**IN THE HIGH COURT OF SOUTH AFRICA**

**FREE STATE DIVISION, BLOEMFONTEIN**

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

Case No: 3931/2018

In the matter between

**R& B CONSTRUCTION** **PLAINTIFF**

**And**

**MEC FOR THE DEPARTMENT OF PUBLIC WORKS AND INFRASTRUCTURE, BLOEMFONTEIN**
**FREE STATE** **DEFENDANT**

**CORAM:** MZANA AJ

**HEARD ON:** 07 SEPTEMBER 2021

**DELIVERED ON:** 10 DECEMBER 2021

[1] The plaintiff in this matter issued summons on the 07 of August 2018 in this court against the defendant in terms of which he claimed payment of monies owed for services rendered to the defendant.

[2] The plaintiff's claim is based on the following that:

1. The defendant unilaterally and prematurely terminated their contract

2. At the time of the termination, certain monies were due and payable to the plaintiff; therefore, the defendant has knowledge of his indebtedness to the plaintiff.

[3] It appears that, on the 31st of May 2011, the plaintiff ( who was duly represented by Mrs. M. Matini), was appointed by the defendant (duly represented by Mr Magabane), the Chief Executive Officer (CEO) of Mafu Infrastructure Africa (Pty) Ltd, to carry out and undertake the renovations and additions at Batimea Special School in Thabanchu, Free State Province (Tender No PWRD (T) 100/201).

[4] The terms of the appointment were amongst other things that:

- The plaintiff was contracted to carry out and undertake the scope of works indicated in the issued tender documents and in return the defendant would pay to the plaintiff the sum of R 9 433 330.00 (Nine Million Four Hundred and Thirty Three Thousand Three Hundred and Thirty Rand).

[5] The plaintiff commenced with the contracted work and periodically submitted payment certificates to the defendant for and in respect of completed work, which certificates were paid by the defendant, from time to time. On the 8th of March 2013, the defendant summarily, prematurely terminated the contract and instructed the plaintiff to immediately discontinue all works and vacate from the site.

[6] The plaintiff has argued that, at the time of the premature termination of the contract, certain monies for and in respect of work already done and completed by it pursuant to the appointment prior to the termination, were due, owing and payable to the plaintiff by the defendant.

[7] It is the evidence of the plaintiff that, subsequent to the termination there were discussions and negotiations in respect of the monies due, owing and payable to the plaintiff by the defendant. These discussions and negotiations were conducted by and between representatives of the plaintiff and the defendant on a form of correspondence, meetings and telephone conversations. This is evidenced by a letter dated the 25 of January 2017, the letter that was addressed to the plaintiff by

the defendant's legal representative, Advocate Moletse. In which the defendant acknowledges that,

1) It is indebted to the plaintiff, in the amount of R2 210 479.65 (Two million hundred and ten thousand four hundred and seventy nine rand sixty five cents).
2) Final payment certificate 14 had been prepared and was awaiting signature thereof on behalf of the plaintiff, after which final payment would be effected to the plaintiff for and in respect of the appointment and the project.

3) Confirms that, this payment in terms of the final payment certificates No 14 is aimed at amicably setting all payments and pertinent issues emanating from the appointment and the associated project. Despite this acknowledgement by the defendant and various calls for the defendant to make payment, no payment was made.

[8] However, according to the plaintiff on the 29th of January 2018 the defendant changed its stance and informed the plaintiff that, it will not be making any further payments to the plaintiff and further suggested or requested a meeting with the plaintiff to be held on the 14th of February 2018.

[9] In response to the claim, the defendant denies the allegation made by the plaintiff and indicated that it has no knowledge of the balance, as a result raised the following special pleas that:

1) **The plaintiff does not exist in law or lack locus standi**. In that although the plaintiff describes itself as a private company, there are no records of registration exists with the office the Commission of the Intellectual Property and Company (CIPC)

2) **Plaintiff's claim has prescribed;** the contract was terminated on the 8th of March 2013 and summons was served on the 18th of August 2018 (more than 3 years).

