REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA
(MPUMALANGA DIVISION, MBOMBELA)

(1)	REPORTABLE:NO
(2)	OF INTEREST TO OTHER JUDGES: YES
(3)	REVISED: YES
[redacted] …………..	07/06/2024 ………………………..
SIGNATURE	DATE

CASE NO: 2257/2018

In the matter between:

COHVEST 67 CC T/A GUBEVU MANAGEMENT SERVICES — First Plaintiff

FORCE MADUNA — Second Plaintiff

and

MPUMALANGA DEPARTMENT OF PUBLIC WORKS AND TRANSPORT — Defendant

This judgment was handed down electronically by circulation to the parties and/or parties' representatives by email. The date and time for hand-down is deemed to be June 07 2024 at 10:00.

JUDGMENT

MASHILE J:

[1] When this matter served before this Court, the parties had, on an earlier date, applied and obtained a court order directing that those four special pleas raised by the Defendant ("the Department") be determined discretely from the merits such that this Court will concern itself with those pleas alone. I have noted that although there are two Plaintiffs, it is common cause that the Second Plaintiff has no locus standi to institute this action. As such, I will henceforth refer to the First Plaintiff as Cohvest without any reference to the Second Plaintiff.

[2] The four special pleas to which I have referred above are:

2.1 *res judicata*;

2.2 In terms of Section 12 of the Prescription Act No. 68 of 1969 ("Act 68 of 1969"), the claim has prescribed;

2.3 Clause 14 of the agreement between the parties provides that any legal proceedings by either party against the other must be commenced within a period of twelve months from the date on which the claim arose; and

2.4 The six months period contemplated in Section 3 of the Institution of Legal Proceedings against certain Organs of State Act 40 of 2000 was not observed as Cohvest served the notice after the period had expired.

[3] The facts from which the special pleas arise are that Cohvest is suing the Department for an amount of **R14 047 873.70**. The claim is founded on an agreement concluded by the parties on 1 December 2011 at Nelspruit, now Mbombela. The contract comprises the signed agreement, letter of appointment issued by the Department, letter of acceptance by Cohvest, bid, all schedules, minutes of meetings and annexures. In terms of the contract, Cohvest was to act as consultant providing training and logistic services to the Department regarding intake of new learner contractors to the Department. Cohvest avers that the intakes of these learner contractors were over a period of four years with each intake being for two years.

[4] In compliance with the contract, Cohvest trained the first intake of learner contractors during the period beginning 20 October 2011 and completed on or before 20 October 2013. Cohvest ceased providing services to the Department on or about 20 October 2013. Alleging that the Department had breached the terms of the contract, Cohvest demanded payment on 13 March 2018. I deem it gratuitous to consider *res judicata* because the Department has abandoned reliance thereon. As such, the Court will proceed to consider the remaining three special pleas.

PRESCRIPTION

[5] Insofar as prescription is concerned, the Department has pleaded that the claim of Cohvest is based on a contract which was concluded on 1 December 2011. The Department cancelled the agreement on 20 October 2013 on which date the claim of Cohvest fell due. Cohvest served its summons on the Department on 23 August 2018, which is more than three years after the date on which the claim arose. For the aforesaid, the Department maintains that the claim has prescribed in terms of Act 68 of 1969.

[6] According to Cohvest, the agreement between the parties provided for two intakes of learner contractors for two years each. The first intake started and concluded without any challenges. At the end of the first intake, the Department failed or refused to continue

with the second intake of another two years. Cohvest regards the failure or refusal by the Department as a breach of Clause 13.4 of the agreement, which provides that:

> *"In addition to the rights given to it under this clause, either party may terminate this Agreement if the other party breaches any terms of this Agreement and such breach is not remedied within fourteen (14) days of written notice from the first party specifying the breach and stating the intention to terminate the Agreement if the breach is not remedied."*

[8] Cohvest contends that its claim has not prescribed as alleged by the Department. The essence of the argument is that while it agrees that the breach happened upon the Department refusing or failing to proceed with the second intake, the debt could not have become due until it had placed the Department in *mora* and cancelled the agreement. In other words, prescription would not run until Cohvest has delivered upon the Department the notice mentioned in Clause 13.4 of the agreement.

