



**IN THE HIGH OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA**

(1) REPORTABLE: **NO**
(2) OF INTEREST TO OTHER JUDGES: **NO**
(3) REVISED:

Date: **14 JULY 2022** Signature: _____

Case No.: 69402/2017

In the matter between:

THE MINISTER OF HOME AFFAIRS

First Applicant

**THE DEPARTMENT OF HOME AFFAIRS IN THE REPUBLIC
OF SOUTH AFRICA**

Second Applicant

And

NEC AFRICA (PTY) LTD

Respondent

In re:

NEC AFRICA (PTY) LTD

Applicant

And

THE MINISTER OF HOME AFFAIRS

First Respondent

**THE DEPARTMENT OF HOME AFFAIRS IN THE REPUBLIC
OF SOUTH AFRICA**

Second Respondent

THE CHIEF EXECUTIVE OFFICER OF STATE INFORMATION

TECHNOLOGY AGENCY SOC LTD	Third Respondent
STATE INFORMATION TECHNOLOGY AGENCY SOC LTD	Fourth Respondent
EOH HOLDINGS LIMITED	Fifth Respondent
EOH MTHOMBO (PTY) LTD	Sixth Respondent
ACCENTURE (SOUTH AFRICA) (PTY) LTD	Seventh Respondent

JUDGMENT

NEUKIRCHER J:

[1] This is an application¹ in terms of Rule 41(1)(c). The Notice of Motion reads *inter alia* as follows:

"1. Directing the Respondent, NEC Africa (Pty) Ltd, to pay the cost incurred by the First and Second Applicants (including the costs of two counsel), in opposing the urgent application instituted by the Respondent on 9 October 2017, and the subsequent withdrawal on 19 July 2018."

[2] The Rule 41(1)(c) application² was instituted on 11 October 2021 which is three years and almost 4 months after the NEC³ withdrew their review application.

¹ The applicants in the present application were the respondents in the review application. They are referred to as "the applicants" in this judgment

² Called "the costs application" herein

³ The present respondent

The common cause facts:

[3] The following facts are common cause:

- 3.1 on 9 October 2017 the NEC instituted urgent motion proceedings against the applicants;
- 3.2 the purpose of that application was to review and set aside Bid no RFP 1498/2016 which was *inter alia* for the design, maintenance and support of an integrated automated biometric identification system for the second applicant (the Department of Home Affairs – “the DHA”) ⁴;
- 3.3 the applicants opposed the review application and on 22 May 2018 a meeting took place at the office of the Deputy Judge President the purpose of which was to apply for a special allocation and to set directives regarding the exchange of further affidavits;
- 3.4 on 19 June 2018, a week before the applicants were due to deliver their answering affidavit, the NEC withdrew the application – the notice of withdrawal simply states:

“TAKE NOTICE that the Applicant hereby withdraws the above-mentioned application.”
- 3.5 accompanying this notice was an email by the NEC’s attorneys of record stating the following:

“Please find attached our client’s notice of withdrawal of the application. Given the history and development of this matter, the notice of withdrawal does not contain a tender for the payment of costs.

⁴ This application is referred to as “the review application” herein

We intend to resolve the issues of costs with the respondents individually and in the circumstances we invite the respondents' individual suggestions in this regard.”;

- 3.6 of course, the failure to tender costs did not sit well with the applicants, whose attorney responded to this email in a letter dated 16 November 2018. In this letter he sets out his client's position and the substantial costs that had been incurred before the matter was so abruptly withdrawn. As the letter sketches the reasons for this application, it is apposite to quote it:

“2. Following an extensive consideration of your client's invitation, our client hereby proposes the following, for the reasons mentioned herein below:

- 2.1 Since the institution of the review application proceedings in the Pretoria High Court in October 2017, followed by the urgent interlocutory applications in November 2017, our client has incurred substantial legal costs in opposing these proceedings.*
- 2.2 In order to challenge your client's contentions, our client was required to secure the services of two senior counsel, a junior advocate, and experts to assist our clients to rebut the allegations presented – due to the complex nature of the matter.*
- 2.3 The complete set of the founding papers, including the amended notice of motion and founding affidavit with annexures, aggregated to more than 500 pages.*

