MDA PRESENTS

FIRST AID FOR CONTRACTS

Prevention is Cheaper than Cure

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PRESCRIPTION AND CONSTRUCTION CONTRACTS

Author: Tsele Moloi

This article considers the principle of prescription applied in the high court action instituted by Group Five Construction (Pty) Ltd (the "G5") against the Minister of Water Affairs and Forestry (the "MWAF") ("*G5 case*"). In its action G5 claimed payment of four (4) amounts in respect of claims (referred to as claims A-D (the "Claims") it alleges were due in terms of the provisions of the contract for the project known as the construction of the Injaka Dam and Appurtenant Works. The applicable contract was the General Conditions of Contract,1998.

Clause 61 of the contract was the dispute resolution procedure applicable to disputes which may arise between the parties during the currency of the contract. Initially it provided for mediation to be the first mechanism applicable to resolve disputes arising between the parties. As a result of two amendments both parties agreed to refer their disputes to the dispute resolution board ("DRB"). In order for the DRB's recommendations to become final and binding both parties had to accept them. Nothing turns on the material facts of each claim, save to say that:

1. Claim A is a claim for payment of R6 843 476,68 in terms of clauses 3(3) and 50(1) read with clause 51;
2. Claim B is a claim for payment of (i) R925 178,82 in terms of clause 42(1) and/or clause 26(7)(b) and/or 30; and (ii) R1 696 089,62 in terms of clause 42(1) alternatively clause 45;
3. Claim C is a claim for payment of (i) R1 745 679,44 in terms of clause 39 and/or 40 and/or 42(1) and 26(7) and/or 30; (ii) R577 020,18 in terms of clause 42(1) alternatively clause 45; and (iii) R7 601 195 in terms of clauses 39 and 40.
4. Claim D is a claim for payment of R7 987 186,90 in terms of clause 49.

G5 referred the claims to the DRB. The DRB issued its recommendations on the Claims. However, the parties did not accept them which meant they did not become final and binding. Under the dispute resolution procedure, approaching the court was the last option available to a party dissatisfied with the recommendation by the DRB. As there was no acceptance of the DRB's recommendation, G5 elected to notify the MWAF that it intended to refer the Claims to court.

G5 set out its Claims in the summons and particulars of claim served on 2 December 2005. In its special plea the MWAF contended that the Claims had prescribed. The MWAF alleged that the period of prescription for each claim commenced on the date G5 delivered its notice of referral to court – i.e. claim A being 6 September 2001, claim B being 3 October 2001, claim C being 22 February 2002 and claim D being 20 March 2002. This allegation was based on the fact that the summons was only served on 2 December 2005, more than three (3) years after the notices referring the Claims to court were delivered by G5.

According to the MWAF the date of the notices referring the Claims to court was the date on which prescription began to run to a period of three (3) years unless interrupted. In the circumstances, the serving of the summons dated 2 December 2005, failed to interrupt the running of the prescription period timeously.

G5 disputed this defence. G5, *inter alia*, contended that each of the Claims became due on the date of issuing of the final completion certificate for the project. This certificate was issued on 4 March 2003. As such the three (3) year prescription period began to run from this date.

As an alternative defence, G5 alleged that, prescription began to run when the Claims were submitted to the engineer for his determination. In other words, that the prescription period of three (3) years, began to run earlier than 4 March 2003[1] - which was the date of issuing the final completion certificate, and that prescription was interrupted by the delivering of notices referring the Claims to court.

Broadly speaking, the court was required to determine the date on which the debts (the Claims) became due. This would constitute the date on which the prescription period would commence to run. If they became due on the dates when G5 delivered its notices referring the Claims to court, the Claims would have prescribed as the service of the summons occurred more than three years after these dates. Ancillary to this question was if prescription began to run earlier – i.e. when the Claims were submitted to the engineer - did the notices referring the Claims to court interrupt the running of prescription.

Section 10 of the Act states that:
"Subject to the provisions of this Chapter and of Chapter IV, a debt shall be extinguished by prescription after the lapse of the period which in terms of the relevant law applies in respect of the prescription of such debt".

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1 Group Five Construction v The Minister of Water Affairs and Forestry (39161/05) [2010] ZAGPPHC 36 (5 May 2010), paragraph 12

Section 11 of the Act states that:
"save where an Act of Parliament provides otherwise, three years in respect of any other debt".