3) **Non –compliance with the provisions of section 3(1) and (2) of Act 40 of 2002.** Notice was served in 2018 way beyond the prescribed time of six (6) months

**PRESCRIPTION ACT 68 OF 1969 ( THE ACT)**

[10] Prescription is a legal principle in terms of which a debtor's liability to pay an outstanding debt is extinguished after the passing of prescribed time. In terms of the Act, debts prescribed after a period of 3 years. Therefore, in order to avoid losing the legal right to enforce a claim, a creditor must interrupt prescription by instituting proceedings against a debtor before the end of the 3-year period.

[11] **Section 12 of the Act**, states that, prescription commence to run as soon as debt becomes due, except if, the debtor wilfully prevents knowledge of existence of the debt, or the creditor has no knowledge and could not acquire knowledge by exercising reasonable care.

[12] Also in terms of **Section 14 of the Act,** the running of prescription is interrupted by an "express or tacit acknowledgement of liability by a debtor or by service of a process to claim payment. This special plea is often refer to as a peremptory exception in the sense that, if established, it renders the claim permanently unenforceable --**RAND STAPLE-MACHINE LEASING (PTY) LTD ICI (SA) LTD 1977 (3) SA 199 W.** The defence that an action has prescribed because it has not commenced within the time permitted by some statute can be raised by means of a plea of prescription.

[13] As indicated above, the appointment was terminated on the 8th of March 2013, and summons were issued and correctly submitted on the 7th of August 2018.

[14] However, the defendant through the acknowledgment of debt dated the 25th of January 2017 interrupted prescription. Therefore, prescription in this matter started to run from that day on which the interruption took place. In the premise, the special plea of prescription cannot stand and ought to be dismissed.

**LOCUS STANDI**

[15] It is the argument of the defendant that, the Plaintiff does not have locus standi in fact does not exist. However, the court disagrees with the defendant in this aspect on the basis that, the defendant after the scrutiny of the application for a tender that was advertised the defendant, went ahead and appointed the plaintiff. A contract was then concluded between the two parties, that the plaintiff will do certain and specified work and the defendant will pay the plaintiff for the work done.

[16] Subsequent to the conclusion of the contract, the plaintiff performed the contracted works, which were periodically paid by the defendant. I align myself with the plaintiff, whether the plaintiff is registered or not is immaterial as their agreement was based on the appointment letter not the CIPC. It was the responsibility of the Respondent to validate the credentials of the Plaintiff prior to issuing and commencing with the contract and its obligations. As a result this special plea cannot stand.

[17] **NON-COMPLIANCE WITH INSTITUTION OF LEGAL PROCEEDINGS AGAINST CERTAIN ORGANS OF STATE ACT 40 OF 2002 (the Act)**

It is worth mentioning that, this Act, was introduced to harmonize periods of prescription of debts owed by organs of state, and to make provision for a uniform requirement for giving of notices in connection with the institution of legal proceedings. It repealed several statutes that had previously regulated proceedings against various state bodies such as the police and the defence force. The Act came after the decision in the constitutional court of **MOHLOMI VS MINISTER OF DEFENCE 1997 *(1) SA 124 ( CC*** in which **section 113 (1) of the Defence Act 44 of 1957** was declared unconstitutional since it made no allowance for failure to timeously notify the defence force of the intention to sue it, despite the circumstances. It is not only meant to bring consistency to procedural requirements for litigating against organs of state but also to render them compliant with the Constitution.

[18] The way in which it seeks to achieve a procedure that is not arbitrary and that operates efficiently and fairly both for the plaintiff and an organ of the state is to give a court the power to condone a plaintiff's non-compliance with the procedural requirements in certain circumstances. Thus, access to courts is facilitated while at the same time procedures against large governmental organizations that need to keep their affairs in order are regulated.

