IN THE HIGH COURT OF SOUTH AFRICA

(GAUTENG DIVISION, PRETORIA)

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

DATE: 16/04/2026

SIGNATURE [redacted]

Case No: 23596/13

In the matter between:

UNIE-TECH DEVELOPMENT INITIATIVE (PTY) LTD (in liquidation)	**Plaintiff**
and	
THE MEC FOR THE DEPARTMENT OF AGRICULTURE IN THE LIMPOPO PROVINCE	**First Defendant**
THE PREMIER OF THE LIMPOPO PROVINCE	**Second Defendant**
THE MINISTER OF AGRICULTURE	**Third Defendant**

JUDGMENT

The judgment and order are published and distributed electronically.

Summary: Action instituted by liquidators of wound up company to claim amounts due on rendered invoices in terms of a service level agreement between company and organ of state. Defendants served counterclaim 5 years after plea and raised special pleas of prescription, res iudicata and non compliance with section 3 of act 40 of 2002. Plaintiff argued that counterclaim, absent permission from Plaintiff or condonation of the court, impermissible by virtue of Rule 24(1) and that counterclaim would in event have become prescribed. Held that counterclaim was prescribed and that the issue in relation to Rule 24(1) thus moot. Defendants' special pleas dismissed and judgment granted in favour of Plaintiff.

PA VAN NIEKERK, J

INTRODUCTION:

[1] Plaintiff is a company with limited liability, presently in liquidation, and represented by its two duly appointed liquidators. First Defendant is the MEC for the Department of Agriculture in the Province of Limpopo, Second Defendant is the Premier of the Limpopo Province and Thid Defendant is the Minister of Agriculture. The three Defendants are all joined in their official capacities.

[2] On 22 April 2013 Plaintiff instituted action against Defendants, claiming payment of the amount of R2 425 663.17 allegedly due and owing pursuant to a Service Level Agreement ("SLA") which was entered into between Plaintiff (then represented by a director) and the Department of Agriculture in the Province of Limpopo ("DAPL") duly represented by a certain Mr Robinson. The SLA was signed on 27 July 2007 and related to the design, supply, and installation of irrigation systems and related infrastructure and services managed by DAPL, for selected and identified irrigation schemes in that province.

BACKGROUND FACTS:

[3] The SLA provided for the rendering of invoices by Plaintiff to DAPL from time to time, and payment by DAPL of those invoices. On 12 May 2009 the SLA was cancelled by the then head of DAPL after Plaintiff was placed in provisional liquidation. At the time the SLA was cancelled, certain invoices that were rendered remained unpaid.

[4] Plaintiff's claim relates to amounts allegedly owing in respect of the aforesaid outstanding invoices rendered prior to cancellation of the SLA. At the commencement of the trial it was recorded by the parties that the *quantum* of Plaintiff's claim based on the unpaid invoices were agreed to be the amount of R2 229 575.75 and the quantum of a counterclaim which Defendants belatedly instituted during 2018 for alleged over-payment and expenses which the Defendants had to incur following the cancellation of the SLA, was also settled.

[5] On 9 June 2009 Plaintiff was finally wound up in terms of an order of this court and the liquidators were duly appointed on 18 June 2009. The liquidators convened and conducted an enquiry in terms of sections 417 and 418 of the Companies Act 61 of 1973 ("the enquiry") during April 2010. During the enquiry and on 23 April 2010, an engineer employed by of DAPL made the necessary valuations, calculations and reconciliations in respect of unpaid services performed by Plaintiff in terms of clauses 2, 37, 44 and 46 of the General Conditions of Contract for Works of Civil Engineering Construction (which conditions were incorporated into the SLA) and concluded that the total outstanding amount due to Plaintiff amounted to R2 425 663.17.

