constituted 'adjudicative proceedings' which involved the 'service of a process' that interrupted prescription in terms of s 15(1)⁸ of the Prescription Act. Furthermore, his unfair dismissal constitutes a 'debt' for purposes of the Prescription Act and in the circumstances, prescription was delayed in terms of s 13(1)(f).⁹ Finally, on the issue of costs, Mr Jeewan argues that since he raises fundamental issues which have a bearing on an infringement of his rights guaranteed in s 39(2) and s 34 of the Constitution, the principles laid down in *Biowatch Trust v Registrar Genetic Resources and Others*¹⁰ (*Biowatch*) should apply.

Transnet's case

[19] In broad terms, Transnet contends that whereas before the TBC Mr Jeewan was asserting his rights in terms of the LRA not to be unfairly dismissed, his claim before the high court is one for damages arising from an alleged breach of his employment contract and an infringement of his rights in terms of the common law. Relying on this Court's judgment in *Makhanya v University of Zululand*,¹¹ (*Makhanya*) Transnet argues

⁷ *Myathaza v Johannesburg Metropolitan Bus Services (SOC) Limited t/a Metrobus and Others* [2016] ZACC 49; (2017) 38 ILJ 527 (CC); [2017] 3 BLLR 213 (CC); 2017 (4) BCLR 473 (CC); 2018 (1) SA 38 (CC).

⁸ Section 15(1) of the Prescription Act provides that 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.

⁹ Section 13(1)(f) of the Prescription Act provides that if the debt is the object of a dispute subjected to arbitration, the period of prescription shall not be completed before a year has elapsed after the day referred to in paragraph (i).

¹⁰ *Biowatch Trust v Registrar Genetic Resources and Others* [2009] ZACC 14; 2009 (6) SA 232 (CC); 2009 (10) BCLR 1014 (CC).

¹¹ *Makhanya v University of Zululand* [2009] ZASCA 69; 2010 (1) SA 62 (SCA); [2009] 8 BLLR 721 (SCA); [2009] 4 All SA 146 (SCA); (2009) 30 ILJ 1539 (SCA) paras 12-13.

that the service of any process on it by Mr Jeewan for the enforcement of his LRA rights could not, in the circumstances, interrupt the running of prescription involving his rights in terms of the common law. On this basis, so it argues, his claim for damages, which arise from an alleged breach of his employment contract, constitutes a 'debt' which arose as soon as he was dismissed on 14 May 2010.

[20] As far as the provisions of s 39(2) and s 34 of the Constitution are concerned, Transnet argues that there would be no need for this Court to interpret the provisions of the Prescription Act as was done by Froneman J in *Myathaza*. It contends that the two cases are clearly distinguishable. In *Myathaza* the applicant had secured an arbitration award in his favour which became the subject of review proceedings before the labour court when his former employer, Metrobus, made application for the award to be reviewed and set aside. This meant that the applicant could not implement or execute the award whilst the review proceedings were still pending in the labour court. When the applicant subsequently applied to have the award made an order of court, he was faced with a plea by Metrobus that the arbitration award had prescribed in terms of the Prescription Act three years after it was issued. Mr Jeewan's case is different, so it is argued. Since he is asserting his rights in terms of his employment contract and the common law, nothing prevented him from instituting his action for damages on termination of his employment on 14 May 2010.

[21] As to the applicability of the *Biowatch* principle on the issue of costs, Transnet contends that *Biowatch* is not intended to protect every private individual who sues or litigates against the State. In Mr Jeewan's case, it is argued that he was not asserting rights protected by the Constitution and as such, *Biowatch* finds no application.

Discussion and findings

[22] Since the primary issue in this appeal is one of prescription, it is perhaps convenient to preface this discussion with what was said by the Constitutional Court in

*Road Accident Fund and Another v Mdeyide*¹² (*Mdeyide*) regarding the important role that time limits play in litigation. The Court said the following:

'In the interests of social certainty and the quality of adjudication, it is important though that legal disputes be finalised timeously. The realities of time and human fallibility require that disputes be brought before a court as soon as reasonably possible. Claims thus lapse, or prescribe, after a certain period of time. If a claim is not instituted within a fixed time, a litigant may be barred from having a dispute decided by a court. This has been recognised in our legal system – and others – for centuries.'¹³

The Court also said the following:

