

# MDA CONSULTING



## FIRST AID FOR CONTRACTS

Prevention is Cheaper than Cure

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### **FIDIC: PRESCRIPTION OF CLAIMS**

#### **Introduction**

Very often last ditch attempts to settle disputes, prior to the referral to Arbitration take place which can protract and delay commencement of the formal dispute resolution process. In fact, it may be risky for these dispute resolution processes to be followed prior to such referral. If the dispute resolution processes do not result in settlement, could the option to proceed to Arbitration prescribe?

In order to determine this, we need to answer the questions: when does prescription start to run and how long is the period until the claim will prescribe?

#### **When Does Prescription Start To Run?**

Determining the moment that prescription starts to run involves careful factual analysis, read with the provisions of the Prescription Act 68 of 1969 (“the Act”). In terms of Section 12 of the Act, prescription commences as soon as the debt is due.

The word ‘debt’ includes any liability arising from and being due or owing under a contract.<sup>1</sup> A debt is ‘due’ when it is immediately claimable by the creditor or conversely, immediately payable by the debtor. This means that there has to be a debt in of

<sup>1</sup> *Leviton & Son v De Klerk’s Trustee* 1914 CDP 685 at 691; *HMBMP Properties (Pty) Ltd v King* 1981 (1) SA 906 (N) at 909A-B

which the debtor is under an obligation to perform immediately<sup>2</sup>. Christie<sup>3</sup> states:

*“the same test of recoverability has been expressed in different words: when the debt is recoverable, owing and already payable; immediately claimable; when the creditor acquires a complete cause of action for its recovery; or when the cause or right of action accrues, which may be taken as synonymous expression.”*

#### **PRESCRIPTION OF CLAIMS:**

The knotty question is whether or not prescription can run whilst a contract is in progress or are my rights preserved by the Contract? First Aid for Contracts analyses this predicament in relation to the FIDIC Construction Contract.

In the Supreme Court of Appeal case of *Group Five Construction ((Pty) Limited v the Minister of Water Affairs and Forestry*<sup>4</sup> the Court examined whether a claim, which was subject to the contractual dispute resolution process as agreed in the contract, had fallen “due” or not. The contract (an amended version of the standard form GCC contract)

specifically provided that to the extent that a recommendation of the DRB (Dispute Review Board) wasn’t accepted in writing by the parties, either party was entitled to refer the unresolved matter to court, subject to giving written notice if its intention to do so within the agreed time period. If such notice was not given, the prior decision of the Engineer became final and binding.

The Minister of Water Affairs and Forestry raised a special plea of prescription to Group 5’s summons.

<sup>2</sup> *Evins v Shield Insurance Co Ltd* 1980 (2) SA 814 (A) at 838; *Deloitte Haskins & Sells v Bowthorne Hellerman Deutsch* 1991 (1) SA 528 (A) at 532G-I

<sup>3</sup> *The Law of Contract of South Africa, 5<sup>th</sup> Edition at page 486*

<sup>4</sup> 2011 JDR 0161 (SCA)

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Group 5 submitted two alternatives in its argument:

- i. the claims did not become due at any date prior to the completion date of the project; or alternatively
- ii. the running of prescription commenced before the parties began the dispute resolution procedures: i.e. as soon as the causes of action for the various amounts claimed were complete, but that the running of prescription was interrupted in terms of s 15(1) of the Act by service on the engineer of each claim.

The trial court judge was of the view that before instituting court proceedings the contractor was obliged to go through the dispute resolution procedure. Having done so, the impediment to litigation was removed and the contractor was entitled to institute legal proceedings forthwith as soon as he had given notice. Accordingly prescription began to run no later than the giving of such notice.

There is a distinction between the Group 5 case and the FIDIC Red Book (1999) provisions. In Group 5, after the failure of the DRB, any impediment that existed ceased to exist and the parties were free to institute action in court. This is not the case in the FIDIC Red Book (1999) – where the impediment exists until the final arbitral award is given. The dispute resolution procedure has, at each escalating level of the process, an enforceable decision or determination – that is subject to review at the next level.