[6] On 30 April 2010 the liquidators of Plaintiff demanded payment from DAPL by way of a letter which had the following features:

[6.1] The letter was addressed to "*the Limpopo Provincial Government Department of Agriculture, Private Bag X9487 Polokwane*", and the letter refers to the enquiry held on 23 April 2010 and confirmed that the Department of Agriculture for the Provincial Government of Limpopo, by means of a Mr Gouws, testified at the enquiry on behalf of the Department of Agriculture and supplied the liquidators with documentation from DAPL which were used in the enquiry;

[6.2] It was confirmed that, in terms of certain specified contracts the Department was indebted to Plaintiff in the total amount of R2 425 663.17, while also specifying the individual contractual amounts which made up the total amount.

[6.3] The letter concludes to record that the amounts are due and payable and a demand was made for payment of the debt with a notification that an application for payment of the amount would be launched, should it not be paid;

[6.4] That letter contains the following paragraph which alludes the DAPL to a potential counterclaim which it may have and which reads:

"The Department after qualification of the amounts can prove a claim against the insolvent estate, if the Department so desire. The Department is not entitled to apply set-off after liquidation and more specifically is not entitled to apply set-off of the unliquidated amounts".

This paragraph clearly refers to amounts which the Department allegedly intended to claim from Plaintiff but which amounts had to be quantified.

[7] On 10 May 2010 the office of the State Attorney, Pretoria, responded in writing to the aforesaid letter, which response has the following features:

[7.1] It was recorded that the letter of demand *supra* does not comply with "*...the strict requirements of Act 40 of 2002, specifically sections 3 and 4 thereof*";

[7.2] It was recorded that the Mapela project would be finalised within a month, whereafter the DAPL would be in a position to quantify a counterclaim;

[7.3] Paragraph 5 of the letter contains the following:

> "We will proof (*sic*) a claim against the liquidated estate in this matter. Please notify us when the creditor's meeting will be convened".

[8] On 2 June 2010 the liquidators responded to the letter of the State Attorney *supra*, which letter has the following features:

[8.1] It was (rather ineloquently) recorded that:

> "In your letter referred to restrict (*sic*) requirements of Act 40 of 2002 and more specifically section 3 thereof. The purpose of the Act, with respect, is to place you in a position to know the facts of the particular case [You and your client knows the facts that give rise to the debt extremely well]

In this instance your client [with yourself being present] brought to the insolvency inquiry documents in the excess of 400 pages setting out all the facts of this matter. You have in your possession copies of the document that has been handed in at the insolvency *alternatively* copies of the said documentation in your client's possession.

In the insolvency inquiry your client referred to all these documentation and confirms the indebtedness of your client in the insolvent estate".

[8.2] The letter then again sets out particulars of the individual amounts which made up the total claim of R2 425 663.17, with due reference to the SLA. The letter again concluded with a demand that the Department pay the amount of R2 425 663.17 to Plaintiff within 10 days failing which an application for payment of the amount would be launched.

[9] On 15 September 2010 Plaintiff instituted an application in this court, seeking payment of the amount of R2 330 474.49 based on 5 separate specified claims relating to different identified sites which fell under the provisions of the SLA. In the founding affidavit of that application, the Plaintiff relied on the testimony of Mr Gouws referred to *supra* which he gave at the enquiry and where he testified that the DAPL was indebted to the Plaintiff.

[10] Defendants filed an answering affidavit wherein the Defendants did not place in issue the terms of the agreement, or raised any defence on the merits of Plaintiff's claim save to state that the evidence of Gouws was inadmissible, and that the application, for that reason, should be dismissed. On 30 October 2012 De Klerk AJ dismissed the Plaintiff's application with costs, and from a transcript of the proceedings it transpires that De Klerk AJ was informed, after argument of the matter, that he could simply make an order dismissing the application whereafter the Applicant (Plaintiff *in casu*) could still pursue its

remedies. De Klerk AJ did not deliver any judgment and neither of the parties sought reasons for that order. From a perusal of the papers filed in that application, the transcript of the argument of that matter to which the parties referred to in court, and the fact that De Klerk AJ failed to deliver a judgment, the only reasonable inference to be drawn is namely that the matter was not adjudicated on merits and it was accepted by all parties at that time that there was no final pronouncement on the merits of Plaintiff's cause of action.