'This Court has repeatedly emphasised the vital role time limits play in bringing certainty and stability to social and legal affairs and maintaining the quality of adjudication. 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 become lost, witnesses may no longer be available to testify, or their recollection of events may have faded.'¹⁴ The quality of adjudication is central to the rule of law. For the law to be respected, decisions of courts must be given as soon as possible after the events giving rise to disputes and must follow from sound reasoning, based on the best available evidence.'¹⁵

[23] In order to decide the issue of prescription in this appeal, it is necessary, I believe, to first examine the nature of the claim that Mr Jeewan seeks to assert in the high court. As the agreed facts in the special case show, he seeks no relief in terms of the LRA. His claim is one for damages arising from an alleged unlawful termination (by Transnet) of his employment contract. In other words, his claim is based on an infringement of his common law rights and not the LRA. The contractual basis for the

¹² *Road Accident Fund and Another v Mdeyide* [2010] ZACC 18; 2011 (1) BCLR 1 (CC); 2011 (2) SA 26 (CC); See also the remarks of Didcott J in *Leach Mokela Mohlomi v Minister of Defence* 1996 (12) BCLR 1559; 1997 (1) SA 124.

¹³ *Mdeyide* para 2.

¹⁴ See *Mohlomi v Minister of Defence* 1997 (1) SA 124 (CC); 1996 (12) BCLR 1559 (CC) para 11. See also *Engelbrecht v Road Accident Fund and Another* [2007] ZACC 1; 2007 (6) SA 96 (CC); 2007 (5) BCLR 457 (CC) para 29 and *Brümmer v Minister for Social Development and Others* [2009] ZACC 21; 2009 (6) SA 323 (CC); 2009 (11) BCLR 1075 (CC) paras 64-67.

¹⁵ *Mdeyide* fn 12 para 8.

relief he seeks is that his employment contract was terminated wrongfully and unlawfully on 14 May 2010. Had this not occurred, his contract would have terminated naturally when he retired at the age of sixty-three in 2034.

[24] It is perhaps convenient to briefly set out the current state of the law in circumstances where a litigant, such as Mr Jeewan, may be faced with several different causes of action arising from the same set of facts. In *Makhanya*,¹⁶ this Court said the following:

‘The LRA creates certain rights for employees that include “the right not to be unfairly dismissed and [not to be] subjected to unfair labour practices”.¹⁷ I will refer to those rights interchangeably as ‘LRA rights’. Yet employees also have other rights, in common with other people generally, arising from the general law. One is the right that everyone has (a right emanating from the common law) to insist upon performance of a contract. Another is the right that everyone has (a right emanating from the Constitution and elaborated upon in the Promotion of Administrative Justice Act) to just administrative action.¹⁸

Thus there is the potential (I emphasise that I refer only to the potential) for three separate claims to arise when an employee’s contract is terminated. One is for infringement of his or her LRA right. Another is for infringement of his or her common law right. And where it occurs in the public sector, a third is for infringement of his or her constitutional right.

An LRA right is enforceable only in the Commission for Conciliation, Mediation and Arbitration (CCMA)¹⁹ or in the Labour Court.²⁰ (I will refer to them interchangeably as the ‘Labour Forums’ except where it becomes necessary to distinguish them). The

¹⁶ *Makhanya* fn 11 paras 11-13.

¹⁷ Section 185 of the LRA.

¹⁸ Section 33(1) of the Constitution: ‘Everyone has the right to administrative action that is lawful, reasonable and procedurally fair.’ The Interim Constitution provided a right in comparable terms in s 24.

¹⁹ Created by s 112 of the LRA.

²⁰ So far as disputes fall within the jurisdiction of the CCMA the exclusivity of its powers is implicit in the procedures for resolution of such disputes. As for the Labour Court, s 157(1) of the LRA provides: ‘. . . [T]he Labour Court has exclusive jurisdiction in respect of all matters that elsewhere in terms of this Act . . . are to be determined by the Labour Court.’ (see *Fedlife Assurance Ltd v Wolfaardt* 2002 (1) SA 49 (SCA) (*Fedlife*), on the meaning of that subsection, approved in *Fredericks v MEC for Education and Training, Eastern Cape* 2002 (2) SA 693 (CC)).

common law right is enforceable in the high courts²¹ and in the Labour Court.²² And the constitutional right is enforceable in the high courts²³ and in the Labour Court.²⁴

[25] Whilst some confusion and uncertainty may have existed with regard to the issue of jurisdiction,²⁵ exclusive or otherwise, between the high court and the labour court arising from certain relevant provisions of the Constitution,²⁶ the LRA²⁷ and the Basic Conditions of Employment Act²⁸ (BCEA), when dealing with certain labour related matters, this was authoritatively put to rest by the Constitutional Court in *Baloyi v Public Protector and Others*²⁹ (*Baloyi*).