- 2.4 *The Record of Proceedings comprised of more than 8000 pages, which, needless to say, was an arduous document to consider.*
- 2.5 *Your client, as early as February 2018, had approached the office of the Deputy Judge President ("DJP") to convene and publish a Special Allocation for the exchange of further affidavits, and a set down date for the hearing of the matter, which meeting was held on Tuesday, 22 May 2018.*
- 2.5.1 *At that meeting the DJP directed that, inter alia, the majority of the respondents, including our clients, file their answering affidavits by 29 June 2018.*
- 2.5.2 *You circulated your notice of withdrawal via email on 18 June 2018, merely a week before our clients were due to deliver their answering affidavit, which comprised of more than 125 pages, excluding annexures.*
- 2.6 *At the time of your client's withdrawal of its review application, our clients were considering the final draft of their answering affidavit for purposes of finalising and deposing to same.*
- 2.7 *In order to prepare and formulate a response, numerous consultations, meetings, and interactions between the representatives of the Council for Scientific and Industrial*

Research ("CSIR") and the DHA were held, to obtain comprehensive instructions.

3. *As a result of your client's election to pursue the review application, our clients incurred substantial costs (in the sum of over R3 million) to oppose your client's application, including (but not limited to) the costs of employing three counsel, the services of experts, and appointing correspondent attorneys. In the event that you request to view the invoices detailing these costs, kindly let us know, and we will make the necessary arrangements in this regard.*
4. *In view of the aforementioned, we refer to the decision of SA Commercial Catering and Allied Workers' Union v Lehapa NO (Mostert NO intervening) 2005(6) SA 365 (WW) wherein it was held that where a litigant withdraws proceedings, he or she is in a position similar to that of an unsuccessful litigant, and the general rule is that the other party is entitled to costs.*
5. *Based on the foregoing, we are instructed to propose that your client pays a contribution to our clients' legal costs (including disbursements) in the sum of R2.5 million.*
6. *Accordingly, please furnish us with your client's response to our client's proposal by close of business on 29 November 2018."*
- 3.7 on 13 February 2019, the applicants' attorney addressed a follow-up email to the NEC – it was met with a deafening silence.

[4] Then, on 19 November 2019, the State Information Technology Agency SOC Ltd ("SITA") – who were the third and fourth respondents in the review

application - launched an application to recover their costs of that application. On 31 July 2020, the applicants launched an application for leave to intervene in those proceedings in which they sought the following relief:

*"2. The Respondent, NEC Africa (Pty) Ltd is directed to pay the costs incurred by the Department of Home Affairs (intervening party/second applicant) in opposing the urgent application instituted by the respondent on 09 October 2017 and withdrawn on 19 June 2018."*⁵

[5] The applicants state that the reason for this application was that their basis for seeking costs against NEC therein was identical to those in SITA's application. However, on 5 August 2020, the applicants withdrew their application for leave to intervene. There is no explanation for this in the founding affidavit of this costs application. All that the applicants state in their founding affidavit is:

"20. In the matter of SA Commercial Catering and Allied Workers' Union v Lehapa NO (Moster NO intervening) 2005(6) SA 354 (W), the Court held that where a litigant withdraws proceedings, he or she is in a position similar to that of an unsuccessful litigant, and the general rule is that the other party is entitled to costs.

21. NEC Africa is liable for the costs incurred by Applicants in opposing its review application. This much is acknowledged in the email correspondence wherein NEC Africa requests proposals for the settlement of such costs."

⁵ I.e. precisely the same relief presently sought

The Defence

- [6] The NEC opposes the costs application on the following grounds:
- 6.1 that the applicants claim for costs, to the extent that it has a valid claim which is denied, has prescribed;
 - 6.2 the withdrawal of the review application was because the conduct of the NEC had rendered the relief sought moot by the date allocated for hearing;
 - 6.3 that the email of 19 June 2018 indicating that the NEC *"intends to resolve the issues of costs with the respondents individually..."* is not an admission of liability for costs.
- [7] It is appropriate to first deal with the issue of whether the applicants claim for costs has prescribed as, if successful, it would be dispositive of the matter.

The Prescription Defence

- [8] Section 12 of the *Prescription Act*⁶ reads as follows:

"12 When prescription begins to run

(1) Subject to the provisions of subsections (2), (3), and (4), prescription shall commence to run as soon as the debt is due.

(2) If the debtor wilfully prevents the creditor from coming to know of the existence of the debt, prescription shall not commence to run until the creditor becomes aware of the existence of the debt.

(3) A debt shall not be deemed to be due until the creditor has knowledge of the identity of the debtor and of the facts from which the debt arises:

⁶ Act 68 of 1969

Provided that a creditor shall be deemed to have such knowledge if he could have acquired it by exercising reasonable care.