THE ISSUES FOR DETERMINATION

[11] As set out in paragraph [4] *supra*, the parties informed this Court at the commencement of the hearing that the issue of the *quantum* of Plaintiff's claims based on the unpaid invoices as well as the quantum of Defendants' purported counterclaim were no longer in dispute. I was further informed by Plaintiff's counsel that the parties agreed that the only issues which remained to be determined were namely whether the Defendants were entitled to pursue their counterclaim as well as certain special pleas filed by the Defendants. I was further informed that those issues were matters of legal argument, and that it was therefore not necessary that any evidence be led.

[12] The Defendants' counsel was required to confirm the aforesaid arrangement as conveyed by Plaintiff's counsel, and after a confusing address and lengthy debate, I was eventually informed by Defendants' counsel that the matter could proceed on the basis that it be accepted that the Plaintiff would be entitled to judgment on the agreed *quantum*, but for the Defendants' counterclaim and/or any of the special pleas being upheld.

[13] The effect of the aforesaid agreement was therefore that it was not necessary that any evidence be led, and that the matter proceed on the basis that the parties argue the remaining issues raised by the parties. These issues can conveniently be summarised as follows:

[13.1] During 2018 Defendants amended their plea by introducing a counterclaim some 5 years after filing the Defendants' original plea and two special pleas. Plaintiff advanced argument in heads of argument that such amendment and introduction of that counterclaim was impermissible in terms of the provisions of Rule 24(1) because neither the Plaintiff nor the Court gave permission to introduce such a counterclaim which was not filed simultaneously with the Defendants'plea. In either event, so argued the Plaintiff's counsel, any such claim instituted in 2018 by the Defendants based on the purported cause of action as formulated in the Defendants' purported counterclaim prescribed because the facts underlying that purported counterclaim was known to the Defendants at the time when the insolvency inquiry was conducted. The issues for determination are therefore whether the Defendants' counterclaim was before court properly, and if so, whether such counterclaim had become prescribed;

[13.2] Defendants raised two special pleas against Plaintiff's particulars of claim in the pleadings, firstly that Plaintiff failed to comply with section 3(1) of the Limitation of Legal Proceedings against certain organs of State Act 40 of 2002, and secondly a special plea that the Plaintiff's claims have prescribed because the contract was cancelled during 2009. Defendants thereafter amended the pleadings by introducing a third special plea to the effect that the claims by

Plaintiff have been dismissed by De Klerk AJ in the application referred to *supra*, as result of which the Defendants are entitled to raise the defence of *res judicata*.

[14] The aforesaid special pleas and legal points will be dealt with separately hereunder.

DEFENDANTS' COUNTERCLAIM

[15] During October 2018 the Defendants served amended pages, introducing the counterclaim referred to *supra* for payment of the amount of R4295317.23. Approximately 8 years prior to that being the 10th of May 2010, the office of the State Attorney, Pretoria, referred to the fact that the Defendants intended to institute a claim as set out in the quotation of that letter contained in paragraph [7] *supra*. The Defendants' counterclaim was therefore instituted approximately 10 years after the State Attorney confirmed their awareness of the existence of a counterclaim. Plaintiff objected to the belated institution of this counterclaim on the basis that Plaintiff did not consent to the late institution of the counterclaim, contrary to Rule 24(1), and Defendants failed to seek permission from the court for the late institution of the counterclaim. Plaintiff also raised the point that, even if the belated introduction of that such counterclaim would be permissible, the counterclaim became prescribed.

[16] Any counterclaim which Defendants may have instituted during 2018 clearly become prescribed in terms of the provisions of section 12 of the Prescription Act 68 of 1969. This was conceded by counsel acting on behalf of Defendants during argument. The Defendants' belated counterclaim can therefore not be entertained and the issue whether the Defendants instituted that counterclaim contrary to the provisions of Rule 24(1) becomes moot.