[26] The facts in *Baloyi* were the following: Ms Baloyi was employed by the Office of the Public Protector on a five-year contract with effect from 1 February 2019. The contract provided for a six-month probation period (ending on 31 July 2019), which

²¹ Section 169(b) of the Constitution. The section assigns judicial authority to the high courts in the following terms:

‘A High Court may decide –

(a) any constitutional matter except a matter that:

(i) only the Constitutional Court may decide; or

(ii) is assigned by an Act of Parliament to another court of a status similar to a High Court; and

(b) any other matter not assigned to another court by an Act of Parliament.

²² Section 77(3) of the Basic Conditions of Employment Act: ‘The Labour Court has concurrent jurisdiction with the civil courts to hear and determine any matter concerning a contract of employment ...’

²³ Section 169(a)(ii) quoted above.

²⁴ Section 157(2) of the LRA: ‘The Labour Court has concurrent jurisdiction with the High Court in respect of any alleged or threatened violation of any fundamental right entrenched in Chapter 2 of the [Constitution] and arising from ... employment and from labour relations.’

²⁵ *Fredericks and Others v MEC for Education and Training Eastern Cape and Others* 2002 (2) BCLR 113; 2002 (2) SA 693; [2002] 2 BLLR 119 (CC) (*Fredericks*).

²⁶ Section 169(1) of the Constitution provides:

‘The High Court of South Africa may decide –

(a) any constitutional matter except a matter that –

(i) the Constitutional Court has agreed to hear directly in terms of section 167 (6)(a); or

(ii) is assigned by an Act of Parliament to another court of a status similar to the High Court of South Africa; and

(b) any other matter not assigned to another court by an Act of Parliament.’

²⁷ Section 157(1) of the LRA reads:

‘Subject to the Constitution and section 173, and except where *this Act* provides otherwise, the Labour Court has exclusive jurisdiction in respect of all matters that elsewhere in terms of *this Act* or in terms of any other law are to be determined by the Labour Court.’

²⁸ Section 77(1) of the BCEA provides:

‘Subject to the Constitution and the jurisdiction of the Labour Appeal Court, and except where this Act provides otherwise, the Labour Court has exclusive jurisdiction in respect of all matters in terms of this Act.’

²⁹ *Baloyi v Public Protector and Others* [2020] ZACC 27; 2021 (2) BCLR 101 (CC); [2021] 4 BLLR 325 (CC); (2021) 42 ILJ 961 (CC); 2022 (3) SA 321 (CC).

could be extended for not more than twelve months. At the end of the probationary period, the Office of the Public Protector would be entitled to either terminate Ms Baloyi's employment in terms of clause 5.3 or confirm her appointment if it was satisfied with her 'level of performance' in terms of clause 5.5.

[27] Ms Baloyi's six-month probation period ended on 31 July 2019. On 8 October 2019, Ms Baloyi received a letter from Mr Mahlangu, the Chief Executive Officer of the Public Protector, inviting her to make representations on the confirmation of her employment contract. She did so in writing on 15 October 2019. On 21 October 2019, Ms Baloyi received another letter from Mr Mahlangu, stating that the Office of the Public Protector was unable to confirm her permanent employment and that her contract would terminate on 31 October 2019. The reasons provided were that she was 'not suitable for the role of COO taking into account her overall capability, skills, performance and general conduct in relation to the position'.

[28] Ms Baloyi launched an urgent application in the Pretoria high court, on the basis that the termination of her employment was unlawful and that Ms Mkhwebane, in her capacity as the Public Protector, had not complied with her constitutional obligations in terms of s 181(2) of the Constitution. The alleged unlawfulness of the termination had two aspects: first, the termination amounted to a breach of contract and, secondly, it amounted to an exercise of public power that breached the principle of legality, a standard to which all exercises of public power are measured. Ms Baloyi founded her case on 'contract, the Constitution and the Public Protector's public duties as an organ of state'.

[29] The relief sought by Ms Baloyi in the high court was three-fold. First, a declaratory order that the decision to terminate her employment contract was unconstitutional, unlawful, invalid and of no force and effect. Second, flowing from that, an order setting aside the termination decision. Third, a declaratory order to the effect that Ms Mkhwebane, in her official capacity, had failed to fulfil her obligations under s 181(2) of the Constitution.

