IN THE HIGH COURT OF SOUTH AFRICA,

FREE STATE DIVISION, BLOEMFONTEIN

Reportable:	**YES/NO**
Of Interest to other Judges:	**YES/NO**
Circulate to Magistrates:	**YES/NO**

Case number: 3362/2013

In the matter between:

CEM BRICK MANUFATURES CC Plaintiff

and

THE HOD: DEPARTMENT OF HUMAN SETTLEMENTS 1ST Defendant

FREE STATE PROVINCE

ZIMVO TRADING CC 2ND Defendant

CORAM: **MHLAMBI J,**

HEARD ON: 19 APRIL 2018

DELIVERED ON: 03 MAY 2018

MHLAMBI, J

[1] The plaintiff, as cessionary of certain claims based on contracts entered into between the second defendant and the first defendant and which were ceded to it by the second defendant, instituted action against the first defendant. In terms of these contracts, the second defendant had to construct a number of houses for certain municipalities under the jurisdiction of the first defendant. The plaintiff supplied the bricks and building material.

[2] The initial summons was amended to replace the HOD (head of the department) with the MEC (member of the executive council) as required by the provisions of the State Liability Act (SLA). The first defendant filed a special plea to the plaintiff's amended summons alleging that the plaintiff's claim had prescribed due to the effluxion of time. The centre piece of the determination of the Special Plea hinges on the interpretation of the provisions of section 2(1) of the SLA and section 15(1) of the Prescription Act.

[3] The first defendant, relying on section 2 of the SLA, contended that the said section was obligatory and required that any proceedings taken against any department, must be instituted against the executive authority of such department and the executive authority of such department must be cited as the nominal defendant. Non-compliance with an obligatory statutory prescript is a nullity or legally ineffective. In elucidation and expansion of this submission, the counsel orally argued that the

fact that the MEC and the HOD shared the same wing (though opposite to each other) in the same building occupied by the Department of Human Settlement, Free State Province, was very important as an indication of the two positions being separate entities, occupied by two individuals with separate identities. Consequently, this differentiation affected the validity of any process/ proceedings against the department if the service was effected on the department citing the HOD as nominal defendant and not the MEC.

[4] As no legislation empowered the HOD of a department to institute proceedings or that the proceedings could be instituted against an HOD on behalf of the department, the amended summons, substituting the HOD with the MEC three years after the debt arose and was due, was legally ineffective and did not interrupt prescription as set out in section 15(1) of the Prescription Act, 68 of 1969. Any amendment should have been done before prescription occurred.

[5] In the light of the above reasoning and the conclusions arrived at by the first defendant hereunder by the first defendant, it was submitted on its behalf that the plaintiff's claim had prescribed in terms of section 11(d) of the Prescription Act:

"5.1 Citing the HOD of the Department, as defendant, contrary to the obligation prescription of section 2(1) and 2(2) of the State Liability Act, 20 of 1957 is an effective legal process for purposes of the Prescription Act, 68 of 1969;

5.2 Nor was the said process served on the MEC: Department of Human Settlement, Free State Province;

5.3 Nor was there any contractual nexus or a debtor/creditor relationship between plaintiff and the HOD: Department of Human Settlement;

5.4 All the documents relied on indicated the HOD as a representative and agent, not as principal. The action could not be instituted against an agent.

[6] The plaintiff's counsel urged me to follow the decision by Jordaan, J in the application for the amendment of the pleadings and that all the issues raised by the first defendant were dealt with therein. The mandatory thrust of section 2 of the SLA was aimed at the citation of the nominal defendant and did not affect the status of the defendant as a debtor as required by section 15(1) of the Prescription Act. If the HOD was a different party, neither a notice of withdrawal was filed by the HOD nor a substitution by the MEC. I was urged to follow this decision unless I was convinced that it was wrong.

[7] The original summons was served on the HOD on 26 August 2013. The amended particulars of claim were delivered on 6 February 2017 and the first defendant's amended plea was filed on 12 April 2017. The first defendant submitted in its heads that according to paragraph 7 of the particulars of claim, the first debt of the first claim arose in December 2011 and the debt of the second claim arose on 11 November 2011. Any amendment should have been done before prescription occurred.