The debt will only become due at the conclusion of the dispute resolution process, accordingly prescription will not start running on the occurrence of an event or circumstance giving rise to a claim nor when the determination is made.

This is all very well and good, but what if the dispute is never referred to the DAB? Surely this cannot be without consequence? In the writer's opinion, if either party fails to refer a dispute to the DAB, its right to do so will prescribe within 3 years of the dispute arising. This conclusion, while not cast in stone, can be argued, based on the fact that a right to claim the appointment of the DAB has a correlative 'debt' within the ordinary meaning of the word. This 'debt' arises because a party, who cannot (even though obliged to) provide a determination that is fair, has to participate the DAB proceedings to determine what is fair (i.e. a claim for time / money)<sup>5</sup>.

#### How Long is the Period until the Claim is Prescribed?

In terms of Section 11(d) of the Act, the period of prescription applicable to claims is three years.

#### How would the Group 5 judgment affect those using the FIDIC Red Book (1999) Contract?

The claims submission process commences with the submission by the contractor of a claim to the appointed engineer. If there is a dispute regarding this claim, it follows the dispute resolution procedures agreed to, being submission to the DAB and ending in Arbitration, failing amicable settlement.

In terms of clause 20 of the FIDIC Red Book (1999), disputes must be adjudicated by the DAB in accordance with Sub-Clause 20.4 [*Obtaining Dispute Adjudication Board's Decision*]. The decision of the DAB is final and binding on the parties (who shall promptly give effect to it) unless and until it shall be revised in amicable settlement or an arbitral award.

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<sup>5</sup> A 'debt' is not defined in the Prescription Act. In terms of the matter *Boundary Financing Limited v Protea Property Holdings (Pty) Ltd* 2009 (3) SA 447 (SCA) it was held that a claim for rectification does not have as a correlative a debt within the ordinary meaning of the word. Rectification does not create a new contract; it merely serves to correct the written memorial of the agreement. Should a claim for rectification of a contract become prescribed after three years parties may become entitled to rights and subject to obligations wrongly recorded and never intended. That, in my view, is a result never intended by the Prescription Act.

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Neither party shall be entitled to commence arbitration of a dispute unless a notice of dissatisfaction has been given as prescribed in the contract. There are two exceptions to this rule which we shall not deal with here.

Where a notice of dissatisfaction is given under Clause 20.4, both parties shall attempt to settle the dispute amicably before the commencement of arbitration. However, unless the parties agree otherwise, Arbitration may be commenced on or after the 56<sup>th</sup> day after the day on which notice of dissatisfaction was given, even if no attempt was made to settle amicably.

Clause 20.6 [*Arbitration*] provides that unless settled amicably, any dispute in respect of which the DAB's decision (if any) has not become final and binding shall be finally settled by Arbitration.

It can be said that the effect of the Group 5 judgment means that the running of prescription will be delayed until the parties to the contract have exhausted all of the dispute resolution mechanisms provided for in the contract (i.e. the arbitral award has been given). For as long as the dispute resolution process is on track, the claim (or "debt" for the purposes of the Act) is not "due". Compliance with any contractually contemplated dispute resolution machinery will be seen as a contractual prerequisite for the enforcement of a claim and will form part of the claimant's cause of action. However, if the contractor fails to follow the dispute resolution procedures within the timelines prescribed, its right to follow such procedures will lapse. Accordingly, in order for claim to survive, the claim must be referred to the DAB within 3 years of the dispute arising. In this regard, it is not the event that determines the commencement of the prescription period, but the date upon which the dispute arises.

### Conclusion

The only conclusion that one can make is that it would be unwise for any contractor to sit back and let the time pass him by when he becomes aware of a dispute regarding a claim. Simple. Prescription is alive and well in construction contracts and is not a monster that one wants to battle face to face. Careful consideration needs to be given and proper application of the steps needs to be taken, not only for submission of claims, but also for the contractor's remedies to enforce a disputed claim. Follow the dispute resolution procedures available to you in the contract timeously – and for those of you that are involved in projects that span over a couple of years - don't wait until the end of the project to act. You may receive a nasty surprise – a defence of prescription.

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