[30] The high court dismissed Ms Baloyi's application on the basis that it did not have jurisdiction over the dispute and that it should have been brought before the labour court. The high court reasoned that Ms Baloyi's contention that her employment contract had been terminated unlawfully rested on the allegation that it was terminated contrary to the Policy on Probation and Disciplinary Policy of the Office of the Public Protector and was taken by an official without the necessary authority. It also attributed significance to the fact that Ms Baloyi's employment contract contained a clause stating that the employment relationship could be terminated at the end of the probationary period in accordance with the requirements of the LRA. The high court also noted that Ms Baloyi's employment contract incorporated the Policy on Probation of the Office of the Public Protector, which stipulates that 'following the recommendation to annul the appointment, Human Resource Division should take the necessary steps as per the provisions of the [LRA]'.

[31] The high court concluded that not only did Ms Baloyi make allegations that in essence raised 'a labour dispute as envisaged by the LRA, the employment contract itself point[ed] to the LRA as the vehicle for vindicating the rights under it'. Relying on dicta from the Constitutional Courts judgments in *Chirwa*³⁰ and *Gcaba v Minister of Safety and Security*,³¹ (*Gcaba*) the high court concluded that it was precluded from hearing the matter. The high court did not consider whether the decision to terminate Ms Baloyi's employment was taken for an ulterior purpose, nor did it consider whether the conduct of Ms Mkhwebane was otherwise unconstitutional insofar as it allegedly fell short of what is required by s 181(2) of the Constitution. It made no ruling regarding the declaratory relief.

[32] Significantly in *Baloyi*, the Constitutional Court found, amongst others, that s 157(1) of the LRA does not afford the labour court with general jurisdiction in employment matters and, as a result, the high court's jurisdiction will not be 'ousted by s 157(1) simply because a dispute is one that falls within the overall sphere of

³⁰ *Chirwa* fn 6 para 161.

³¹ *Gcaba v Minister of Safety and Security and Others* [2009] ZACC 26; 2010 (1) SA 238 (CC); 2010 (1) BCLR 35 (CC); (2010) 31 ILJ 296 (CC); [2009] 12 BLLR 1145 (CC) para 8.

employment relations'.³² It found that both the LRA and the BCEA expressly recognise that there are certain matters in respect of which the labour court and the high court enjoy concurrent jurisdiction. In relevant part, s 157(2) of the LRA provides:

'The Labour Court has concurrent jurisdiction with the High Court in respect of any alleged or threatened violation of any fundamental right entrenched in Chapter 2 of the Constitution of the Republic of South Africa, 1996, and arising from –

- (a) employment and from labour relations;
- (b) . . .
- (c)'

[33] It recognised that similarly, s 77(3) of the BCEA³³ provides that the Labour Court 'has concurrent jurisdiction with the civil courts to hear and determine any matter concerning *a contract of employment*, irrespective of whether any basic condition of employment constitutes a term of that contract'. It found that disputes arising from employment contracts do not, without more, fall within the exclusive jurisdiction of the labour court is further made clear by s 77(4) of the BCEA, which emphasises that the exclusive jurisdiction of the labour court referred to in s 77(1) –

'does not prevent any person relying upon a provision of [the Employment Act] to establish that a basic condition of employment constitutes a term of a contract of employment in any proceedings in a civil court or an arbitration held in terms of an agreement.'

[34] Apart from its other findings relating to the exclusive jurisdiction of the labour court to hear labour related matters as well as the concurrent jurisdiction of both the labour court and the high court to deal with other rights of employees arising from the general law, the following passage from *Baloyi* insofar as it is relevant to the nature of the right being asserted by Mr Jeewan, is instructive:

³² *Fredericks* fn 25 para 40. See also *Fedlife* fn 20 para 25, in which Nugent JA held that: 's 157 (1) does not purport to confer exclusive jurisdiction upon the Labour Court generally in relation to matters concerning the relationship between employer and employees'. The approach endorsed in *Fredericks* and *FedLife* was also followed in various judgments of the High Court, including *Jacot-Guillarmod v Provincial Government* 1999 (3) SA 594 (T) at 600E-G and *Runeli v Minister of Home Affairs* 2000 (2) SA 314 (TKH) at 323-324.

³³ While reference is made herein to the BCEA as it was done in *Baloyi*, it finds no application in this matter.