DEFENDANTS' SPECIAL PLEA OF *RES JUDICATA*

[17] From the contents of paragraph [10] *supra*, it is clear that the court which adjudicated the application referred to in that paragraph did not adjudicate the merits of the Plaintiff's cause of action. The *onus* for a successful plea of *res judicata* rests on the party raising that defence.[1] *In casu* the Defendants failed to provide any information which can substantiate any argument that the court which dismissed that application, pronounced on the merits of Plaintiff's claims in this action.

[18] Defendants' counsel persistently argued that the mere fact that the application was dismissed with costs, amounts to a dismissal of Plaintiff's cause of action which entitles Defendants to raise the special plea of *res judicata*. That submission is legally untenable because it is not the form of the order granted but the substantive question that was dealt with by the Court which made the order, which should be considered.[2]

[19] An order dismissing an application equates to a judgment of absolution from the instance which does not constitute a bar to a subsequent action.[3]

---

1 Erasmus, Superior Court Practice, at page *D1, Rule 22-33 and the cases cited there, in particular: Hoatson v Paton (1907) 28 NLR 12; Lowrey v Steedman 1914 AD 532.*

2 *MV Wisdom C United Enterprises Corporation v STX Pan Ocean Co. Ltd 2008 (3) SA 585 (SCA) paragraph 9.*

3 *Rail Commuters' Action Group and others v Transnet Ltd and others 2006 (6) SA 86 (C) at 74H to 75.*

See also: *Vena v Vena and Another NO 2010 (2) SA 248 (ECP) at paragraph 8.*

[20] In summary; the learned Acting Judge dismissed the application which equates to absolution from the instance, Defendants failed to provide any factual evidence which confirms that the court hearing that application disposed of the merits of Plaintiff's claims against Defendants, and the record of those proceedings as referred to in paragraph [10] *supra* clearly indicates that the court dismissed the application on the legal points raised by the Respondents in that application (Defendants *in casu*) namely that the evidence of Gouws was impermissible. It is patently clear that the learned Acting Judge did not dispose of that application on the merits of Plaintiff's cause of action.

[21] The Defendants' special plea of *res judicata* therefore stands to be dismissed.

DEFENDANTS' SPECIAL PLEA OF PRESCRIPTION

[22] Defendants counsel argued that prescription commenced on 12 May 2009 being the date on which the SLA was cancelled. During argument Defendants' counsel argued that the liquidators were appointed on 18 June 2009 and therefore became aware of the Plaintiff's claims on that date or thereafter. On direct questioning, it was impossible to obtain any comprehensible submission from Defendant's counsel why the liquidators should have been aware of the Plaintiff's claims on the date that they were appointed as liquidators, or at which stage thereafter they should reasonably have been aware of the claim.

[23] Be that as it may, it is common cause that the liquidators held an inquiry during which inquiry an employee of DAPL provided a reconciliation, based on the invoices rendered by Plaintiff, confirming the indebtedness of DAPL to the Plaintiff.

[24] The facts *in casu* in relation to the insolvency inquiry, during which the liquidators became aware of the existence of the Plaintiff's cause of action against the Defendants are on all

fours with a judgment of this court delivered by Sardiwalla J.[4] In that judgment the learned Judge referred to the fact that proceedings by and against a company is suspended by virtue of the provisions of section 359(1) of the Companies Act until a liquidator is appointed. In paragraph [24] of that judgment, the learned Judge held that the liquidators could only become aware of the cause of action upon the conducting of an inquiry in terms of the provisions of section 415 of the Companies Act and, having regard to the provisions of section 12(3) of the Prescription Act, prescription could only run from that date.

[25] On the common cause facts in this matter it is clear that the liquidators became aware of all the facts underlying the indebtedness of DAPL to Plaintiff when Gouws testified during the enquiry and produced the necessary documents, reconciliations and other information which confirmed that indebtedness and the *quantum* thereof.

