REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

(GAUTENG DIVISION, PRETORIA)

Case No: 32647/2017

(1) REPORTABLE: ~~YES~~ / NO
(2) OF INTEREST TO OTHER JUDGES: ~~YES~~/NO
(3) REVISED.

10/2/2020
....
DATE   SIGNATURE

IN THE MATTER BETWEEN:-

REAL GLOBAL BUSINESS SOLUTIONS — Plaintiff

And

STATE INFORMATION TECHNOLOGY AGENCY — Defendant

JUDGMENT

Kollapen J

Introduction

[1] This is an action in which Plaintiff claims payment in respect of 14 separate claims arising out of a Labour Broker Contract in terms of which the Plaintiff alleges that it provided contractors to perform and/or to provide services to the Defendant on various individual projects and for which it alleges it became entitled to payment from the Defendant.

[2] The Plaintiff's case is that following its determination as a preferred supplier of the Defendant, it entered into a written agreement with the Defendant (the primary agreement), which would then enable it as an accredited service provider to submit quotations to the Defendant for the provision of services to the Defendant and where such services were procured, a service level agreement (the secondary agreement) would be entered into between itself and the Defendant. The claims which constitute the totality of the action instituted all arise from individual service level agreements.

The evidence and the issues in dispute

[3] While the Defendant has admitted the existence of both the primary agreements as well as the secondary agreements, it raised various defences in response to the claims of the Plaintiff and they included that:-

a) The various service level agreements upon which the Plaintiff relies are unlawful and/or invalid as they were not concluded following a process which is fair, equitable, transparent and cost effective as required by Section 217 of the Constitution. This defence was not pursued during the trial.
b) That all of the 14 claims upon which the action is based have prescribed and the Plaintiff is accordingly precluded from seeking to enforce such claims.
c) That on the evidence the Plaintiff had failed to prove the terms of the secondary agreements that would entitle it to payment.
d) On the merits, it placed in dispute that the Plaintiff had proved that the actual services for which it sought payment were provided and properly proved.

[4] Ultimately much of the trial and the arguments focused on the defence of prescription and it may be useful to deal with that at the outset.

The defence of prescription

[5] The Plaintiffs pleaded case is that following the conclusion of the 14 service level agreements relating to each of the claims which form the subject matter of the action, it was required to submit invoices to the defendant on either a weekly or monthly basis and to annex to those invoices legible copies of timesheets indicating the actual number of hours which the specific contractor had rendered services. The Defendant was required to effect payment of those invoices within 30 days after submission.

[6] All of the invoices which form the basis of the Plaintiffs claim were submitted during the period September 2009 to January 2013 and at the time of their submission were accompanied by timesheets that purported to support every invoice so submitted. The evidence of Mr Desai the former managing director of the Plaintiff confirmed that when the invoices were originally submitted they would have been accompanied by legible timesheets. This appears to be in accordance with the Plaintiffs assertion in its particulars of claim that it complied with its obligations in terms of the various service level agreement.

[7] Mr Desai's further evidence was that while the Defendant effected payment of various invoices which are not the subject matter of this action, it failed to do so in respect of others and upon enquiry, Plaintiff was advised that either an invoice or timesheet was missing or not legible and the Plaintiff was requested to provide a copy which it did. This appeared to have occurred on numerous occasions in respect of the same claim until finally a Ms Clark who was also in the employment of the Plaintiff prepared a spreadsheet with the outstanding unpaid invoices and met with a Ms Van Niekerk of the Defendant in order to reconcile the outstanding invoices and to address any queries. Ms Clarks evidence was that this process occurred in June 2014 and the spreadsheet that formed the basis of her meeting with Ms Van Niekerk indicates in respect of many of such invoices the Defendants comments as being ' Requested copy of invoice or supporting document " while the Plaintiffs response thereto was in many instances " Attached"

[8] Thus on this score there is little doubt from the evidence that the reason offered for non-payment by the Defendant was the absence of an invoice or a timesheet or both but that by June 2014 , this gap had been largely addressed following the meeting between

Ms Clark and Ms Van Niekerk. Nothing of substance transpired after that and summons was issued in May 2017.

[9] Summons was served on the 31 May 2017 and the Defendant accordingly raised a special plea that the claims had become prescribed as more than 3 years had elapsed since they became due. Clearly on a simple timeline if the last of the claims was submitted in January 2013 , the payment would have become due 30 days later and prescription would have begun to run from then resulting in the claim prescribing in about February 2016 – well before Summons was issued and served.

[10] Plaintiff filed a replication to the special plea of prescription and while it admitted that the invoices were submitted more than 3 years prior to the institution the action, it pleaded that it had failed to annex timesheets to the invoices submitted to the Defendant and that when the non- payment of those invoices was queried, the Defendant pointed out that no timesheets or supporting documents were annexed to the invoices.

[11] The Plaintiff further pleads that during June 2014 it re-submitted those invoices and/or timesheets and /or supporting documents that had not been originally submitted or where the copies of documents submitted were illegible. Arising out of this Plaintiff contends that the payment for those invoices would have become due in July 2014 and that accordingly when summons was issued in May 2017, the claims evidenced by the invoices submitted in June 2014 had not prescribed.