'The mere potential for an unfair dismissal claim does not obligate a litigant to frame her claim as one of unfair dismissal and to approach the Labour Court, notwithstanding the fact that other potential causes of action exist. In other words, the termination of a contract of employment has the potential to found a claim for relief for infringement of the LRA, *and* a claim for enforcement of a right that does not emanate from the LRA (for example, a contractual right). The following dictum of the Supreme Court of Appeal in *Makhanya*, which squarely addressed a contractual cause of action in the employment context, is apposite in this regard:

"The LRA creates certain rights for employees that include the right not to be unfairly dismissed and [not to be] subjected to unfair labour practices. . . . Yet employees also have other rights, in common with other people generally, arising from the general law. One is the right that everyone has (a right emanating from the common law) to insist upon performance of a contract.

When a claimant says that the claim arises from the infringement of the common-law right to enforce a contract, then that is the claim, as a fact, and the court must deal with it accordingly. When a claimant says that the claim is to enforce a right that is created by the LRA, then that is the claim that the court has before it, as a fact. When he or she says that the claim is to enforce a right derived from the Constitution, then, as a fact, that is the claim. That the claim might be a bad claim is beside the point."³⁴

Although these remarks were made in the context of a jurisdiction issue, they are equally apposite in relation to the plea of prescription that was raised in this matter.

[35] As the Constitutional Court accepted in *Baloyi*,³⁵ the approach endorsed in *Makhanya* aligns with a series of judgments of this Court³⁶ that have confirmed that a contractual claim arising from a breach of a contract of employment falls within the ordinary jurisdiction of the high court, notwithstanding the fact that the contract is one of employment.

³⁴ *Baloyi* fn 29 para 40.

³⁵ *Baloyi* fn 29 para 41.

³⁶ *Lewarne v Fochem International (Pty) Ltd* [2019] ZASCA 114; (2019) 40 ILJ 2473 (SCA); [2020] 1 BLLR 33 (SCA) para 9; *South African Maritime Safety Authority v McKenzie* [2010] ZASCA 2; 2010 (3) SA 601 (SCA); [2010] 3 All SA 1 (SCA) para 7 (*McKenzie*). *Manana v King Sabata Dalindyebo Municipality* [2010] ZASCA 144; [2011] 3 All SA 140 (SCA); [2011] 3 BLLR 215 (SCA); (2011) 32 ILJ 581 (SCA) para 23 (*Manana*); and *Fedlife* fn 20 paras 4-5 and 24.

[36] The following further extracts from *Baloyi* confirm that employees are not deprived of their common law remedies on termination of a contract of employment:

‘Indeed, contractual rights exist independently of the LRA. As the Supreme Court of Appeal has on numerous occasions emphasized, section 23 of the Constitution does not deprive employees of a common law right to enforce the terms of a fixed-term contract of employment and the LRA, in turn, does not confine employees to the remedies for “unfair dismissal” provided for in the Act.’³⁷ Chapter VIII of the LRA is “not exhaustive of the rights and remedies that accrue to an employee upon termination of contract of employment.”³⁸

Matters “concerning a contract of employment, irrespective of whether any basic condition of employment constitutes a term of that contract”, are expressly noted in section 77(3) of the Employment Act as falling within the *concurrent* jurisdiction of the High Court and the Labour Court. The question whether contractual claims arising from employment contracts fall within the concurrent jurisdiction of the High Court and the Labour Court has not explicitly arisen before this Court. However, as noted above, the Supreme Court of Appeal has explained on numerous occasions, with reference to the reasoning of this Court regarding jurisdiction over claims based on administrative action in the labour sphere, that the High Court retains its jurisdiction in respect of claims arising from the enforcement of contractual rights in the employment context.³⁹ This finding is borne out by the plain language of section 77(3) of the Employment Act, quoted above, and sections 157(1) and 157(2) of the LRA.’⁴⁰

[37] On the above reasoning, the Constitutional Court held that:

‘A claim for contractual breach, absent reliance on any provision of the LRA, can be identified on Ms Baloyi’s papers. The LRA does not extinguish contractual remedies

³⁷ *Fredericks* fn 25 para 40. See also *Fedlife* fn 20 para 25, in which Nugent JA held that: ‘s 157(1) does not purport to confer exclusive jurisdiction upon the Labour Court generally in relation to matters concerning the relationship between employer and employees’. The approach endorsed in *Fredericks* and *FedLife* was also followed in various judgments of the High Court, including *Jacot-Guillarmod v Provincial Government* 1999 (3) SA 594 (T) at 600E-G and *Runeli v Minister of Home Affairs* 2000 (2) SA 314 (TKH) at 323-324, see fn 32 above.

³⁸ *Fedlife* fn 20 para 22.

