

Case summary written by Jarrod Van Der Heever and checked by Courtney Altmuner.

26 March 2021

Background

The case at hand came before the High Court of South Africa Eastern Cape Division, Bhisho (“**the Court**”) involves an application for summary judgment by Mariswe (Pty) Ltd (“**the Plaintiff**”) against The MEC for Roads and Public Works (“**the Defendant**”) in terms whereof the Plaintiff sought payment in the sum of **R334 799.92** in terms of a written agreement concluded between the Plaintiff and the Defendant in relation to engineering services rendered by the Plaintiff to the Defendant.

Despite the Defendant having admitted to being indebted to the Plaintiff in the aforesaid amount, the Defendant opposed the summary judgment application brought by the Plaintiff. The Defendant’s defence was based on the grounds that the Plaintiff’s claim had prescribed and that the Plaintiff failed to comply with the National Treasury Note 3 of 2016/17 (“**the Note**”), which failure allegedly precluded the Plaintiff from claiming payment. The Court proceeded to analyse only the first defence raised by the Defendant, namely that the Plaintiff’s claim had allegedly prescribed.

Court held

The Court, in analysing whether the defence of prescription was indeed a *bona fide* defence noted that the first demand for payment was made by the Plaintiff on **20 April 2016**. The Plaintiff sent a subsequent demand on **10 August 2016**, a ‘final’ notice was served on the Defendant on **10 October 2016** followed by a notice that legal action was anticipated on **25 January 2017**.

On **30 January 2017**, the Defendant forwarded a memorandum to the Plaintiff wherein the Defendant stated that it would only be in a position to settle the debts due to its contractors during the financial year commencing during **April 2017**. However, no payment was forthcoming to the Plaintiff and summons was eventually issued and served on the Defendant on **28 July 2020**.

The Court noted that section 11(d) of the Prescription Act 68 of 1969 (“**the Act**”), provides that a

Plaintiff's claim shall be prescribed after a period of 3 years. The Court further noted that section 2(1) of the Act states that prescription shall begin to run as soon as the debt arises. In the present case, the debt arose on 20 April 2016. Section 14 of the Act states that prescription shall be interrupted by any express or tacit acknowledgement of a debt owed and, once interrupted, prescription shall commence running fresh from the date of the interruption.

The Court held that, in light of the aforementioned, even if the memorandum sent by the Defendant on **30 January 2017** is deemed to have interrupted prescription, the summons was still issued, after 3 years of this date (by approximately 5 months). The Plaintiff alleged in the affidavit in support of summary judgment that the Defendant once again acknowledged liability on **9 September 2019**, as set out in an item of correspondence addressed to the Plaintiff.

The Plaintiff however failed to annex the aforementioned correspondence to its affidavit in support of the summary judgment, and, as such, the Court was unable to find in favour of the Plaintiff.

The Court held that, in light of the aforesaid, the Defendant had indeed raised a *bona fide* defence and that the summary judgment application was refused.

A punitive costs award against the Plaintiff was sought by the Defendant however the court held that the failure to annex the correspondence may have simply been a clerical error. The Court held that there existed no grounds on which to depart from the usual order. Summary Judgment was accordingly dismissed and the Defendant was granted leave to defend.

Mariswe (Pty) Ltd v MEC for Roads and Public Works (411-21) [2021] ZAECBHC
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