



**IN THE HIGH COURT OF SOUTH AFRICA,**  
**FREE STATE DIVISION, BLOEMFONTEIN**

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|------------------------------|--------|
| Reportable:                  | YES/NO |
| Of Interest to other Judges: | YES/NO |
| Circulate to Magistrates:    | YES/NO |

**Case number: 317/2018**

In the matter between:

**MIIB BUSINESS TECHNOLOGIES (PTY) LTD**

**Plaintiff**

and

**MANGAUNG METROPOLITAN MUNICIPALITY**

**Defendant**

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**HEARD ON: 5 and 6 NOVEMBER 2019**

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**JUDGMENT BY: LOUBSER, J**

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**DELIVERED ON: 19 DECEMBER 2019**

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- [1] The Plaintiff in this action is claiming an amount of R 6 959 814 damages from the Defendant for breach of contract. In its Plea, the Defendant denied any breach of contract, and included a

Special Plea of prescription. The Special Plea was not dealt with at the inception of the proceedings, since the Defendant elected to hear the evidence of the Plaintiff first before it would decide whether to persist with the plea of prescription or not.

- [2] The Plaintiff called only one witness to testify, namely its managing director, Mr. Jos Badimo. Thereafter the Plaintiff closed its case, whereupon Mr. Rautenbach, appearing for the Defendant, applied for absolution from the instance in terms of the provisions of Uniform Court Rule 39(6). He advanced two grounds for his application, namely that the claim of the Plaintiff had already prescribed, and that the Plaintiff had failed to show that it suffered any damages resulting from the alleged breach of contract. In view of the apparent contentiousness of the grounds for the application, I requested the parties to file heads of argument. The Defendant filed its heads on 14 November 2019 and the Plaintiff filed its heads on the 20 November 2019. This Judgment therefore only concerns the application for absolution.
- [3] In applications for absolution the Court has a discretion to grant or refuse absolution from the instance<sup>1</sup>. The test to be applied by the court at this stage of the trial is whether there is evidence upon which a court might reasonably find for the Plaintiff. Another approach is to enquire whether the Plaintiff has made out a *prima facie* case<sup>2</sup>.

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<sup>1</sup> *Goliath v MEC for Health, Eastern Cape* 2015 (2) SA 97 (SCA) at par 19

<sup>2</sup> *Government of the Republic of Zimbabwe v Fick and Others* 2013 (5) SA 325 (CC)

- [4] As mentioned already, the claim is for breach of contract. Mr. Badimo handed in the contract concerned, which is a contract between the Naledi Local Municipality and the Plaintiff for the installation and maintenance of an integrated financial management system. In 2016 the Naledi Local Municipality was taken over by the Mangaung Metropolitan Municipality with all its liabilities, which explains why the latter is the Defendant in the action and not Naledi, which is no more in existence. The contract is a bulky document and it would not serve any purpose to repeat the contents thereof in this Judgment. I propose to refer only to those clauses which are relevant to the present enquiry.
- [5] The contract was signed by the parties on 16 April 2010, and in clause 5 thereof it is stipulated that the contract was commencing on 1 April 2010 and that the duration of the contract would be for a period of five years. In terms of clause 24 thereof, the fees to be charged by the Plaintiff (service provider) will be based on a fixed monthly fee of R 95 000-00, starting on 30 April 2010. Upon every month end, the service provider shall issue an invoice in an amount equal to R 95 000-00, and payment of the invoice will be effected by the Defendant within five days from the receipt of a correct and original invoice.
- [6] Mr. Badimo testified that the Plaintiff has complied with all its obligations in terms of the contract, but that it was only paid the first invoice of R 95 000-00, which was issued by the Plaintiff at the end of April 2010. Although the Plaintiff went on to issue invoices at the end of each of the following months, no further payments

were made by the Defendant. Then, all of a sudden, the Plaintiff received a letter dated 1 November 2010 from Naledi informing that it came to the attention that there were two companies appointed to conduct similar tasks for the same period, namely Samras and the Plaintiff. Since Naledi wanted to investigate the issue, The Defendant was requested to immediately vacate the premises. Apparently nothing happened in respect of the allegation of two companies for some time, and a period of correspondence between the parties and unsuccessful meetings with government role players followed. During this period, Mr. Badimo was assured by Naledi that they wanted to resolve the issue.

- [7] When the matter did not become resolved, the Plaintiff could not wait any longer, and on 13 June 2011 it requested that its claim be resolved by arbitration to be administered by AFSA. The request was granted by AFSA, and Plaintiff paid the administration fee subsequently. Soon thereafter, however, the attorneys of Naledi requested the Plaintiff to hold the arbitration process in abeyance, because Naledi wanted to amicably resolve the dispute. Another period of correspondence and waiting on the part of the Plaintiff ensued.
- [8] Then, on 15 September 2011, the Plaintiff received a letter from Naledi's attorneys, claiming that the contract in question was unlawful and that it should be set aside and be declared *null* and *void*. This letter ended with the request that an alternative date for the pre-arbitration meeting be agreed upon in the light thereof. According to Mr. Badimo, this letter came as a big shock to him. The next thing of importance that happened was the filing of a

Notice of Motion by the Naledi Municipality on 5 December 2011 in the Free State High Court seeking an order that the contract in question be declared invalid, unlawful and unenforceable. This application was duly opposed by the Plaintiff, but it was never set down for hearing by Naledi.