[26] Prescription therefore commenced to run from the date of the enquiry and as a result, the Defendants' special plea of prescription stands to be dismissed.

DEFENDANTS' SPECIAL PLEA OF NON-COMPLIANCE WITH SECTION 3 OF ACT 40 OF 2002

[27] This special plea is based on the submission that the liquidators failed to notify the relevant Organ Of State (DAPL) in terms of section 3 of the Institution of Legal

4 *Symes NO and Another v Stuart van der Merwe and Others (24400/2015) [2018] ZAGPPHC 885, paragraphs [21] to [25].*

Proceedings Against Certain Organs of State Act 40 of 2002 ("ILPACOSA") that the Plaintiff intended to institute the action.

[28] The Plaintiff's counsel argued that the letters of demand dated 30 April 2010 and 2 June 2010 respectively addressed by the liquidators initially to the DAPL and thereafter to the office of the State Attorney, Pretoria, as referred to in paragraphs [6] and [8] *supra*, constitutes compliance with section 3 of ILPACOSA. In support of this submission Plaintiff's counsel relied on various judgments which held that the purpose of section 3 is to provide notice in order to alert the organ of state to the pending claim so that it may investigate and decide how to respond. Section 3 of ILPACOSA may be in the form of a letter of demand and a perusal of the relevant authorities clearly confirms that it is not the form, but the substance of that letter which determines compliance with section 3 of ILPACOSA.[5]

[29] On a perusal of the aforesaid correspondence exchanged between the liquidators and the DAPL, as well as the State Attorney, it is clear that:

[29.1] The letters refer to the insolvency enquiry where an official of that Department confirmed the indebtedness of DAPL to Plaintiff;

[5] ***Masindi v MEC Department of Health, Limpopo Provincial Government [2024]*** *ZALMPPHC 1 paragraph 21*

See also: *Ledwaba obo Minor Children v MEC for Health, Limpopo Province [2025] ZALMPPHC 241 paragraphs 21 and 31.*

[29.2] There is reference to the SLA, confirming that contract as forming the underlying cause of action;

[29.3] The individual amounts which are claimed in terms of the relevant individual and identified sites are clearly stipulated.

[30] In my view there is no doubt that the aforesaid correspondence constitutes compliance with section of 3 of ILPACOSA. Significantly, during argument the Defendants' counsel made no attempt to illustrate why the aforesaid correspondence did not constitute a letter of demand or contained the grounds for the claim, not surprisingly so because such an argument would not have been supported by the facts.

[31] In the premises, the Defendants' special plea of non-compliance with section 3 of ILPACOSA stands to be dismissed.

CONCLUSION

[32] Whereas any counterclaim which Defendants may have had, became prescribed, and the three special pleas raised by Defendants stand to be dismissed, it follows that the Plaintiff is entitled to judgment on the agreed amount of R2 229 575.75 with *mora tore* interest from date of institution of the action to date of payment. In my view there is no reason why costs should not follow the event.

IN THE PREMISES, I MAKE THE FOLLOWING ORDER:

[1] It is declared that any counterclaim which the Defendants intended to institute has come prescribed virtue of the provisions of section 12 of the Prescription Act 68 of 1969.

[2} Defendants' special pleas are dismissed, with costs.

[3] Defendants are ordered to pay to Plaintiff the amount of R2 229 575.75 with interest thereon *a tempore morae* from date of service of the summons to date of payment.

[4] Defendants are ordered, jointly and severally, the one paying, the other to be absolved, to pay Plaintiff's costs of the action, including costs of two counsel, costs of senior counsel to be taxed on Scale C.

[redacted]

P A VAN NIEKERK
JUDGE OF THE GAUTENG DIVISION,
PRETORIA

APPEARANCES

FOR PLAINTIFF: ADV J HERSHENSOHN
ADV R DE LEEUW

INSTRUCTED BY: SCHABORT POTGIETER ATTORNEYS INC.

FOR DEFENDANT: ADV MIHLANGA

INSTRUCTED BY: STATE ATTORNEY