

SOUTH AFRICA / JUDGMENT

# Coombe N.O v Premier of the Province of KwaZulu Natal (2144/2000) [2015] ZAKZDHC 62 (31 July 2015)

[2015] ZAKZDHC 62

## COURT

Kwazulu-Natal High Court, Durban

## BEFORE

Sishi

## CASE / FILE NUMBER

2144/2000

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IN

THE HIGH COURT OF SOUTH AFRICA,

KWAZULU-NATAL

LOCAL DIVISION, DURBAN

CASE

NO: 2144/2000

DATE:

31 JULY 2015

In

the matter between:

COLIN

ARNOLD VICTOR COOMBE

N.O.....PLAINTIFF

And

THE

PREMIER OF THE PROVINCE

OF

KWAZUU-

NATAL.....DEFENDANT

ORDER

Delivered

on: 31 July 2015

The

defendant's first and second special pleas are dismissed.

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**JUDGMENT**

SISHI J

**Introduction**

- [1] The plaintiff instituted an action against the defendant for the payment of R122 283, 54, being additional moneys due to the defendant in terms of the contract; R92 237,40 being penalties erroneously charged by the defendant in terms of the contract and R19 829, 16, being retention money retained by the defendant in terms of the contract.
- [2] The plaintiff in this matter sues the defendant in his representative capacity as an executor of the deceased estate, Adari Krishna Appanna who died on 9 July 1999. The plaintiff is the nominee of the First National Asset Management and Trust Company (Pty) Ltd, the Executor testamentary of the late Adari Krishna Appanna.
- [3] The defendant is the Premier of the Province of KwaZulu Natal.

Factual

**background**

- [4] The plaintiff's cause of action is based on the contract entered into by the relevant parties on 12 December 1994, which was concluded between the aforesaid Adari Krishna Appanna "The Contractor", then, the sole proprietor of a construction

business conducted by him under the style of "The three builders" and the defendant, duly represented by its authorised

signatory.

- [5] In terms of the aforesaid building contract, the contractor undertook to perform certain building works for the defendant at Astra Primary School in Chatsworth, Durban.
- [6] It was the term of the said contract that the contractor would complete the building works by 11 December 1995.
- [7] It was a further term of the contract that should the building works be delayed due to any of a number of defined events or factors, a contractor would be entitled to apply in writing within twenty one days of the cause of delay arising, to the defendant's

authorised representative, for an extension of the contract period, stating the cause of delay and the period of extension applied for.

- [8] The aforesaid application was to be considered and acceded to wholly or in part or refused by the defendant's authorised

representative.

- [9] It was a tacit, alternatively, implied term of the contract that the decision referred to in the paragraph above would be made within a reasonable time of one month.
- [10] During the course of construction, the Contractor encountered several of the aforesaid defined events or factors causing delays to the carrying out of the building works and, acted in accordance with the procedure referred to in paragraph 8 above.
- [11] The plaintiff has set out in its plea, in the particulars of claim a number of such applications in respect of which it is alleged that the defendant did not respond to within a reasonable time, the plaintiff incurred certain penalties in terms of the contract.
- [12] It is at this stage not necessary to deal with the merits of this application as parties agreed that the Court is required to adjudicate upon the defendant's special pleas first.

The

## issues

- [13] The issue in this matter is whether or not the defendant's two special pleas should be upheld.
- [14] In order for these special pleas to be understood in their proper perspective, it is necessary to set out verbatim both the special pleas and the plaintiff's replications thereto.

### Defendant's first special plea

- [15] The defendant's first special plea is set out as follows in the pleading:

'(1) The plaintiff relies upon a contract comprising, inter alia, annexure "B: to the plaintiff's Particulars of Claim, in support of the plaintiff's causes of action and claims as against the defendant.

- (2) Clause 27 of the contract provides as follows:

*"(1) Should any dispute or difference arise between the representative/agent or the Director-General and the contractor as to any matter relating to the meaning of or arising out of the contract, the Director-General shall have the option of dealing with the claim directly to determine such dispute or difference by a written decision given to the contractor. The said decision shall be final and binding on the parties unless the contractor within 21 days of the receipt thereof by written notice to the Director-General*

rejects the same.

- (2) Should the contractor not accept the decision of the Director-General the contractor shall be entitled to have recourse to the courts of law of the Republic of South Africa provided that any action to be instituted under this clause shall be commenced and process served within 6 months of the date of the aforesaid decision".