[9] In cross-examination and then in re-examination, Mr. Badimo testified that the single payment that was made by Naledi for the month of April 2010, was only received by the Plaintiff around August 2010. That payment, though, was an unequivocal acknowledgment of debt for the whole period of five years, he testified. When the arbitration in the High Court was filed on 5 December 2011, he finally realized that the contract with Naledi was then terminated, and he then also realized that the arbitration proceedings were then also something of the past. He thereafter never insisted that the application should proceed. Mr. Badimo further conceded that there never was any unequivocal undertaking by Naledi or by the present Defendant to pay him. But he testified that he understood prescription to mean that if you engage with the debtor, the running of prescription becomes interrupted.

[10] This witness further conceded that clause 32.1 of the contract provided the Naledi Municipality with the right to terminate the contract whenever they wish to do so, but he insisted that clause 32.2, which makes provision for a claim for damages in such an event, entitled the Plaintiff to sue for the outstanding balance over the contract period of 60 months. This is precisely what the plaintiff was now doing, he told the Court. He confirmed that the Plaintiff

eventually issued summons against the Defendant on 24 January 2018.

[11] I now turn to the ground of prescription. The Prescription Act 68 of 1969 provides that a debt like the present one prescribes after three years<sup>3</sup>. In terms of section 13 the completion of prescription is delayed where, inter alia, the debt is the object of a dispute subjected to arbitration. In such a circumstance the period of prescription will not be completed before a year has elapsed after the day on which the impediment ceased to exist<sup>4</sup>. The Act further provides in section 14 that the running of prescription shall be interrupted by an express or tacit acknowledgment of liability by the debtor.

[12] In the present case, the contract would have elapsed after a period of 5 years, that is at the end of March 2015. The duration of the contract, however, never got that far, because on 5 December 2011 the Defendant filed the High Court application referred to above. Mr. Badimo testified that he regarded the filing of that application is a clear sign that Naledi had terminated the contract. The damages claimed, therefore became due on that date. An official stamp of the Sheriff on the summons bears the date of 29 January 2018, which leads to the assumption that the summons was served on Naledi around the end of January 2018, which is a little more than six years after the debt became due. At a first glance, therefore, the Plaintiff's claim appears to have become hopelessly prescribed.

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<sup>3</sup> Section 11(d)

<sup>4</sup> Section 13 (1)(i)

[13] Mr. Daniels, appearing for the Plaintiff, submitted in his heads of argument that the contract value of R 6 959 814-00 must be seen and viewed as one unitary and indivisible amount, although it is made up of the equal instalments of R 95 000-00 per month over a period of 5 years. This is so, he submitted, because the issue of the payment of a debt consisting of outstanding payments in instalments is a question of fact and not a question of law. The evidence before this Court is that the indivisible amount of the claim became due and payable on 5 December 2011, on which date it became clear to the Plaintiff that Naledi had terminated the contract. The result thereof is that prescription of the claim began to run on 5 December 2011.

[14] Whenever prescription is pleaded by a Defendant, the creditor bears the onus of proving that the completion of prescription was either delayed (in this instance, by the arbitration proceedings) or by the interruption of the prescription (for instance by an express or tacit acknowledgment of liability by the debtor or the debtor's agent)<sup>5</sup>. In the present case, Mr. Badimo testified that there never was any unequivocal acknowledgment of liability to pay the Plaintiff, apart from the single payment of R 95 000-00 that was made in 2010. That payment, he testified, signalled an acknowledgment of the liability to pay the whole debt. I do not agree, because Naledi already made it clear in September 2011 that it regarded the contract as unlawful, *null* and *void*. The clear implication thereof was that it was Naledi's view that it had made

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<sup>5</sup> *Regering van die RSA v SA Eagle Versekeringsmaatskappy* 1985 (2) SA 42 (O) and *KLD Residential CC v Empire Earth Investments* 2017 (6) SA 55 (SCA)

the payment erroneously. In any event, if Mr. Badimo is correct in this regard, the running of prescription shall commence to run afresh from the day on which the interruption takes place<sup>6</sup>, with the effect that the claim for the whole debt had still become prescribed. By his own evidence, however, he regarded the whole contract as terminated on 5 December 2011, which makes the payment in August 2010 mostly irrelevant. The result is that the Plaintiff has failed to prove that the running of prescription became interrupted.

[15] The only question remaining is whether the completion of prescription was actually delayed under the circumstances set out in Section 13 of the Act, and to such an extent that it can be said that the Plaintiff's claim had not become prescribed. According to the evidence, the arbitration proceedings instituted by the Plaintiff commenced on 13 June 2011. According to Mr. Badimo, he decided not to proceed with such arbitration on 5 December 2011. If another year is added to the period 13 June 2011 to 5 December 2011 (in terms of Section 13), a period of delay amounting to 18 months is applicable. Even under such circumstances, the claim had clearly become prescribed by January 2018.

[16] Lastly, I should mention that I do not envisage any possibility that the Plaintiff's case may be strengthened by evidence that might emerge during the Defendant's case. I therefore have to come to the conclusion, unfortunately, that there is no evidence upon which

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<sup>6</sup> Section 14(2) of the Act



the Court might reasonably find for the Plaintiff. In the premises, it is not necessary to decide the question whether the Plaintiff has shown that it suffered any damages resulting from the alleged breach of contract.

[17] The following order is made:

1. Absolution from the instance is granted with costs.

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**P.J. LOUBSER, J**

For the Plaintiff:

Instructed by:

Adv. A.N Daniels

B.L Nkuna Inc, Pretoria

C/O Matsepe Inc.

Bloemfontein

For the Defendant:

Instructed by:

Adv. J.S. Rautenbach

Webber Cooper Lockman Inc.

Bloemfontein