REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG

CASE NO: A5005/2014
COURT A *QUO* CASE NO: 40945/2011

(1) REPORTABLE: YES / NO
(2) OF INTEREST TO OTHER JUDGES: YES/NO
(3) REVISED.

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DATE SIGNATURE

In the matter between:

METTLE DEVELOPMENT FINANCE ONE (PTY) LTD Appellant

And

CALGRO M3 DEVELOPMENTS (PTY) LTD Respondent

J U D G M E N T

LAMONT, J:

[1] For the sake of convenience the parties are referred to herein as plaintiff (respondent) and defendant (appellant).

[2] During or about the period September 2007 to November 2007 the plaintiff and the defendant entered into an agreement the terms of which are encapsulated in a written document dated 22 November 2007 which is signed by each of the parties. It was a term of the agreement that the plaintiff would make certain payments and "*if for whatever reason the said agreements are not finalised within 30 days hereof … you [Defendant] will forthwith on our demand refund to us the aforesaid amounts in cash …*". Notwithstanding the stipulation that the plaintiff would be entitled to demand payment if certain agreements were not finalised within 30 days the parties proceeded to treat the right of the plaintiff to reclaim payment as not having fallen due until finally it became clear that the agreements were not going to be concluded. By 26 March 2008 it became apparent that the agreements contemplated in the agreement between the parties were never going to be concluded. This is apparent from a letter of that date.

[3] As at 26 March 2008 the amounts claimed by the plaintiff had already been paid by the plaintiff, the last payment having been made during or about early January 2008.

[4] As at 26 March 2008 the amounts which had been paid by the plaintiff and which the defendant had agreed to pay to the plaintiff were known and claimable.

[5] Over a period of time there were negotiations between the parties concerning how if and when the amount would be paid. The negotiations did not lead to any agreement.

[6] The defendant in its special plea raised the question of prescription. The defendant (in its plea as ultimately amended) alleged that the claim became due and payable during or about March 2008 alternatively during May 2008 and that as summons had not been served until October 2011, the claim had become prescribed three years after one of the two dates. The plaintiff in a replication alleged that the plaintiff had made demand during October 2008 and that prescription would run from the date of demand terminating at a date after summons had been issued.

[7] The contention of the plaintiff was that prescription would only commence after demand had been made and that as demand had not been made prior to that date prescription did not commence to run. There is no express allegation that the earlier demands relied on by the defendant were not demands contemplated by the agreement. Those appear to be the issues the court *a quo* had to decide.

[8] The Prescription Act No 68 of 1969 (the Act) provides in section 12(1) that prescription shall commence to run as soon as the debt is due. In its ordinary meaning a debt is due when it is immediately claimable by the creditor and as its correlative, it is immediately payable by the debtor. The debt must be one in respect of which the debtor is under an obligation to pay

immediately. A debt is only said to be claimable immediately if a creditor has the right to institute an action for its recovery. In order to be able to institute an action for the recovery of a debt a creditor must have a complete cause of action in respect of it. The expression "*cause of action*" means the entire set of facts which give rise to an enforceable claim and includes every fact which is material to be proved to entitle a plaintiff to succeed in his claim.

See: *Van Deventer v Ivory Sun Trading 77* 2015 (3) SA 532 (SCA) at 539;

Umgeni Water v Mshengu [2010] 2 All SA 505 (SCA) paras [5] to [6].

[9] The question to be decided in the present case is whether or not the fact that the agreement stated "*You will forthwith on our demand refund to us the aforesaid amount/s*" delays prescription of a claim otherwise claimable until the demand has been made.

[10] Simply put was the plaintiff's cause of action complete even although demand had not been made.