³⁹ See, for example, *Makhanya* fn 11 paras 12-13 and 18; *Fedlife* fn 20 paras 4-5 and 24; *Manana* fn 36 para 23; and *McKenzie* fn 36 paras 7-9.

⁴⁰ *Baloyi* fn 29 paras 46-47.

available to employees following a breach of their contract of employment, or unlawful termination thereof. While she may also have a claim for unfair dismissal in terms of the LRA, Ms Baloyi has elected not to pursue this claim. Nothing in the LRA, or the BCEA, required her to advance that claim in the Labour Court.⁴¹

[38] Against the backdrop of the legal principles enunciated by this Court in the number of decisions referred to above, and as confirmed by the Constitutional Court in *Baloyi*, there can be no doubt that Mr Jeewan's claim as well, which is located in the common law, falls within the ordinary jurisdiction of the high court. It follows that the high court's conclusion on the issue of jurisdiction was incorrect. Furthermore, since the LRA does not extinguish contractual remedies available to employees following a breach of or unlawful termination of a contract of employment,⁴² it further follows, by parity of reasoning, that the high court's finding that the matter was *res judicata* on account of the claim pursued at the TBC and finalised in terms of the arbitration award was similarly incorrect. In the circumstances, Transnet's concessions on the issue of jurisdiction and *res judicata*, albeit late, are nonetheless correct. The real issue of course is whether his claim has prescribed in terms of s 11(d) of the Prescription Act. It is to this issue that I now turn.

[39] Section 12(1) of the Prescription Act provides that 'subject to the provisions of ss (2), (3) and (4), prescription shall commence to run as soon as the debt is due'. For 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.⁴³ A 'cause of action' for purposes of prescription means –

⁴¹ Ibid para 48.

⁴² Ibid.

⁴³ See, for example, *Truter and Another v Deysel* [2006] ZASCA 16; 2006 (4) SA 168 (SCA) para 16 (*Truter*); *Evins v Shields Insurance Co. Ltd* 1980 (2) SA 814 (A) (*Evins*) at 838D-H, and *Deloitte Haskins* fn 4 at 532H-I.

‘ . . . every fact which it would be necessary for the plaintiff to prove, if traversed, in order to support his right to the 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.’⁴⁴

[40] A close examination of the allegations set out in his amended particulars of claim as well as the agreed facts contained in the special case, indicates that Mr Jeewan pursues a claim for contractual breach alternatively delictual damages arising from the unlawful termination of the contract. The series of allegations he relies on in paragraph 4 of the particulars of claim for a contractual breach are precisely the same as for his delictual claim in paragraph 5, save that he now pleads wrongfulness, intention and/or negligence on the part of Transnet.

[41] As correctly pointed out by Transnet’s counsel, Mr Jeewan makes the following concession:

‘It is common cause that my LRA claim at the TBC is not the same as my contractual claim in the High Court.’

The significance of this concession is that whilst he pursued a claim for reinstatement before the TBC, his claim before the high court is for damages arising out of a breach of his contract of employment alternatively delictual damages for unlawful termination of his contract in terms of the common law. As the background facts indicate, Mr Jeewan was fully aware of the sequence of events that led to the holding of the disciplinary hearing against him on 14 and 17 May 2010. He was also fully aware of the fact that despite the hearing being postponed to 17 May 2010, he was effectively dismissed on 14 May 2010 when Transnet had signed the termination letter. He was consequently aware, on 14 May 2010, of the fact that his dismissal was unlawful. And, of course, he was aware of the identity of the debtor. All this points to the fact that his ‘cause of action’ for contractual damages arose on 14 May 2010.

⁴⁴ *McKenzie v Farmers’ Co-operative Meat Industries Ltd* 1922 AD 16 at 23, cited with approval in *Evins* at 838D-F.

[42] For his delictual claim, the requirements of fault and unlawfulness do not constitute *factual* ingredients of the 'cause of action', but amount to *legal* conclusions to be drawn from the facts:

'A cause of action means the combination of *facts* that are material for the plaintiff to prove in order to succeed with his action. Such facts must enable a court to arrive at certain *legal conclusions regarding unlawfulness and fault, the constituent conclusions regarding the unlawfulness of a delictual cause of action* being a combination of factual and legal conclusions, namely, a causative act, harm, unlawfulness and culpability or fault.'⁴⁵ (Emphasis added.)

