IN THE HIGH COURT OF SOUTH AFRICA

(NORTH GAUTENG HIGH COURT, PRETORIA)

Date: 2010-05-05

Case Number: 39161/05

In the matter between:

GROUP FIVE CONSTRUCTION (PTY) LIMITED Plaintiff

and

THE MINISTER OF WATER AFFAIRS AND FORESTRY Defendant

JUDGMENT

SOUTHWOOD J

[1] The plaintiff claims from the defendant payment of a number of amounts pursuant to a written agreement ('the contract') entered into on 28 November 1995 in terms of which the plaintiff undertook the construction of the Injaka Dam and Appurtenant Works ('the Works') at the Sabie River Government Water Scheme for a contract price of R147 231 618,60. The contract consists of a number of documents including the General Conditions of Contract ('GCC') which provide for

compensation and additional amounts to be paid by the defendant to the plaintiff in the circumstances provided for.

[2] Clause 61 of the GCC provided for the reference of disputes to mediation. On 14 November 2000 the parties entered into a written agreement ('Amendment 1') in terms of which they agreed that Amendment 1 replaced the provisions for mediation in clause 61(2) of the GCC and that where a dispute, but for the provisions of Amendment 1, would have been referred to mediation in terms of clause 61(1)(e), such dispute would be referred to the Dispute Review Board ('DRB') created by Amendment 1 ('DRB1'). In March 2004 the parties entered into a second written agreement ('Amendment 2') having a similar effect to Amendment 1: i.e. that disputes would not be referred to mediation in terms of clause 61 of the GCC, but would be referred to a DRB created by Amendment 2 ('DRB2').

[3] In his special plea the defendant raises prescription. The defendant contends that claims A-D were referred to the DRB created by Amendment 1; that the plaintiff did not accept the recommendations of the DRB; that the plaintiff gave notice to the defendant that it intended to refer each claim to court; that each claim fell due in terms of section 12(1) of the Prescription Act 68 of 1969 ('the Act') on the date on which the plaintiff gave notice of its intention to refer the matter to court; that the dates were all more than three years before the plaintiff served its summons on the defendant and, accordingly, that claims A-D have become prescribed in terms of s 11 of the Act.

[4] In its replication the plaintiff denies that the amounts claimed in claims A-D became due in terms of s 12 of the Act at any time prior to the completion date. The plaintiff alleges that the completion date was 4 March 2003 which was the date reflected in the final approval certificate dated 5 March 2003 issued in accordance with clause 55(1) of the GCC. The plaintiff contends that the prescription period of three years did not elapse between 4 March 2003 and 2 December 2005. In the alternative, the plaintiff alleges that prescription was interrupted in respect of each the plaintiff's claims (i.e. A-D) by service within the prescribed prescription period, of a process whereby the plaintiff claimed payment of the debts as contemplated in s 15(1) of the Act and that such interruption persists. In the further alternative, the plaintiff contends in respect of the claim of R7 601 195 referred to in paragraph 22(c) of the particulars of claim, that prescription commenced to run on 6 October 2004, the date on which the plaintiff gave notice of its intention to refer the claim to court and 3 years did not elapse before summons was served on 2 December 2005.

[5] S 10 of the Act provides that 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. In terms of s 11(d) the period of prescription applicable to the claims is three years. S 12(1) provides (ss (2), (3) and (4) are not applicable) that prescription shall commence to run as soon as the debt is due.

[6] The question of prescription depends upon the date upon which the debts became due. If they became due on the dates upon which the plaintiff gave notice that it intended to refer them to court they clearly prescribed as the plaintiff's summons was served more than three years after the last of these dates.

[7] The word 'debt' clearly includes any liability arising from and being due or owing under a contract – see ***Leviton & Son v De Klerk's Trustee*** **1914 CPD 685** at 691; ***HMBMP Properties (Pty) Ltd v King*** **1981 (1) SA 906 (N)** at 909A-B. A debt is 'due' when it is immediately claimable by the creditor or conversely, immediately payable by the debtor – see ***HMBMP Properties (Pty) Ltd v King supra*** at 909C-D; ***The Master v IL Back and Co Ltd*** **1983 (1) SA 986 (A)** at 1004F-H. This means that there has to be a debt immediately claimable by the creditor, or, stated in another way, that there has to be a debt in respect of which the debtor is under an obligation to perform immediately – see ***Evins v Shield Insurance Co Ltd*** **1980 (2) SA 814 (A)** at 838; ***The Master v IL Back and Co Ltd supra*** 1004D-E; ***Deloitte Haskins & Sells v Bowthorne Hellerman Deutsch*** **1991 (1) SA 528 (A)** at 532G-I.

