



Reportable:	YES / NO
Circulate to Judges:	YES / NO
Circulate to Magistrates:	YES / NO

**IN THE HIGH COURT OF SOUTH AFRICA
(NORTHERN CAPE HIGH COURT, KIMBELEY)**

**Case No: 183/2013
HEARD ON: 26/08/2014
DELIVERED: 24/10/2014**

In the matter between:

**BELIZE/FREELANCE CONSTRUCTION APPLICANT/PLAINTIFF
JOINT VENTURE**

AND

**MEMBER OF THE EXECUTIVE COUNCIL RESPONDENT/ DEFENDANT
FOR THE DEPARTMENT OF ROADS
AND PUBLIC WORKS:
NORTHERN CAPE PROVINCE**

JUDGMENT

PAKATI J

[1] The plaintiff/applicant is Belize/ Freelance Construction Joint Venture, a joint venture concluded between Belize Construction (Pty) Ltd, and Freelance Construction (Pty) LTD,

a company duly incorporated and registered, with its principal place of business situated at 54 Fritz Stockenström Street, East End, Bloemfontein. The defendant is the Member of the Executive Council for the Department of Roads and Public Works, Northern Cape Province (“the MEC”).

- [2] The plaintiff and the defendant entered into a written contract in terms of which the plaintiff constructed a Secure Care Centre in De Aar for the Department of Social Services. The amount tendered and approved for the project was R22 847 880-00. The plaintiff asserts that it completed the work according to the specifications and performed all its obligations in terms of the contract. The plaintiff maintain further that the defendant improperly withheld an amount of R656 000-00 of the contract price as a penalty deduction. This accusation is denied by the defendant.
- [3] The plaintiff has, for the reasons set out in para 2 (above), instituted action against the defendant on 01 February 2013 for payment of R747 840-00 (R656 000-00 plus 14% VAT) with interest at 15% per annum *a tempora morae* to date of payment. According to the plaintiff the defendant was not entitled to withhold any payment due to it.
- [4] The defendant raised a special plea in terms of s 3 (2) (a) of the Institution of Legal Proceedings Against Certain Organs of State Act, 40 of 2002 (“the Act”), that the plaintiff did not give

timeous notice in writing of its intention to institute legal proceedings. It gave notice only on 07 June 2011 whereas it was claimed that the debt became due and payable on 11 May 2010 more than six months after its claim was due. This computation shows that the notice happened. It is common cause that the plaintiff has not applied for condonation for its failure to serve such notice timeously in compliance with the Act. It is further common cause that the MEC has not given consent in writing for the initiation of legal proceedings without such notice. The defendant submitted that I should uphold the special plea and dismiss the plaintiff's claim with costs.

[5] The plaintiff asserts that the cause of action is not for a 'debt' as contemplated in s 3 (1) of the Act, but for the balance amount outstanding in terms of the written contract. The plaintiff therefore disputes its obligation to comply with s (3) (2) (a) of the Act to give notice within six months from the date on which the debt became due. It submits that its claim falls outside the definition of 'debt' and characterised it as compelling specific performance and not claiming for damages.

[6] In Clauses 4.5.7, 4.5.10, 4.5.11, 4.5.12 and 4.5.14 of the plaintiff's Particulars of Claim the plaintiff pleads:

"4.5.7 The plaintiff is entitled to a revision of the date for practical completion, and for which revision the principal agent shall not adjust the contract value, for delays inter alia caused

by inclement weather; inability to obtain materials and goods and default by a nominated subcontractor;

4.5.10 [T]he plaintiff shall, within 60 working days of the delay ceasing, submit such claim to the principal agent, failing which the plaintiff shall forfeit such claim;

4.5.11 [T]he principal agent shall, in writing, within 20 working days after receipt of a claim grant, reduce or refuse the working days' claim and determine the revised date for practical completion in relation to work days granted;

4.5.12 [W]here the principal agent fails to act in terms of clause 29.7, the claim shall be deemed to be refused;

4.5.13 [S]hould any disagreement arise between the plaintiff and the defendant or its principal agent(s), as to any matter arising out of or concerning the agreement, either party may give notice to the other to resolve such disagreement;

4.5.14 [W]here such disagreement is not resolved within 10 working days of receipt of such notice it shall be deemed to be a dispute which shall be adjudicated by litigation.”

- [7] Clause 29.7 alluded to in para 4.5 12 (above) provide that:
*“29.7 The **principal agent** shall, in writing, within twenty (20) **working days** after receipt of a claim in terms of 29.6 Grant, reduce or refuse the working days claimed.”*
- [8] The plaintiff maintains that 16 delayed claims were lodged with the principal agent. However, the principal agent failed to take a decision or to convey it within the allocated period of 20 working days as set out above (para 4.5.11). After having given notice in terms of clause 40.1 of the contract to resolve the disagreement, which remained unresolved after 10 days, the plaintiff declared a dispute in terms of clause 40 of the contract.
- [9] Clause 40.1 of the contract stipulates that:
*“40.1 Should any disagreement arise between the **employer** or his **principal agent** or **agents** and the **contractor** as to any matter arising out of or concerning this **agreement** either party may give notice to the other to resolve such disagreement.”*
- [10] Adv Williams, for the plaintiff, insisted that the defendant is under an obligation to make payment in terms of the contract. Specific performance is the recourse to take in a claim sounding in money. He contended that the defendant could not justify the refusal to pay. The plaintiff in its argument relied on the case of **NICOR IT CONSULTING (PTY) LTD v**

NORTHWEST HOUSING CORPORATION 2010 (3) SA 90 (NWM) where it was held in paras 29 and 30:

“[29] When a right is adversely affected by legislation and particularly when such right is one contained in the Constitution, the offending provision must be interpreted restrictively. If in interpreting the definition of ‘debt’ para (b) qualifies the whole of para (a), then the notice contemplated in s 3 of the Act would only have to be given when the claim is one for damages. If on the other hand para (b) qualified only (i) and (ii) of para (a), then any action would be subject to the provisions of s 3 of the Act.