[9] The Department, on the other hand, asserts that breach occurred on 20 October 2013 when it cancelled and/or failed and/or refused to continue with the second intake. That date represents the date on which the debt arose and prescription began to run. If the Court agrees with the Department, the debt prescribed in October 2016. The issue and service of the summons was therefore out of time by almost two years.

[10] Section 12 of Act 68 of 1969 is concerned with the time at which prescription begins to run. The Section provides as follows:

> *"(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 willfully 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."*

[11] In *Mtokonya v Minister of Police*[1], the Constitutional Court held at paragraph 36 that the facts of which the creditor needed to be aware do not extend to the knowledge of the legal consequences but simply to those facts the creditor would need to prove in order to prove his claim against the debtor. Equally, in *MEC for Health: Western Cape v M C* [2] the Court concluded that the required knowledge extends to the minimum facts necessary to prove a claim and that a debt is due when it is owing and payable.

[12] The question is therefore, when did Cohvest acquire knowledge of the identity of the Department and the minimum facts from which its debt arose. Insofar as the identity of the debtor is concerned, Cohvest has always known that the debtor was the Department with which it had entered into the agreement consequently the identity of the debtor in this instance cannot present any difficulties. A more profound question, however, is What were the minimum facts and when did Cohvest acquire knowledge of such facts?

[13] The answer to that question is found in a reply to a memorandum of the Department and an sms by a representative of the Department on 20 November 2013, wherein Cohvest stated that:

13.1 It acknowledged that it had the knowledge of the position of the Department regarding the continuation of the contract, specifically that the Department deemed the agreement to have lapsed.

13.2 Cohvest objected to this view.

13.3 Cohvest made it clear that it considered the approach of the Department on the matter as breach of the agreement between them.

13.4 Cohvest attached the contract documents to the letter.

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[1] [2017] ZACC 33

[2] [2020] ZASCA 165 (SCA) at paragraphs 6 and 7

13.5 Cohvest threatened to embark on other measures deemed necessary in the event that the Department remained intransigent on the stance it had adopted.

13.6 In the event that the Department did not do so, Cohvest would regard it "business as usual".

13.7 Cohvest afforded the Department 7 days within which to terminate the agreement in writing.

13.8 Cohvest was of the opinion the contract was meant to have existed for a period of four years from date of commencement; and

13.9 Cohvest had suffered damages or would suffer damages in the form of rental of office space and retention of staff in anticipation of carrying out its obligations in terms of the contract.

[14] It is apparent that the letter above contains all that was necessary to institute a claim for damages the requirements of which are:

14.1 The existence of the agreement and its terms.

14.2 Breach of the terms of the agreement.

14.3 Damages.

14.4 A causal link between the breach and the damages; and

14.5 The loss was not too remote.

[15] The contents of the letter above make it inexorable to conclude that on 20 October 2013 Cohvest was aware of the minimum facts from which its claim arose and could have

commenced these proceedings earlier than it did to avoid it becoming prescribed. The assertion put forward by the Counsel for Cohvest that the prescription of the debt in this matter ought to be determined by the expiry of the period referred to in its letter of 13 March 2018 is untenable for various reasons.

[16] Firstly, it would mean that prescription would not begin to run when a debt becomes due as provided in Section 12(1). Manifestly aberrant is Cohvest's acknowledgment of the breach by the Department on 20 October 2013. For some reason Cohvest wants to control the date on which prescription should begin to run. The date on which prescription begins to run cannot be left for determination by one of the parties. This would be absurd as the one party can protract the onset of prescription for as long as it suits it. Besides, that argument is not supported by any case authority, as is evident from above.