[12] On the face of it what the Plaintiff asserts in its replication is at odds with the case it advances in its particulars of claim where it alleges that ' the plaintiff complied with its obligations in terms of the secondary agreement ' (the service level agreements) ….. 'and furnished invoices to the defendant to which plaintiff annexed legible copies of the timesheets as evidence (sic) by Annexure " RGB 5 "

[13] The dates of the invoices and timesheets evidenced by RGB 5 all relate to the period 2009 and thereafter.

[14] The replication seeks to advance a different case then the one that is advanced in the particulars of claim but in any event the difficulty the Plaintiff has is that the evidence does not support the case pleaded in the replication in that the evidence of Mr Desai was that invoices and timesheets would have been submitted in compliance with the secondary agreement in the period 2009 and thereafter and this is to some extent

supported by the evidence of Ms Clark that the Plaintiff would have submitted the timesheets several times .

[15] The crisp question then is whether the action of the Plaintiff prescribed by the time summons was issued in May 2017. Section 12 of the Prescription Act No 68 of 1968 provides as follows:-

Section 12 of the Prescription Act provides for the running of the prescription and in relevant parts provides follows:-"12 When prescription begins to run

(1) Subject to the provisions of subsection (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: Provided that a creditor shall be deemed to have such knowledge if he could have acquired it by exercising reasonable care"

[16] The evidence of Mr Desai was that the system operated by the Plaintiff would have worked on the basis that an invoice together with supporting documents would have been generated timeously and submitted to the Defendant and further that when the Defendant alleged that it did not have a particular document it was more likely that the Defendant had lost or misplaced it rather than that the Plaintiff had not submitted it.

[17] The consequence of this is that it must follow that in respect of all of the claims of the Plaintiff , the amounts payable would have become due 30 days after the submission of invoice and supporting documents in the period 2009 to January 2013. That the Defendant later claimed it did not have the documents submitted or that the copies were not legible cannot detract from the Plaintiffs own case and evidence that it complied with its obligations in terms of the agreement and submitted what the agreement obliged it to do so. That being so the debt would have become due 30 days after submission and

leaving aside whatever else occurred in that time, would have prescribed before May 2017.

[18] The Constitutional Court in **Food and Allied Workers Union obo Gaoshubelwe v Pieman's Pantry (Pty) Limited 2018 (5) BCLR 527 (CC); [2018] 6 BLLR 531 (CC); 2018 39 ILJ 1213 (CC) (20 March 2018)** held as follows:-

"Thus, once a debt becomes due, prescription begins to run and provided that prescription is not interrupted by the circumstances set out in sections 13, 14 and 15 of the Prescription Act, the debt shall, in terms of section 10, be extinguished after the lapse of time set out. Once a debt has prescribed, there is no basis upon which a creditor can seek to have non-compliance with the time periods provided for in the Prescription Act condoned. The debt has been extinguished and no after-life or a resuscitation of the debt is possible. Such an outcome is consistent with providing the certainty and predictability that prescription periods are intended to introduce into the law relating to the enforcement of debts. The circumstances under which prescription begins to run, as well as those that may interrupt its running are all intended to provide a balance between fairness and flexibility, on the one hand, and certainty and predictability, on the other."

[19] In **Myathaza v Johannesburg Metropolitian Bus Services (SOC) Limited t/a Metrobus and Others 2018 (1) SA 38 (CC) para 125** the Constitutional Court per Justice Zondo in separate concurring remarked that:-

"[125] *There are three important principles on which the Prescription Act is based. The first is that, once a debt is due to a creditor by a debtor, prescription starts running. The second is that the creditor must interrupt the running of prescription before it runs for the whole period of prescription applicable to that debt. The third is that, if the creditor fails to interrupt prescription in the matter contemplated in the Prescription Act before the relevant prescription period expires and the debtor has not acknowledged liability during that period, the debt prescribes upon the expiry of the prescription period. What these principles reveal is that, once prescription has commenced running, unless the debtor acknowledges liability or the creditor interrupts the running of prescription in the manner prescribed by section 15(1) read with subsection (6) before the expiry of the period prescribed for that debt, the debt is extinguished upon the expiry of the period. The running of prescription is one side of* *the coin and the interruption of the running of prescription is the other. This is evident from section 10(1) read with sections 12, 14 and 15."*

[20] The inevitable conclusion must thus be that the Plaintiff's claim became prescribed before the issue of summons. Of course one has some considerable measure of sympathy for the Plaintiff. It displayed enormous patience in constantly providing copies of invoice and timesheets to the Defendant of what it had already submitted. It was during this time perfectly entitled to proceed with summons but instead chose to try and resolve the matter by engaging the Defendant. Meanwhile the clock of prescription was running down during this period and ultimately when the Plaintiff elected to issue summons it was met by a plea of prescription.

[21] Under the circumstances the plea of prescription must be upheld and the Plaintiffs claim falls to be dismissed with costs.

ORDER

I make the following order:-

The Plaintiffs claim is dismissed with costs.

NJ. KOLLAPEN
JUDGE OF THE HIGH
COURT, PRETORIA

APPEARANCES

DATE OF HEARING	:	**5 NOVEMBER 2019**
DATE OF JUDGMENT	:	10 February **2020**
PLAINTIFFSCOUNSEL	:	**Wayne Gibbs**
INSTRUCTED BY	:	**SD Nel Attorneys**
DEFENDANTS COUNSEL	:	**Makosi Gwala**
INSTRUCTED BY	:	**Diale Mogashoa Attorneys**