[43] Mr Jeewan's argument that there was no immediate obligation on the part of Transnet to perform, in relation to the debt, on 14 May 2010, is not borne out by the agreed facts contained in the special case. In the special case, Transnet admitted firstly that Mr Jeewan's claim constituted a 'debt' for purposes of ss 11(d) and 12 of the Prescription Act. And secondly, that the debt was due and owing by it on 14 May 2010 when it dismissed him. The fact that Mr Jeewan referred his unfair dismissal to the TBC for arbitration, as he was advised to do by Transnet, is an election that he made at the time. This does not, in any way, detract from the fact that his contractual debt became due on 14 May 2010 and as such was hit by the provisions of s 11(d) of the Prescription Act.

[44] The final submission to consider is whether the high court was obliged to re-interpret the provisions of the Prescription Act having regard to s 39(2) and s 34 of the Constitution on the basis that the Prescription Act limits rights in terms of the Bill of Rights. Inasmuch as the high court's judgment is silent on this aspect, we were informed by Mr Jeewan that this issue was raised by him in his heads of argument before that court. Counsel for Transnet did not contend otherwise. Whilst it is true that the Prescription Act does limit rights in the Bill of Rights, I do not believe, for the reasons set out herein, that s 12 of the Prescription Act needs to be interpreted any differently in respect of the claim being asserted by Mr Jeewan in these proceedings. As

⁴⁵ See M M Loubser *Extinctive Prescription* 1 ed (1996) para 4.6.2 at 80-81; *Evins* fn 43 at 838D-H; *Deloitte Haskins* fn 4 at 532H-I; *Truter* fn 43 para 17.

mentioned already, his present claim is for damages arising out of a contractual breach that took place on 14 May 2010. This claim was not dependent on the outcome of any other claim for relief arising out of an infringement of the LRA. As the *ratios* both in *Makhanya* and *Baloyi* confirm, on the termination of an employment contract an employee can find a claim for relief for infringement of the LRA, and a claim for enforcement of a right that does not emanate from the LRA, for example, a contractual right. It is clear from *Baloyi* that there is no obligation on such a litigant to wait for the LRA processes to be exhausted before invoking common law remedies. In Mr Jeewan's case, the route he elected to follow was to seek re-instatement of his employment. From the date of dismissal, the running of prescription was triggered. It was only when the award was made against him that he decided to follow a different route, that is, sue for damages. By then it was already five years down the line and his claim had already prescribed.

[45] I am accordingly of the view that Mr Jeewan's reliance on the judgment of Froneman J in *Myathaza* is misconceived. As Transnet correctly argues, the two cases are distinguishable in the manner already alluded to in paragraph 18 above.

[46] As alluded to earlier, the facts in *Myathaza* are clearly distinguishable from the present matter. Mr Myathaza was asserting rights solely in terms of the LRA whereas Mr Jeewan, having failed with his dispute before the TBC, then decided to pursue a claim for damages arising out of a contractual breach and in terms of the common law. Mr Jeewan was aware of every fact which it would be necessary for him to prove, if traversed, in order to support his litigation in the high court. Whilst there may have been a need to re-interpret the Prescription Act in terms of s 39(2) and s 34 of the Constitution in Mr Myathaza's case, no such need arises in Mr Jeewan's case. As observed by the Constitutional Court in *Baloyi*, where more than one potential cause of action arises because of a dismissal dispute, 'a litigant must choose the cause of action she wishes to pursue and prepare her pleadings accordingly'.⁴⁶ Thus, pursuant to Mr Jeewan's dismissal, nothing stopped him from approaching the high court sooner for purposes of pursuing his common law claim. All in all, I am of the view that none of the

⁴⁶ *Baloyi* fn 29 para 38.

arguments advanced by Mr Jeewan regarding the issue of prescription in this appeal are sustainable. The appeal directed to that leg of the appeal must accordingly fail.

[47] However, as stated before, Transnet's concessions in respect of the special pleas pertaining to jurisdiction and *res judicata*, respectively, were correctly made, and the appeal directed at the orders of the high court upholding those two special pleas must succeed, as these orders were not formally abandoned and therefore still stand. This, however, does not detract from the fact that in the stated case, Transnet sought an order 'upholding all or any of its three special pleas'. Thus, Transnet would have been entitled to the dismissal of Mr Jeewan's claim. This brings me to the issue of costs.

