IN THE HIGH COURT OF SOUTH AFRICA

EASTERN CAPE LOCAL DIVISION, BHISHO

CASE NO: 426/16

In the matter of:

RAY TSHISELA **Applicant**

versus

THE MEC: DEPARTMENT OF ECONOMIC DEVELOPMENT,
ENVIRONMENTAL AFFAIRS AND TOURISM
EASTERN CAPE PROVINCE **First Respondent**

THE HEAD: DEPARTMENT OF ECONOMIC DEVELOPOMENT,
ENVIRONMENTAL AFFAIRS AND TOURISM
EASTERN CAPE PROVINCE **Second Respondent**

JUDGMENT

STRETCH J:

[1] After 28 years, the applicant retired from employment with the Department of Economic Development, Environmental Affairs and Tourism ("the Department") at the end of 1996. Upon his retirement, his pension benefits became due.

[2] The applicant avers that he was paid his pension benefits in the sum of R397 076,06 after eight years had elapsed. In January 2005 he enquired from the chief director of pensions administration, whether the payment he had received included interest. He did not get a reply.

[3] In December 2008 he received a response from the head of Treasury advising that the matter had been referred to the Department where he had been employed for its information and action. He was also advised to telephone the pension office in Bhisho to enquire in this regard. It was explained to him that National Treasury and the Pension Office were the only parties who could assist him with regard to pension matters.

[4] He apparently did so and in July 2009 received a letter from his ex-employer assuring him that his complaint had been prioritised. In November 2010 he wrote a letter of complaint to the chief director, pension administration. In February 2011 he wrote back to his ex-employer followed by a reminder two months later.

[5] In October 2011 the Department circulated an internal memorandum to the second respondent explaining that the Government Employees Pension Fund ("GEPF") had processed the applicant's claim within the relevant time frame from receipt thereof. It was the delay before its submission to pension administration that had not been accounted for.

[6] In November 2011 the Department forwarded a letter to the applicant. The relevant paragraph reads as follows:

> 'You are hereby requested to detail your claim to the department and indicate the monetary value. On receipt of your quantified claim, the matter will be presented to the department's legal advisor for guidance.'

[7] On 15 January 2012, with the assistance of Liberty Life, the applicant submitted a claim for quantified interest to the Department totalling R449 088,88 alternatively, R392 062,00.

[8] In February 2013 the applicant escalated his complaint to the first respondent, as he had been advised that his issue had been referred to provincial treasury.

[9] The applicant eventually sought legal advice which culminated in what purports to be a lawyer's letter penned by an associate of the attorneys' firm to the first

respondent on 30 June 2014. The letter bears the markings of what I can only describe as hastily and shoddily drafted nonsensical drivel. A follow up letter (this time apparently drafted by the director of the same firm) dated 1 April 2015 (some nine months down the line) appears to be a more accurate reflection of the history which I have thus far referred to, and once again claims payment of interest in the sum of R449 088,08. The letter is also described as notice in terms of section 2 of the Institution of Legal Proceedings Against Certain Organs of State Act 40 of 2002.

[10] On 25 May 2016 the second respondent (apparently not given to expansive discourse) had this to say:

> 'Kindly note that the Department of Economic Development, Environmental Affairs and Tourism disputes your client's claim in respect of interest due on alleged delayed payment of his pension benefits based on the following:
>
> 1. Your client's claim has not been proved.
> 2. It has not been quantified; and more importantly
> 3. The claim has prescribed.
>
> We trust that this brings this matter to finality.'

[11] In February 2017 the applicant launched an application in this court for the following relief:

> '1. Directing that the administrative action of the Department of Economic Development, Environmental Affairs and Tourism, Eastern Cape (the Department) in failing to process the payment of interest, owing, due and payable to the applicant in the sum of R344 923,00 and thereafter effect payment to him be reviewed and set aside.
>
> 2. Directing the first respondent, alternatively the second respondent to process the payment of the aforesaid amount and effect payment thereof to the applicant within 30 (thirty) days from the date of the service of the court order sought herein.

3. Declaring that the aforesaid administrative action is unlawful and unconstitutional and falls to be reviewed, corrected and/or set aside.

4. Directing the first respondent, alternatively, the second respondent to pay interest on the aforesaid amount at the prevailing legal rate of interest from the date of this order to the date of payment.

5. Directing the first respondent to pay the costs …. on the scale as between attorney and client …

6. Condoning, in so far as may be necessary, the delay in filing the application.'

[12] Not only do the respondents dispute liability, but they have also raised the following points in *limine* in opposition to the application:

a. that the applicant's claim has prescribed;
b. that the applicant has failed to give notice of the institution of the proceedings within the statutorily stipulated time period;
c. that the application has raised a factual dispute;
d. that the applicant has unduly delayed the institution of these proceedings.