[17] On the facts of this matter, the debt became due when the Department refused or failed to allow the second intake of new learner contractors. The claim prescribed in 2016 and Cohvest was aware of this as it issued summons in the Gauteng Division of the High Court in which it averred that breach occurred in October 2013. It therefore comes as a surprise that it withdrew that action and instituted fresh proceedings in this Division when it knew very well that the claim had become prescribed.

[18] On the basis of the above, the special plea of prescription must succeed in consequence of which I make the following order:

The claim is dismissed with costs.

<u>LIMITATION OF ACTIONS</u>

[19] Clause 14 of the agreement between the parties stipulates a period within which actions by either party against the other can be instituted. It lays down that:

> *"14. No actions, regardless of form, arising under or relating to this Agreement may be brought by either party more than one year after the cause of action accrued, except that an action for non-payment may be brought by a party not later than one year following the date of the last payment due to such party hereunder."*

[20] In this regard the essence of the special plea of the Department is that Clause 14 described above limits a period within which either party may institute an action or launch an application against the other. The Department cancelled the agreement on 20 October 2013 on which date the claim of Cohvest fell due. Cohvest issued and subsequently served them upon the Department on 23 August 2018. Considering that this happened more than the period allowed in Clause 14 of the agreement, the claim of Cohvest had by the time the summons was issued prescribed.

[21] Clauses containing time-bar provisions are a common phenomenon in the law of contract in this country if the parties concluded them freely and voluntarily and that they are not against public policy. In *Barkhuizen v Napier*[3], the Court stated that subject to the considerations of reasonableness and fairness there existed no reason why time clauses in contracts should not be permissible in a constitutional dispensation where the prescripts of "public policy" are determined in the Constitution of the Republic of South Africa.

[22] In the absence of allegations that the agreement was not freely and voluntarily concluded or that it is against public policy, the clause ought to be accepted. The breach occurred on 20 October 2013 when the Department refused and/or failed to allow the second intake of learner contractors. The one-year period therefore began to run at that time. To state the obvious, the claim for Cohvest then prescribed a year later from that date, which would be during October the following year. Even if one has regard to the second part of the time limitation clause, the claim prescribed in October 2014 as Cohvest was paid on or before 20 October 2013. For the aforegoing reasons, I am constrained to

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[3] CCT72/05) [2007] ZACC 5

uphold the special plea concerning time limitation clause. To that end, I make the following order:

The claim is dismissed with costs.

THE SECTION 3(2) NOTICE ENVISAGED IN THE INSTITUTION OF LEGAL PROCEEDINGS AGAINST CERTAIN ORGANS OF STATE ACT 40 OF 2000 WAS NOT SERVED WITHIN SIX MONTHS

[23] The Department has pleaded in this regard that in terms of section 3 of the Institution of Legal Proceedings against Certain Organs of State Act 40 of 2002, Cohvest was obliged to serve the Defendant with written notice of the alleged breach of contract referred to in the particulars of claim, of the facts on which the Defendant's alleged liability arose and of the particulars thereof within six months of its occurrence. Cohvest failed to serve such notice on the Department within six months as prescribed in Section 3 of the Act. Cohvest is as such, not entitled to prosecute their claim against the Department.

[24] This Court has already decided that the breach occurred in October 2013 and that the debt became due then. Accepting that approach, the notice should have been served upon the Department on or before 20 April 2014. It follows that Cohvest failed to comply with the statutory provision in Section 3 of the Institution of legal Proceedings against certain Organs of State Act 40 of 2000. Against that background, it should stand to reason that this special plea too must succeed. In the result, I make the following order:

The claim is dismissed with costs.

[redacted]

B A MASHILE

JUDGE OF THE HIGH COURT OF SOUTH AFRICA

MPUMALANGA DIVISION, MBOMBELA

APPEARANCES:

Counsel for the Plaintiff:	**Adv MS Ngomane**
Instructed by:	**Macbeth Attorneys Inc**
Counsel for the Defendant:	**Adv Kruger SC**
Instructed by:	**Slabber Attorneys**
Date of Judgment:	**07 June 2024**