[11] In my view the solution to the problem is that the debt became due once the trigger event entitling the plaintiff to make demand had occurred. That trigger event was the fact that the agreements which originally had to be concluded within a 30 day period were never going to be concluded. That event occurred during mid-March 2008. It is the trigger event which causes

the amount to become due not the notice of demand. It is logically so as the notice of demand is a step in the process of claiming an already due amount. It is not a pre-condition to the amount becoming payable. Prescription commences to run once the debt is due. The notice of demand is not a pre-requisite for the issue of summons. The summons would constitute the demand. No demand is required to entitle the plaintiff to sue. There is no *mora* issue which might require notice to be given. See e.g. *Ridley v Marais* 1939 AD 5 at 9, Fluxman *v Brittain* 1941 AD 273 at 294.

[12] The principle is discussed in *Damont N.O. v Van Zyl* 1962 (4) SA 47 (C) and many of the applicable authorities cited at 51. The making of or failure to make demand does not impact on the date when prescription commences; it commences when the trigger event occurs: in this case during March 2008.

[13] The notice provided for in the contract is not a condition precedent to the plaintiff's right of action under the contract. The plaintiff's right of action accrues once the trigger event has occurred namely either the 30 days has elapsed or there is no prospect of the agreements being concluded. See *Standard Finance Corporation of South Africa Limited (in liquidation) v Langeberg Ko-operasie Beperk* 1967 (4) SA 686 (A).

[14] The problem can be solved in another way. The solution produces the same result. A creditor cannot by his inaction delay when prescription commences. Hence, if the creditor is entitled to demand payment, prescription commences to run from that moment. See *MacLeod v Kweyiya* 2013 (6) SA1

(SCA) at 9, *Gunase v Anirudh* 2012 (2) SA 398 (SCA) at 14-15, *Uitenhage Municipality v Moloy* 1998 (2) SA 735 (SCA) at 742. In addition there is a principle that a creditor is not able by his own conduct to postpone the commencement of prescription. See *Benson and Another v Walters and Others* 1981 (4) SA 42 (C) at 49G and the cases therein cited.

[15] Even the need to take a simple procedural step which the creditor can take without external aid does not delay prescription commencing. See *Santam Ltd vs Ethwar* 1999 (2) SA 244 (SCA)

[16] The notice of demand relied upon by the defendant dated 26 March 2008 claimed payment. The fact that it is not expressed in strong language, does not threaten action and is conciliatory, in form does not detract from the fact that it is a demand. The plaintiff requires defendant to pay, that is all that a demand is. For this reason too I would find that prescription commenced by no later than 26 March 2008.

[17] Hence the claim prescribed prior to the services of summons. The claim should have been dismissed with costs.

[18] During argument counsel for the plaintiff submitted that there was an agreement between the parties in terms of which the right to claim payment was postponed pending negotiation between the parties. This rather startling submission had no foundation in the pleadings or the evidence. No such agreement was pleaded. In the evidence counsel asked a witness whether, if

such an allegation was made it would be true. The substance of the reply was that the witness could not contest it if it occurred. It did not occur. No witness gave such evidence. The submission is absolutely without foundation. Even if it had substance it would probably be met by a defence raising the principle that indulgences granted allowing late payment of overdue amounts are just that.

[19] I would make the following order.

1. The appeal is upheld.
2. The respondent is to pay the costs consequent upon the appeal.
3. The order made by the court a quo is set aside.
4. The following order is substituted therefore.

   “Plaintiff’s action is dismissed with costs”

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C. G. LAMONT
JUDGE OF THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION

I agree

_____

T.M. MASIPA
JUDGE OF THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION

I agree

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M.P.TSOKA
JUDGE OF THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION

ATTORNEYS FOR APPELLANT	**:**	**J.G. Smit**
COUNSEL FOR THE APPELLANT	**:**	**Adv. H.F. Geyer**
ATTORNEYS FOR RESPONDENT	**:**	**Barnards Incorporated**
COUNSEL FOR THE RESPONDENT	**:**	**Adv. P.F. Louw SC** **Adv. J.W. Kloek**
DATE/S OF HEARING	**:**	**31 July 2015**
DATE OF JUDGMENT	**:**	**06 July 2015**