- (3) The action relates to disputes and/or differences between the Director-General (represented by the defendant) and the contractor (represented by the plaintiff).
- (4) Neither the plaintiff nor the contractor referred the said disputes and/or differences, prior to the institution of the action, for a decision to the Director-General in accordance with the provisions of Clause 27 of the contract.
- (5) The Director-General has accordingly not been afforded the option of dealing with the plaintiff's claims.
- (6) The action is accordingly premature.
- (7) Wherefore, the defendant prays for judgment in his favour and for an order dismissing the plaintiff's claim with costs."

Plaintiff's replication to defendant's first special plea

[16] The plaintiff's replication to the defendant's first special plea is set out as follows:

16.1 The contract does not impose on the contractor a duty to refer the matter to the Director-General for his decision;

16.2 Inasmuch as the contract confers an option on the Director-General to deal with the claims and the defendant alleges that no such option was exercised by the Director-General, and

16.3 Inasmuch as the contract does not prescribe that the Director-General's decision determining the dispute or difference is a sine qua non of the plaintiff's right to sue.

16.4 The first special plea is bad in law and falls to be dismissed.

## Submissions

on defendant's first special plea

[17] Counsel for the defendant submitted that the first special plea should be upheld in that the plaintiff failed to comply with clause 27 of the contract. He submitted that the director general was not given an option to deal with the issues. He submitted that it was imperative for the plaintiff to first ask the Director-General to deal with the request for extensions. Furthermore, he submitted that the application letters dealing with the delay did not notify the defendant of the causes of the delay. He submitted that the summons was issued on 15 March 2000 without the Director-General having been given opportunity to deal with the

issues.

[18] He then submitted that the first special plea should be upheld.

[19] Counsel for the plaintiff submitted that the first defendant's plea was merely a dilatory plea.

[20] Counsel further submitted that in terms of clause 27 of the contract, it does not mean that if the Director-General has not considered the matter and made a decision, then the defendant's special plea should be upheld.

[21] He submitted that the non-referral of the dispute to the Director-General by either party is no bar to the plaintiff's

right to sue the defendant.

[22] He further submitted that there was no contractual obligation on the part of the plaintiff to have referred the matter to the

Director-General for a decision.

[23] He submitted that the interpretation accorded by the defendant to clause 27 of the contract is misplaced.

[24] He submitted that the defendant does not say when the dispute arose and that it is incumbent upon the defendant to place facts before the Court to enable the Court to make a decision on the special plea. The defendant has failed to do so.

[25] He then submitted that the defendant's first special plea is bad in law and falls to be dismissed.

[26] I agree with the plaintiff's submission that clause 27 of the contract does not impose on the contractor a duty to refer the matter to the Director-General for his decision.

[27] The fact that neither party has referred the dispute to the Director-General for decision is not necessarily a bar to the plaintiff to institute the action against the defendant.

[28] There is nothing in the provisions of clause 27 of the contract which requires that the Director-General should first be afforded an opportunity of dealing with the plaintiff's claim before summons is issued.

[29] Accordingly, the submission by Counsel for the defendant that the action is premature has no substance.

[30] In the result, the defendant's first special plea is dismissed.

Defendant's second special plea

[31] The defendant's second special plea reads as follows:

'(1)The plaintiff's claims are regulated by the provisions of the Prescription Act No.68 of 1969 ("the Act").

(2) Summons in the action was served on the defendant at 15h45 on 15 March 2000.

- (3) Those elements, alternatively aspects of the plaintiff's claims which accrued and became due more than three years prior to 15 March 2000, that is prior to 16 March 1997, have become prescribed in terms of Section 11 of the Act and are accordingly unenforceable as against the plaintiff.
- (4) Wherefore the defendant prays for judgment in his favour and for an order dismissing, with costs, those elements, alternatively aspects of the plaintiff's claims which became due more than three years prior to 15 March 2000, that is prior to 16 March 1997.'

Plaintiff's replication to defendant's second special plea

[32] The plaintiff's replication is set out as follows in the pleadings:

*"(1) In relation to the defendant's second special plea the plaintiff denying all the allegations replicates as follows in the alternative:*

- (a) The contractor's claims which form the subject matter of this action, insofar as they are debts within the meaning of Act 68 of 1969, were not due until the representative/agent of the defendant supplied the contractor with a copy of the final account as prescribed by clause 23(4) of the contract.
- (b) Such final account was not supplied to the contractor prior to 16 March 1997
- (2) Wherefore, the plaintiff prays that the defendant's second special plea be dismissed with costs."