Costs

[48] As I pointed out at the outset of this judgment, Mr Jeewan represents himself in these proceedings. Ordinarily he would not have incurred any legal costs except for certain out of pocket expenses for travel and accommodation, etc. and certain disbursements for procuring the record. The general rule for the award of costs in constitutional litigation between a private party and the State is that, if the private party is successful, costs should be paid by the State, and if unsuccessful, each party should pay its own costs.⁴⁷ This is known as the '*Biowatch* principle'. Mr Jeewan contends that the principles in *Biowatch*⁴⁸ should apply. Relying on *Makate v Vodacom (Pty) Ltd*⁴⁹ (*Makate*), he contends that courts must always bear in mind the provisions of s 39(2) when interpreting legislation. If the provision under consideration implicates the rights in the Bill of Rights, then the obligation to apply s 39(2) is activated, thus enjoining the court to promote the purport, spirit and objects of the bill of rights when interpreting the specific provision. In that judgment, the Constitutional Court found that it could not be disputed that s 10 read with ss 11 and 12 of the Prescription Act limits the rights guaranteed by s 34 of the Constitution.⁵⁰ It went on to find that in construing those

⁴⁷ *Biowatch* fn 10 para 43.

⁴⁸ *Biowatch* fn 10.

⁴⁹ *Makate v Vodacom (Pty) Ltd* [2016] ZACC 13; 2016 (4) SA 121 (CC); 2016 (6) BCLR 709 (CC).

⁵⁰ *Ibid* para 90.

provisions, the high court ‘was obliged to follow s 39(2) irrespective of whether the parties had asked for it or not’.

[49] There are, however, exceptions to the *Biowatch* principle as set out in *Affordable Medicines Trust v Minister of Health*,⁵¹ a case decided before *Biowatch*, in which Nqobco J (as he then was) observed that there may be circumstances which justify the departure from the general rule on costs in constitutional litigation, such as where the litigation is *frivolous* or *vexatious*. Later on, in *Lawyers for Human Rights v Minister in the Presidency and Others*,⁵² the Constitutional Court explained the exceptions to the *Biowatch* principle as follows:

‘What is “vexatious”? In *Bisset* this Court said this was litigation that was frivolous, improper, instituted without sufficient ground, to serve solely as an annoyance to the defendant”. And a frivolous complaint? That is one with no serious purpose or value. Vexatious litigation is initiated without probable cause by one who is not acting in good faith and is doing so for the purpose of annoying or embarrassing an opponent. Legal action that is not likely to lead to any procedural result is vexatious.’⁵³

[50] Should Mr Jeewan be held liable for any costs now that he is unsuccessful? Considering the dictum in *Chirwa*, which has been alluded to earlier, I do not believe that the litigation that Mr Jeewan embarked upon can be said to be improper, frivolous or vexatious. In my view, the *Biowatch* principle is applicable both in respect of this appeal and the high court litigation.

[51] There is a further reason why I do not believe that Mr Jeewan should be liable for any costs. This arises from Transnet’s late abandonment of the issues of jurisdiction and *res judicata* in this Court. Having concluded, correctly, that the high court was wrong on these issues and that it could no longer defend the appeal in that regard, Transnet could have abandoned the judgment on these issues at a much earlier

⁵¹ *Affordable Medicines Trust v Minister of Health* [2005] ZACC; 2006 (3) SA 247 (CC); 2005 (6) BCLR 529 (CC) para 138.

⁵² *Lawyers for Human Rights v Minister in the Presidency and Others* [2016] ZACC 45; 2017 (1) SA 645 (CC); 2017 (4) BCLR 445 (CC).

⁵³ *Ibid* para 19.

stage.⁵⁴ Instead it put Mr Jeewan to the inconvenience of having to prepare his heads of argument on these issues as well. As a result, two of the orders granted by the high court fall to be set aside. In all the circumstances, I consider that it would be fair if both parties carried their own costs herein.

Order

[52] In the result, the orders I make are the following:

- 1 The appeal is dismissed, save to the extent set out below.
- 2 The appeal in relation to the orders upholding the special pleas of jurisdiction and *res judicata* is upheld.
- 3 The order of the High Court is set aside and replaced with the following order:
 - '3.1 The special plea of prescription is upheld.
 - 3.2 The special pleas of jurisdiction and *res judicata* are dismissed.
 - 3.3 The plaintiff's claim is dismissed.
 - 3.4 There is no order as to costs.'
- 4 There is no order as to costs in this Court.

R SEEOBIN
ACTING JUDGE OF APPEAL

Appearances

For the appellant:	S Jeewan (in person)
For the first respondent:	Adv M K Mathipa
Instructed by:	Ningiza Horner Incorporated, Sandton McIntyre van der Post, Bloemfontein

⁵⁴ Rule 41(2) of the Uniform Rules.