[8] In granting the application for the amendment of the pleadings, Jordaan, J said the following on page 11 of the judgment: *"The crux of the question is therefore, whether the intended amendment seeks to*

introduce a new entity as defendant or merely seeks to introduced a new entity as defendant or merely seeks to rectify an incorrect citation of the same entity and defendant.

1. *To my mind, it is clear that the claim was not instituted against the HOD in his personal capacity, but as representative of the relevant department.*

2. *It was understood as such, by the first respondent, as appears from the allegations in the plea that I have referred to.*

3. *It is not disputed that the service was effected at the address of the relevant department, although referring to the HOD instead of the MEC.*

4. *Both the first and third respondents are represented by the same State attorney.*

5. *The Department was aware of all the substantial elements of the claim from the outset*

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I am convinced that the amendments do not constitute a substitution of one entity with another. It only seeks to rectify an incorrect citation of the same department. In the result the service of the summons was effective in interrupting prescription and allowing the amendments will not be prejudicial to the first and third respondent."

[9] I was referred to various decisions in support of the granting of the special plea, most of which were dealt with in the application for the amendment as having been irrelevant to the matter at hand. In conclusion I was referred by Mr Claassen, on behalf of the first defendant, to a quotation (by Mageza AJ in an earlier application in the same matter) in paragraph 3 of the unreported

decision by Beshe J in **THABO MTHEMBU and MEMBER OF THE EXECUTIVE COUNCIL FOR EDUCATION, EASTERN CAPE AND BUYISILE ZOKO CASE NUMBER 943/2007** which reads as follows:

"It is not difficult to imagine the position the Plaintiff must have found itself in once it dawned on it that it no longer had recourse as against the Minister of Education and prescription had possibly set in. Undeterred by this development and in the best tradition of astute legal practitioner's ability to find ways within the Rules of Court, as opposed to commencing new proceeding against the correct organ of State- the MEC, an election to 'substitute' rather than to issue an serve new Summonses was made."

[10] The facts in that case are distinguishable from the present one. In that case the Minister of Education was erroneously sued instead of the Member of the Executive Council for Education. The court did not deal with the special plea of prescription but upheld the special plea relating to non-compliance with section 3 of the Institution of Legal Proceedings Against Certain Organs of State.

[11] Section 15 of the Prescription Act states the following: **JUDICIAL INTERRUPTION OF PRESCRIPTION.**

(*1) The running of prescription shall, subject to the provisions of subsection (2), be interrupted by the service on the debtor of any process whereby the creditor claims payment of debt.*

(2) Unless the debtor acknowledges liability, the interruption of prescription in terms of subsection (1) shall lapse, and the running of prescription shall not be deemed to have judgment or the judgment is set aside.

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(3)……

(4) ……

(5) ……..

(6) …….”

It is common cause that the plaintiff is the creditor and the Department of Human Settlements is the debtor. The written agreement between the department and the second defendant defines the department as *“the Department of Human Settlements or any person authorised by Head of the Department to act on its behalf”.* The second defendant then ceded its right, title and interest in its payment to the plaintiff. As correctly pointed out by Jordaan, J that the service of the summons was effected on the debtor and effectively interrupted prescription.

[12] The same argument raised in the previous application for amendment was presented in this case as regards costs. No plausible reason exists in my view not to grant a similar order. I agree with the reasons advanced that, even though the application did not involve complicated issues, the case in its entirety justified the use of two counsel as it was obviously of paramount importance to the parties. I accede to the request that that the costs of two counsel be allowed. I cannot find fault with Jordaan, J’s judgment more in particular in the conclusions arrived at in respect of the authorities cited and that prescription was interrupted. I therefore agree with the decision made.

[13] In the result, the following order is made:

The special plea is dismissed with costs which costs shall include the employment of two counsels.

MHLAMBI, J

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