(4) Prescription shall not commence to run in respect of a debt that is based on the alleged commission of-

(a) any sexual offence in terms of the common law or a statute; and

(b) offences as provided for in sections 4, 5, 6, 7 and 8 (1) and involvement in these offences as provided for in section 10 of the Prevention and Combating of Trafficking in Persons Act, 2013, during the time in which the creditor is unable to institute proceedings because of his or her mental or intellectual disability, disorder or incapacity, or because of any other factor that the court deems appropriate.”⁷

[9] Rule 41(1) states:

“(1) (a) A person instituting any proceedings may at any time before the matter has been set down and thereafter by consent of the parties or leave of the court withdraw such proceedings, in any of which events he shall deliver a notice of withdrawal and may embody in such notice a consent to pay costs; and the taxing master shall tax such costs on the request of the other party.

(b) A consent to pay costs referred to in paragraph (a), shall have the effect of an order of court for such costs.

⁷

It is not disputed that the period of prescription under discussion is 3 years

(c) *If no such consent to pay costs is embodied in the notice of withdrawal, the other party may apply to court on notice for an order for costs."*

[10] It is common cause that the NEC's notice of withdrawal was delivered on 19 July 2018 and was not accompanied by a tender for costs. Thus the question is:

10.1 when does prescription start to run in respect of the Rule 41(1) application?

10.2 does the NEC's attorneys' email of 19 June 2018 embody a tender for costs?

10.3 what effect, if any, does the applicants application for intervention and subsequent withdrawal⁸ have on the running of the prescription?

[11] The applicants argue that despite the NEC's email of 19 June 2018 and their attorneys' correspondence of 16 November 2018, 13 February 2019 and 19 November 2019 and a telephone call between its attorneys and that of the NEC at mid-December 2018⁹, the NEC have simply failed to make good on their original undertaking.

[12] The applicants also argue that although SITA successfully prosecuted a claim for costs, the NEC has otherwise remained silent on the issue vis-à-vis the other respondents in the review application.

⁸ See paragraph 3.8 *supra*

⁹ Where the latter undertook to "*take instructions*" from his client

[13] The applicants then argue that, in order to determine whether or not the claim has prescribed one must first ascertain the nature of the claim. This goes to the heart of whether the claim for costs, absent a consent to pay or a court order, can be considered to be a debt. This, so the argument goes, is because a litigant is not automatically entitled to their costs of litigation and that for the “debt” to become “due”, either an agreement regarding the amount of costs to be paid, or the taxation thereof via a court order, must first take place.

[14] In furthering their argument, the applicants rely, *inter alia*, on the following dictum of Harms JA in **Santam Ltd v Ethwar**¹⁰:

“...It seems to me that the answer, perforce, has to be that the parties could not have intended that the respondent could recover her costs without a prior agreement or taxation. Any summons claiming payment of costs not agreed upon or not taxed would have been met by a successful exception.”

[15] But reliance on **Santam** for this proposition is, in my view, misplaced: in that case the respondent had instituted an action for compensation. The appellant offered to settle the matter by way of payment in terms of Rule 34 and also agreed to pay the respondent’s costs “as taxed or agreed between the parties”. The offer was accepted by the plaintiff and the damages were paid. But the plaintiff only presented his bill of costs and a notice of taxation more than three years later. Harms JA found that the meaning of “prescription should

¹⁰ [1999] 1 All SA 252 (A) at 256

commence running as soon as the debt is due” is that “...a debt becomes due in terms of the Act when the creditor acquires a complete cause of action for its recovery; further, that a cause of action is the entire set of facts which a plaintiff proves to succeed”.

- [16] In **Santam** the Court found that, given the terms of the appellant’s tender, the parties could not have intended that the respondent could recover costs without a prior agreement or taxation. Thus, prescription could only start upon either one of those two events taking place. Given that neither event had taken place, prescription had therefore not commenced and the claim had not prescribed.

- [17] The set of facts in **Santam** is very different to that *in casu*, the question here is: what is the trigger for prescription *i.e.* when is the cause of action complete?

- [18] The applicants argue that, at worst, this would be once this Court orders that the NEC is to pay the applicant’s costs. They argue that this is firstly because there is no tender for costs in the notice of withdrawal and secondly because a litigant is not automatically entitled to costs. The argument is further that even were a costs order to be granted, the “*debt*” would not become “*due*” until such time as the costs had been taxed or agreed per **Santam supra**.

- [19] Lastly, the argument is that even if prescription had begun to run, then it started to run on 16 November 2018 when the applicant made efforts to engage with the NEC on the issue of costs – if this is indeed so, then this application was

timeously instituted. If either of the other arguments hold sway, then prescription has not yet commenced.