Section 12(1) of the Act states that:
Subject to the provisions of subsections (2), (3), and (4), prescription shall commence to run as soon as the debt is due[2].

Section 10 read with section 11 provides that that a debt shall be extinguished by prescription after the lapse of three (3) years. Upon the expiry of this period the debt is unenforceable against the other party. In terms of section 12(1) prescription begins to run as soon as the debt becomes due.

In considering G5's action and the MWAF's defence of prescription, the court first considered section 12(1) and what it meant by the word 'debt'. The court referred to a number of authorities which dealt with this particulars issue, accepting that a debt is due when it is immediately claimable by the creditor[3]. Secondly, the court had to consider the provisions of the contract to determine when the Claims arose or became enforceable or in the words of the Act, when did the debts (Claims) become due.

The contract contained a number of provisions regulating the procedure to be followed by a party seeking to enforce a claim. Clause 51 dealt with the claims for compensation and/or additional payment and clause 61 regulated the dispute resolution procedure arising from such claims. The latter stipulating a procedure to refer the disputes to court for resolution, if recommendations of the DRB are not accepted. The court highlighted the fact that this clause did not direct parties only to refer their disputes to court after the works were complete. As such it did not support G5's first defence, that the Claims became due or enforceable on the issuing of the final completion certificate – i.e. 4 March 2003.

In terms of the procedure under clause 61 a party seeking to refer a dispute to court had to have complied with the following procedure:

- a ruling by the engineer; if disputed
- a decision by the engineer, if disputed;
- a referral to the DRB; if disputed
- court proceedings

There was an express obligation on G5 to comply with each step and the time limits prescribed before proceeding to the next stage. Mindful of the Act and the procedure set out in the contract, the court held that G5 was obliged to follow the procedure. G5's cause of action was complete once it had complied with each stage of the process. It could then approach the court with a competent cause of action to resolve the dispute on the Claims.

The court also dismissed G5's alternative defence that prescription commence running earlier when it delivered its Claims to the engineer. It was only on completion of the dispute procedure that a claim was enforceable, as such the debt became due.

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2 Section 10, 11 and 12 of the Prescription Act 68 of 1969

3 Group Five Construction v The Minister of Water Affairs and Forestry (39161/05) [2010] ZAGPPHC 36 (5 May 2010), paragraph 7

In the circumstances, the prescription period, for the Claims, expired three (3) years after the date of each notice referring the claim to court was delivered.

As the court held that prescription began to run on issuing of the notices, the question of whether the notices interrupted prescription, where it began to run when the Claims were referred to the engineer, was moot. However, for sake of completeness the court addressed this issue too. Under section 15(6) there are specific acts which interrupt the running of prescription– i.e. summons. Considering this section and the available case law, the court accepted that the notices could not have interrupted prescription.

The common law position on a construction contract is that payment becomes due once the works are complete. However, to provide the contractor with sufficient cash-flow to execute the works, construction contracts provide for periodic payments. As such, a claim for payment arises periodically subject to the provisions of the contract regulating periodic payments. The consequence under the common law approach is that a claim by a contractor prior to completion of the works is premature. Therefore, under the common law position, considering if a claim has prescribed before a party achieves final completion, will be premature. Similarly, the provisions of the contract regulate a contractor's right to payment for extension of time and additional payment. The provisions set out the requirements a contractor will need to comply with for a right to claim an extension of time and additional payment and how such right is preserved and/or later enforceable. In other words, these provisions dictate when the debt becomes due and/or the right to claim, and as such when prescription actually begins to run.

Interpreting these provisions correctly is important. This contract's provisions departed from the normal common law position of payment due, or a right to claim payment arising, at completion. The court referred to authority to explain its view of when a debt is due, *inter alia*, that *"when the creditor's cause of action is fully accrued and the creditor is able to pursue his claim"*[4]. In this case, the right to sue the employer, through the court, did not arise until the plaintiff had complied with the dispute resolution procedure in full. Until then the cause of action was incompetent. It was with this approach that the court, *inter alia*, held that:

"I am therefore of the view that before instituting court proceedings the contractor was obliged to go through the dispute resolution procedure, but, having done so this 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 notice"[5].

By way of example the standard General Conditions of Contract 2015 ("GCC 2015") provisions provide for a contractor to deliver its claim in terms of clause 10.1, to the employer's agent ("EA's), subject to compliance with time periods.