[13] It has also been contended that the applicant's claim as pleaded does not constitute administrative action and accordingly fails to disclose a cause of action. This is not necessarily the position. The respondents are functionaries of a state department as defined in section 239 of the Constitution. It is obvious from the undisputed 20 year history of this matter that their conduct has failed to promote the efficient administration which not only the applicant but which all the employees and retirees from the Department are entitled to in terms of section 33 of the Constitution. Even if I am not correct, and because I am of the view that the issue of prescription is determinative of this matter, any further delay in the finalisation of what is nothing more or less than a claim founded on the breach of a contractual relationship wherein the applicant seeks either specific performance and/or damages, would not be in the interests of justice.

[14] It is also for this reason that I do not deem it necessary to consider and decide the various other issues raised by the respondent either in *limine* or on the merits of the claim itself.

[15] It is trite that a debt is extinguished by prescription after the lapse of the prescriptive period applicable to that debt. The debt cannot be revived, not even by an acknowledgment of liability, unless such an acknowledgment amounts to an entirely new undertaking to pay.[1] Although the term 'debt' is not defined in chapter III of the Prescription Act 68 of 1969 (which specifically deals with extinctive prescription), it has been held to refer to anything that is owed or due, such as money, goods or services which a debtor (in this case the Department) is under an obligation to pay or render to a creditor (the applicant).[2]

[16] The party who raises prescription must allege and prove the date of inception of the period of prescription. As a general rule, and in terms of s 12(1) of the Prescription Act, prescription begins to run as soon as the debt is due. A debt is due when it is immediately claimable by the creditor in legal proceedings which place the debtor under an obligation to perform[3].

[17] By virtue of the provisions of s 12(3) of the Prescription Act a debt, whether delictual, contractual or having some other form of origin, is not deemed to be due until the creditor has knowledge of the identity of the debtor and of the facts giving rise to the debt. Thereafer the creditor is afforded a period of three years grace before the debt prescribes. In terms of sections 14 and 15 of the Prescription Act the creditor bears the onus of alleging and proving interruption of prescription by either:

a. an acknowledgment of liability by the debtor;
b. service on the debtor of any process whereby the creditor claims payment of the debt.

[18] It is contended on behalf of the respondents that the applicant ought to have issued the present proceedings within three years of his receipt of the Treasury letter

[1] Lipschitz v Dechamps Textiles GmbH 1978 (4) SA 427 (C)
[2] See for example Duet and Magnum Financial Services CC (in liquidation) v Koster 2010 (4) SA 499 (SCA)
[3] Uitenhage Municipality v Molloy 1998 (2) SA 735 (SCA)

dated 10 December 2008, and that he ought to have cited the first respondent and National Treasury as respondents. I do not agree. It seems from the evidence before me, and particularly the contents of the applicant's query dated 24 January 2005, that the applicant was still none the wiser as to whether the lump sum paid to him in May 2004 was inclusive of interest or not.

[19] That is not the end of the matter however. It is not in dispute that the applicant had, by no later than 5 December 2011, been expressly invited to quantify his interest claim and that he did so in documentation received by the Department on 16 February 2012. The detailed calculations, computations and conclusions submitted by the applicant to the respondents with the benefit of the assistance of Liberty Life, are a clear indication that at the latest, by 16 February 2012 the applicant was aware of the fact of the debt, the quantum thereof and the identity of the debtor. This to my mind, and affording the applicant the largest margin of grace reasonably possible in the circumstances, is the latest date on which the running of prescription could conceivably have kicked in.

[20] This being the position, the prescriptive period came to an end at the latest on 16 February 2015, and the applicant's service of process of this claim which was effected on 14 February 2017 is significantly out of time.

[21] It is contended on behalf of the respondents that there is no other evidence before me to suggest either express or tacit acknowledgment of the debt which could have had the effect of successfully interrupting the running of prescription. I agree. Even if the second respondent's letter inviting the applicant to quantify his claim is capable of construction as tacit acknowledgment of liability, prescription would have commenced to run afresh immediately thereafter in terms of section 14(2) of the Act. This means that prescription would have commenced running afresh on 6 December 2011 being the day after the date on which the applicant says he received the letter inviting quantification from the second respondent. Based on this alternative scenario, the applicant's claim would still have prescribed by the time he issued his application out of the Bhisho High Court on 21 February 2017.

[22] In the premises, and in terms of section 11 of Act 68 of 1969, the applicant's claim has prescribed. The application is dismissed with costs.

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I.T. STRETCH
JUDGE OF THE HIGH COURT

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Date handed down: 12 October 2017