[20] In **Truter and Another v Deyssel**¹¹ the SCA held that:

"[16] ...For the 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."

[21] And at paragraph 19 the SCA held that "cause of action" for the purposes of prescription thus means:

"... 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."

[22] In **Mtokonya v Minister of Police**¹² Zondo J stated the following:

"Section 12(3) does not require the creditor to have knowledge of any right to sue the debtor nor does it require him or her to have knowledge of legal conclusions that may be drawn from 'the facts from which the debt arises'. Case

¹¹ 2006(4) SA 168 (SCA)

¹² 2018 (5) SA 22 (CC)

law is to the effect that the facts from which the debt arises are the facts which a creditor would need to prove in order to establish the liability of the debtor.”

- [23] The argument that the requirement that the “debt” is “due” cannot be fulfilled until a) this Court has actually ordered the NEC to pay those costs; and b) the costs are taxed/agreed upon (i.e. the debt is liquidated) loses sight of the following: in **Mtokanya**¹³, the court referred to an unreported judgment by Moseneke J in **Eskom v Bojanala Platinum District Municipality** in which he stated the following:

‘In my view, there is no merit in the contention advanced on behalf of the plaintiff that prescription began to run only on the date the judgment of the SCA was delivered. The essence of this submission is that a claim or debt does not become due when the facts from which it arose are known to the claimant, but only when such claimant has acquired certainty in regard to the law and attendant rights and obligations that might be applicable to such a debt. If such a construction were to be placed on the provisions of s 12(3) grave absurdity would arise. These provisions regulating prescription of claims would be rendered nugatory and ineffectual. Prescription periods would be rendered elastic, open ended and contingent upon the claimant’s subjective sense of legal certainty. On this contention, every claimant would be entitled to have legal certainty before the debt it seeks to enforce becomes or is deemed to be due. In my view, legal certainty does not constitute a fact from which a debt arises under s 12(3). A claimant cannot blissfully await authoritative, final and binding judicial pronouncements before its debt

¹³ At para 46

becomes due, or before it is deemed to have knowledge of the facts from which the debt arises."¹⁴

- [24] And finally, in **Mtokanya** the notion that "...the meaning of the provision in section 12(3) that a debt shall not be deemed to be due until the creditor has 'knowledge ... of the facts from which the debt arises' includes that the creditor must have knowledge of legal conclusions, i.e. that the conduct of the debtor was wrongful and actionable..." was rejected.
- [25] All the facts informing the application in terms of Rule 41(1)(c) were known to the applicants on 19 June 2018 – on that date its cause of action became complete.¹⁵ The fact that the applicants were not in possession of a court order regarding costs does not postpone the commencement of prescription: in my view they are in the same position as a party who institutes (for example) a damages claim for negligence where the merits portion of the claim must first be decided before the quantum is decided. In these cases, if the claim is not instituted within 3 years, it prescribes.
- [26] What the applicants actually argue is that they require "certainty" as to their position before the period of prescription begins to run, but this argument is untenable as is clear from **Eskom** and **Mtokonya** supra.

¹⁴ *Mtokanya* supra

¹⁵ i.e. they were in possession of (a) the notice of withdrawal, (b) the date of the withdrawal, and (c) all the facts regarding their alleged entitlement to the costs order.

[27] Furthermore, none of the correspondence that flowed between the parties' respective attorneys subsequent to 19 June 2018 has any bearing on prescription and certainly never interrupted it, as there is no indication that the NEC unequivocally acknowledged liability for costs. The fact that the NEC's attorney stated that he was "*awaiting further instructions*" on this issue of costs in mid-December 2018 also does not assist the applicants' case as it falls far short of this acknowledgment.

[28] Thus I am of the view that the applicants' claim had prescribed by the time it launched these proceedings on 11 October 2021.

[29] This being so, the merits of this application do not require consideration.

[30] The order I therefore grant is the following:

The application in terms of Rule 41(1)(c) is dismissed with costs.



**NEUKIRCHER J
JUDGE OF THE HIGH COURT
GAUTENG DIVISION, PRETORIA**

Delivered: This judgment was prepared and authored by the Judge whose name is reflected and is handed down electronically by circulation to the parties/their legal representatives by email and by uploading it to the electronic file of this matter on CaseLines. The date for hand-down is deemed to be 14 July 2022.

Appearances:

For the applicants	:	Adv T Pooe
Instructed by	:	Edward Nathan Sonnenburgs Inc
For the respondent	:	Adv K Harding-Moerdyk

Instructed by : Smit Sewgoolam Inc
Date of hearing : 30 May 2022