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4 Group Five Construction v The Minister of Water Affairs and Forestry (39161/05) [2010] ZAGPPHC 36 (5 May 2010), paragraph 24

5 Group Five Construction v The Minister of Water Affairs and Forestry (39161/05) [2010] ZAGPPHC 36 (5 May 2010), paragraph 23

In the event that the contractor disputes the EA's decision, it would be obliged to deliver a further clause 10.3 notice referring the matter the adjudication board. Clause 10.6 provides a final option to refer the decision of the adjudication board, to arbitration or court proceedings, should it still disagree with such decision. In the context of this case, the contractor's right to proceed to arbitration arises once it has complied with all the steps prescribed in clause 10.1, 10.3 and 10.5. Unless is has done so, its cause of action is incompetent. Similarly, upon delivering a notice disputing the adjudication board's decision, the period of prescription would commence to run.

A further example is in circumstances when the employer instructs a variation. Under clause 6.4 the contractor is obliged to execute the works and deliver a cost of such works, to be approved by the EA. The cost of the variation will form part of the final account. This amount falling within the definition of the contract price and is not subject to the various claims and dispute resolution provisions. As such, the right to claim would only arise once the final account had been prepared. It is with this in mind that the court noted that the Claims:

"were not accommodated in any later certificate and were not incorporated in the engineer's final payment certificate when the final completion certificate was issued as contemplated by clause 52(10) of the GCC"[6].

Clause 52(10) deals with variations instructed, and the cost thereof included or excluded in the contract price[7]. As a matter of interest, under clause 6.4 of the GCC 2015, a delay by an EA to issue his valuation of the variation would provide an additional and separate claim. This second claim and the right to claim would be subject to the claims and dispute resolution procedures and as such, this case and its principles would apply.

It is of benefit to consider this decision against the decision in the matter between Murray & Roberts Construction (Cape) (Pty) Ltd ("M&R") v Upington Municipality ("*Murray & Roberts case*") heard in our appellate division. In this case, the M&R sought an order declaring that the Municipality's claim for damages had become prescribed. The Municipality submitted that the completion of the running of prescription had become delayed in terms of section 13(1)(f) of the Prescription Act, 69 of 1969 when it submitted the dispute to the engineer for his decision in terms of clause 69 of their construction agreement. In effect, submitting the claim to the engineer interrupted the running of prescription. The case also concerned clause 69 of the general conditions of contract. In confirming the *court a quo's* decision, the appellate division held that prescription had been interrupted by submitting the dispute to the engineer in terms of the scheme, a three (3) step procedure, of the dispute resolution procedure. Based on the above there are vast similarities between this case and the G5 case, this article considers. So why the materially different outcomes?

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6 Group Five Construction v The Minister of Water Affairs and Forestry (39161/05) [2010] ZAGPPHC 36 (5 May 2010), paragraph 21

7 Defined as the price tendered - See clause 1(g) of General Conditions of Contract 1982

Primarily it is the applicable provisions of the two contracts. Whereas in the G5 case, the contract prescribed a three (3) step approach of, (i) engineer, (ii) dispute resolution board and (iii) court proceedings, the M&R case prescribed, (i) engineer, (ii) mediator and (iii) arbitration. Reference to a dispute subject to arbitration is of material importance. Where a contract refers to arbitration as a dispute resolution procedure section 13 of the Act is applicable. This section states that:

"*If the debt is the object of a dispute subjected to arbitration the period for prescription shall not be completed before a year has elapsed after the day referred to in paragraph".*

Given clause 69, in the court's view this clause as a whole was considered as one of arbitration, and that submitting the dispute to the engineer resulted in the dispute being subject to arbitration. As such prescription would be delayed until a year after the impediment had ceased – the arbitration proceedings. It is for this reason that the two cases resulted in different outcomes for the respective parties.

Contractors must be cognisant of the provisions of their contracts and their consequence. The contract is the start and end of the rights enforceable against the employer or other party involved. In addition, claims for payment of a debt shall always be subject to section 12 of the Act. A failure to consider the requirements of this section and the provisions of the contract may result in a party incorrectly interpreting the Act resulting in a perfectly legitimate claim becoming prescribed or prematurely enforced.

Similarly, contractors must guard against becoming overly excited of their prospects of success given the M&R case. There are unique features of this case, such as the application of section 13 of the Act, which was not applicable to the G5 case.