## Submissions

on second special plea

- [33] The defendant submitted that in respect of the claim for R122 283.54, the plaintiff failed to comply with the provisions of Section 20, clause 24 of the contract in that letters by the plaintiff requesting the extension of time did not indicate the causes for the delay.
- [34] He then referred to the letters contained in pages 5 and 6 of the defendant's bundle dated 30 November 1995 and 7 December 1995. The first letter referred to the plaintiff's request for an extension of three months dated 24 November 1995 and the defendant's response is that they are unable to support the application due to lack of full motivation. They further stated that it is necessary for the plaintiff to show where the delay has occurred, to what extent it affected the current building program, which traits were effected and for them to quantify the effect of the working date.
- [35] In the second letter, they confirmed the extended completion date to be 29 January 1996 and pointed out that a further fourty four working days which was not presented to the delay committee required an additional motivation before they can consider it.

- [36] Despite the many applications referred to in the plaintiff's particulars of claim requesting an extension of time, only two letters have been furnished by the defendant dealing with lack of motivation for the extension of time.
- [37] Counsel for the defendant then submitted that the delay started in February 1995, the summons was issued on 15 March 2000 for the debt that arose in 1995 as at that time the debt had prescribed. He submitted that it is common cause that the plaintiff died on 9 July 1999 which would have delayed the running of prescription in terms of section 13(1)(h) of the Prescription Act 68 of 1969. He then submitted that by then his claim had already prescribed by 12 June 1996.
- [38] He then submitted that the same applies to the claim of R92 237, 40.
- [39] He then submitted that the elements or aspects of the plaintiff's claim which accrued and became due more than three years prior to 15 March 2000 that is prior to 16 March 1997 have become prescribed in terms of section 11 of the Prescription Act and accordingly unenforceable against the defendant.
- [40] Counsel for the plaintiff submitted that as the plaintiff died on 9 July 1999, the running of prescription should have then delayed by one year in terms of section 13 of the Prescription Act.
- [42] He further submitted that it is incumbent upon the defendant to say which claims have prescribed.
- [43] According to the plaintiff, the final delivery certificate was issued on the day of 11 November 1997, the defendant has, however, pleaded that the final delivery certificate was issued on 12 November 1997.
- [44] Clause 21.1 of the contract provides that the contractor shall deliver to the representatives/agent the works and premises when completed in a clean and perfect state internally and externally, free for occupation and complete in every particular. When the works are, in the opinion of the representative/agent, so completed the representative/agent will issue the first delivery certificate. Clause 21.2 provides that the final delivery certificate will be issued three months after the date of the first delivery certificate provided that if defects referred to in 22.1 hereof, have occurred during this period which are rectified after such period of three months, the final delivery certificate will be issued after the rectification of all such defects.
- [45] Counsel further submitted that the work was completed on 12 November 1997.
- [46] Clause 23.4 of the contract provides:
- "After the completion of the works final account shall be prepared by the representatives/agent and all relevant documents, including documents relating to the accounts of nominated subcontractors, shall be furnished to the representatives/agent by the contractor and he shall provide all assistance necessary for the compilation of the following account. The contractor shall be supplied with the copy of the final*

*account which shall be returned to the Director-General dully signed by the contractor. Should the contractor within three months from the date of issue of the final account fail to object to the contents the final account, giving full details of such objection, or fail to sign the final account, he shall be deemed to be accepted the final account ...”*

- [47] Counsel submitted correctly in my view that the provisions of this clause have not been complied with, the contractor had not been furnished with the final account which he had to sign and return to the Director-General. He also submitted that until that happened, there is no final account.
- [48] It is trite that the party who raises prescription, must allege and prove the date of inception of the period of prescription. See *Gerike v Sack*[1], as a general rule, prescription begins to run as soon as the debt is due unless the debt is as a result of continuing wrong, see *Barnet and others v Minister of Land Affairs*[2]. This means that a debt must be immediately claimable by the creditor in legal proceedings and that the debtor must be under an obligation to perform, see *Benson and another v Walters and others*[3].
- [49] Counsel for the plaintiff submitted correctly that the defendant has not pleaded the date of the inception of the period of prescription. He then submitted that until the final account has been prepared, the debt cannot be due.
- [50] The final delivery certificate was given on 12 November 1997 and before that no prescription can run. Until a final account has been presented, no question of prescription arises.