[30] On a careful reading of the definition of ‘debt’ contained in the Act, it is clear that para (b) qualifies para (a) as a whole. This in my view is the ‘ordinary and natural meaning’ of the words as they are set out in the definition of ‘debt’ in the Act. Nothing that the defendant has raised has persuaded me otherwise. This ‘ordinary and natural’ meaning has been considered within the context and purpose of the Act and I find that it does not offend against the purpose of the Act. More significantly, this ‘ordinary and natural’ meaning makes fewer inroads into the rights of access to courts and equality enshrined in the Bill of Rights in the Constitution. As such, this ordinary and natural meaning is to be preferred above the wider interpretation of the definition of ‘debt’ contended for by the defendant. Accordingly, I find that para (b) of the definition of ‘debt’ in the Act qualifies para (a) of such definition, and

consequently a ‘debt’ for the purposes of the Act is confined to a claim for damages, however such claim arose.”

The plaintiff also referred to the case of **THABANI ZULU & CO (PTY) LTD v MINISTER OF WATER AFFAIRS AND ANOTHER 2012 (4) SA 91 (KZN)** where the principle in Nicor’s case was applied.

- [11] Adv Danzfuss SC, on behalf of the MEC, conceded that it is possible for the plaintiff to claim payment of money by way of specific performance. However, the fact that the plaintiff added clauses 7.4 and 7.5 in its Particulars of Claim, which clauses are normally inserted in a claim for breach of contract, is indicative of the fact that it is a claim for damages. Counsel contended that the plaintiff ignores the refusal by the principal agent to pay the amount which was given rise by the breach of the contract. Clauses 7.4 and 7.5 state:

“7.4 [T]he penalties have been applied and deducted without consideration to the provisions of the contract and the delayed claims;

7.5 [H]ad the principal agent complied with its obligations in terms of the agreement, the principal agent would have granted the delays and working days claimed, from which the plaintiff would not have been liable for any penalties.”

- [12] The crucial question that arises is whether this claim is for specific performance or one for damages. S 1 of the Act defines a debt as follows:

“Debt’ means any debt arising from any cause of action –

(a) Which arises from delictual, contractual or any other liability, including a cause of action which relates to or arises from any –

(i) Act performed under or in terms of any law; or

(ii) Omission to do anything which should have been done under or in terms of any law; and

(b) For which an organ of state is liable for payment of damages, whether such debt became due before or after the fixed date.”

[13] S 3 (1) and (2) (a) of the Act provide as follows:

“3. Notice of intended legal proceedings to be given to organ of state. ---

(1) No legal proceedings for the recovery of a debt may be instituted against an organ of state unless –

(a) The creditor has given the organ of state in question notice in writing of his or her or its intention to institute the legal proceedings in question; or

(b) The organ of state in question has consented in writing to the institution of that legal proceedings-

(i) Without such notice; or

(ii) Upon receipt of a notice which does not comply with all the requirements set out in subsection (2).

(2) A notice must –

(a) *Within six months from the date on which the debt became due, be served on the organ of state in accordance with section 4 (1); and*

(b) *Briefly set out –*

(i) *The facts giving rise to the debt; and*

(ii) *Such particulars of such debt as are within the knowledge of the creditor.”*

[14] Innes CJ in **FARMERS’ CO-OP (REG) v BERRY** 1912 AD 343 at 350 stated:

“Prima facie every party to a binding agreement who is ready to carry out his own obligation under it has a right to demand from the other party, so far as it is possible, a performance in terms of the contract.”

See also **RAS AND OTHERS v SIMPSON** 1904 TS 254 at 256 where the learned Judge enunciated:

“But if specific performance had been asked for and decreed, and had not been carried out, it would have been competent for the plaintiffs in another action to have asked, in lieu of that decreed, for cancellation of the contract and damages. And if they could obtain that relief by means of a second action, I can see no reason in law why they should not ask alternatively for it in this action.”

[15] In my view the cases *supra* support the contention of the defendant that the plaintiff's claim is a claim for damages. The plaintiff declared a dispute with regards to the penalties levied in Certificate 21 and the specified amount payable to it. This negates the refusal to grant the delays. There is no clause in the contract which requires that when the plaintiff declares a dispute it is entitled to payment only if the principal agent refuses to grant the delays. The plaintiff's claim is therefore not what he is entitled to in terms of the contract.

[16] In my view the plaintiff's claim is for damages and not specific performance. The plaintiff was obliged to give notice within the prescribed six months from the date on which the debt became due in terms of s 3 (2) (a) of the Act. It is common cause that the defendant did not consent in writing that legal proceedings be instituted without the required notice as alluded to earlier. The special plea must therefore be upheld with costs.

[17] The defendant sought the following relief under the special plea:

"Therefore the defendant pleads that [the] plaintiff's claim be dismissed with costs."

In the circumstances I grant the following order:

1. The special plea raised by the defendant, the Member of the Executive Council for the Department of Roads and Public Works: Northern Cape, is upheld.
2. The plaintiff's claim is dismissed.
3. The plaintiff, Belize/Freelance Construction Joint Venture, is ordered to pay costs on party and party scale.

BM PAKATI
JUDGE

On Behalf of the Plaintiff:
Instructed by:

ADV WILLIAMS
CJ DE JAGER ATTORNEYS

On Behalf of the Defendant:
Instructed by:

ADV DANZFUSS (SC)
HAARHOFFS INC