[19] The legal requirements for issuing summons against an organ of the state to recover a debt, as *in casu,* are fully set out in Section 3 of the Act, which specifies that:

Notice of intended legal proceedings to be given to the organ of state

1) No legal proceedings for the recovery of a debt may be instituted against an organ of the state unless
    a. The creditor has given the organ of state in question notice in writing of his or her or its intention to institute the legal proceedings
    b. The organ of state in question has consented in writing to the institution of that legal proceedings
        i. Without such notice
        ii. Upon receipt of a notice which does not comply will all the requirements set out in subsection (2)
2) notice must-
    a. Within six(6) months from a date on which the debt became due, be served on the organ of state in accordance with section 4(1) and
    b. Briefly set out-
        i. The facts giving rise to the debt and
        ii. Such particulars of such debt as are within the knowledge of the creditor.
3) For purposes of subsection 2(a) –
    a. A debt may not be regarded as being due until the creditor has knowledge of the identity of the organ of state and of the fact giving rise to the debt, but a creditor must be regarded as having acquired such knowledge as soon as he or she or it could have acquired it by exercising reasonable care, unless the organ of state wilfully prevented him or her or it from acquiring such knowledge; and

b. A debt referred to in section 2(2) (a), must be regarded as having become due on the fixed date.

4) (a) if an organ of state relies on a creditor's failure to serve a notice in terms of subsection (2)(a), the creditor may apply to a court having jurisdiction for condonation of such failure.

(b) The court may grant an application referred to in paragraph (a) if it is satisfied that:

a) The debt has not been extinguished by prescription
b) Good cause exists for the failure by the creditor
c) The organ of state was not unreasonable prejudiced by the failure.

(c) If an application is granted, in terms of paragraph (b), the court may grant leave to institute the legal proceedings in question, on such conditions regarding notice to the organ of state, as the court may deem appropriate.

[20] Therefore, persuaded by the aforementioned, I am satisfied that, the plaintiff out of its own endeavour to comply with the provisions of Act 40 of 2002, in that, on the 19th of June 2018, delivered its notice in terms of section 3 of the Act, upon the defendant. Therefore, based on the above, it cannot be disputed, that six (6) months period has not lapsed as contemplated in the Act. If one calculates from the 29th of January 2018 when the defendant changed its stance to the 19th of June 2018 when the plaintiff served the notice. To be precise it is about four (4) months and twenty one (21) days.

**COSTS**

[21] The guiding principle is that " costs are awarded to a successful party in order to indemnify him for the expense to which he has been put through, having been unjustly compelled either to initiate or to defend litigation" as the case may be. Owing to the unnecessary operation of taxation, such an award is seldom a complete indemnity; but that does not affect the principle on which it is based.

[22] In **Nel Appellant v Waterberg Landbouwerkers Kooperatiewe Vereniging 1946 AD 597 at 608,** the following was stated in relation to costs on an attorney and client scale:

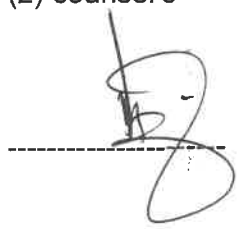
"*The true explanation of awards of attorney and client costs not expressly authorised by statute seems to be that, by reason of special considerations arising either, from the circumstances which give rise to the action from the conduct of the losing party, the court, in particular case considers it just, by means of such an order, to ensure more effectually that it can do by means of a judgment for party and party costs that the successful party will not be out of pocket in respect of the expenses caused to him by the litigation. Theoretically, a party and party bill taxed in accordance with the tariff will be reasonably sufficient for that purpose. But in fact a party may have incurred expense which is reasonably necessary but is not chargeable in the party and party bill.*"

[23] It is also an accepted legal principle that costs is in the discretion of the court. The basic rules were stated as follows by the constitutional court **in *FERREIRA V LEVEIN NO AND OTHERS 1996 (2) SA 621 (CC) at 624 B-C***

[24] In the result, there is no reason why the ordinary rule of costs following the result should not apply.

[25] For the above reasons, and having heard Counsel on behalf of both parties and read the documents filed of record, I make the following order that:

1. The three (3) special pleas raised by the respondent are hereby dismissed
2. The respondent to pay the costs of the application including the costs consequent upon the employment of two (2) counsel's



L. MZANA AJ

On behalf of Plaintiff : Advocate N. Khokho
Instructed by : Mlozana Attorneys
Bloemfontein

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| On behalf of Respondent | : Advocate P.T Masihleho |
| Instructed by | :Department of Public works and Infrastructure, Free State Bloemfontein |