## Analysis

and assessment of the argument

- [51] It is clear from page 1 bundle 2, in a letter dated 14 May 1997 that the defendant as at that date, the department was still making payment to the plaintiff. This is letter from Stauch Vorster Architects confirming submission to the Department of Works, Durban, their recommendations for the payment No.22 in the sum of R29 792, 58, which payment includes the amount of R3 658,74 for vat. The letter attaches a copy of the contract payment voucher and Quantity Surveyor's recommendations.
- [52] It is also evident from the payment certificate number 22 on page 3 of the plaintiff's bundle 2 and page 6 of plaintiff's bundle 2 that is the schedule of adjustments in terms of the contract price adjustment formular prepared by Norman and Single Quantity Surveyors that the contract date completion was extended to the 3 June 1996.
- [53] On pages 7, 8 and 9 of the plaintiff's bundle 2 is a letter dated 24 June 1998 dealing with a list tabulating the dates when drawings and blocks were handed over. Item No.54 thereof states "boundary fencing checked and approved on 28 May 1997".

[54] On page 10 of the plaintiff's bundle 2, is the letter dated 17 January 1997, from Stauch Vorster Architects addressed to 3 builders, dealing with the first delivery certificate, for the release of a guarantee. This letter reads as follows:

*"Dear Sir,*

On behalf of the department of Works, we confirm having completed first delivery of the above service on 7 December 1996.

For your records, we enclose a copy of each of the four certificates of first delivery confirming the days on which practical completion was attained for the various portions of the works".

The letter is signed by Paul Winters, the project architect. Copies of these four certificates of delivery are attached to this letter from pages 11 – 14 of plaintiff's second bundle.

[55] Of importance in all these certificates of first delivery is the date of 17 January 1997, and the aspects dealing with delays.

[56] All four certificates of first delivery are dated 17 January 1997. In the section with delays, the following is recorded delays:

*"It is confirmed that all applications for extension of the contract, in terms of this certificate have been submitted to the principal agent for decision"*

[57] This is a clear indication that as at 17 January 1997, decisions had not yet been made on all applications for extension for the contract period in terms of the certificate referred to above.

[58] Clause 20.4 of the contract deals with delays and provides as follows:

*"If the works are delayed by variations, omissions, additions, substitutions, or organised work stoppages by any workman not due to*

any action on the part of the contractor, exceptionally inclement weather, any substantial increase in provisional quantities, or any other cause beyond the contractor's contributing delay caused by the Director General, or his representative/agent referred to in clause 25 hereof, then the contractor shall be entitled to apply in writing within 21 days of the cause of delay arising to the director general through the representatives/agent for extension of the contract period stating the cause of the delay and period of extension applied for".

[59] It has been indicated above that the director general has extended the completion contract period to 3 June 1996. No document has been produced by the defendant indicating that those extensions had not been granted.

[60] In the circumstances, those claims cannot be held to have prescribed.

[61] Section 12(1) of the Prescription Act 68 of 1969 provides that prescription shall commence to run as soon as the debt is due.

[62] In the Master v I L Back and Co. Ltd and others[4], the following was said:

‘The words “debt is due”, in the section must be given their ordinary meaning. It seems clear that this means that there must be a liquidated money obligation presently claimable by the creditor for which an action could presently be brought against the debtor. Stated another way, the debt must be won in respect of which the debtor is under an obligation to pay immediately’.

This case was cited with approval in Benson and another v Walters and others[5].

[63] I have already indicated above that no final account had been presented in this matter as required by the provisions of the

contract, furthermore, as at 14 May 1997, the department was still making payments to the plaintiff. It is also clear from the documents referred to above that the contract was extended to 3 June 1996.

[64] Considering all the above, I am satisfied that both the first and second special pleas have no merit in this matter. They fall to be dismissed.

Order

[65] The defendant’s first and second special pleas are dismissed.

#### APPEARANCES

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Date of Judgment : 31 July 2015

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[1] 1978

(2) All SA 111 (A)

[2] 2007

(6) SA 313 (SCA)

[3] 1984

(1) SA 73(A) at 82 B-G.

[4] 1983

(1) SA 986 A at 1004.

[5] Supra at 82 C-D.

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