[8] The primary issues raised by the special plea and the replication thereto are:

(1) whether each claim became enforceable/payable on the date on which the plaintiff gave notice of its intention to refer the matter to court (claim A, 6 September 2001: claim B, 30 October 2001: claim C, 22 February 2002 and claim D, 20 March 2002): or

(2) whether the claims became enforceable/payable only on the date of final approval (i.e. 4 March 2003); alternatively

(3) whether prescription was interrupted in respect of each of claims A, B, C and D by service within the prescription period of a process whereby the plaintiff claimed payment of the claims as contemplated in s 15(1) of the Act;

(4) whether the claim of R7 601 195 referred to in paragraph 22(c) of the particulars of claim only became enforceable/payable on 6 October 2004 when the plaintiff gave notice of its intention to refer the matter to court.

[9] At the pre-trial conference the parties agreed that the issues raised by the plea of prescription and the replication should be decided separately from all the other issues in terms of Rule 33(4) and at the commencement of the trial an appropriate order was made. The parties also agreed on certain facts for the purpose of deciding the prescription issues in terms of Rule 33(4) (these facts are set out in a separate document entitled ‘Admitted Facts for Purposes of a

Separated Issue in terms of Rule 33') and that the defendant would close its case in terms of Rule 39(13) on the basis of the agreed facts and that the plaintiff would lead such evidence as may be found to be admissible on the referral agreement whereafter the defendant would lead its evidence in rebuttal.

[10] For present purposes, the admitted facts may be summarised as follows:

(1) On 28 November 1995 the parties entered into the contract, which consists of a number of documents including the GCC;

(2) In terms of the contract the plaintiff undertook the construction of the Injaka Dam and Appurtenant Works ('the Works') at the Sabie River Government Water Scheme for a contract price of R147 231 618,60;

(3) The GCC include a number of clauses which make provision for compensation and/or additional payment to the plaintiff in the circumstances described therein;

(4) The GCC also contains a number of clauses governing the procedure relating to claims for compensation and/or additional payment and the resolution of any disputes arising out of such claims (collectively 'the Dispute Resolution Procedure');

(5) In terms of clause 55(1) of the GCC the Works would not be considered as completed in all respects until a final certificate ('a final approval certificate') was delivered by the engineer to the plaintiff and the defendant stating the date on which the Works were completed and all defects corrected in accordance with the contract;

(6) On 5 March 2003, acting pursuant to clause 55(1) of the GCC the engineer delivered to the plaintiff and the defendant a final approval certificate in which the engineer certified that pursuant to the final inspection held on 4 March 2003 the Works had been completed and all defects corrected in accordance with the contract;

(7) During the execution of the contract the plaintiff made a number of claims for compensation and/or additional payment pursuant to the relevant clauses of the GCC. In the pleadings these claims are referred to as claims A, B, C and D;

(8) 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 of the GCC.

In terms of clause 3(3) the contractor is deemed to have based his tender on the technical data given in the Tender Documents

and, if in the performance of the contract, any circumstances differ from this technical data and this causes delay or additional cost the contractor shall be entitled to make a claim in accordance with clause 51. In terms of clause 50(1) (read with clause 50(4)) if the contractor encounters adverse physical conditions or artificial obstructions which could not have been reasonably foreseen by an experienced contractor at the time of submitting his tender and the contractor is of the opinion that additional work will be necessary which would not have been necessary if the particular physical conditions or artificial obstructions had not been encountered, the contractor shall be entitled to make a claim in accordance with clause 51. In the performance of the contract the plaintiff encountered circumstances and conditions in respect of the quantity, quality and suitability of rock for use as concrete aggregates different from the technical data provided by the defendant in the tender documentation and/or which constituted adverse physical conditions as a result of which the plaintiff became entitled to payment of the amount claimed;

(9) 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.

In terms of clause 42(1) the contractor shall, on the written order of the engineer, suspend the progress of the Works or any part thereof for such time or times and in such manner as the engineer shall order and shall in respect of any delay or additional cost of giving effect to the engineer's order be entitled to make a claim in accordance with clause 51. In terms of clause 26(7)(b) the contractor shall be paid the cost of any services not covered by clause 26(7)(a): i.e. the costs of services required to be rendered by the contractor which the contractor is deemed to have made allowance for in his tender if sufficiently particularised in the tender documents which include taking and delivering to the engineering test specimens from portions of the works already constructed and carrying out tests on supplies of materials intended to be incorporated into the Works and on any test specimens from portions of the Works. In terms of clause 30 the contractor shall, if ordered by the engineer, search for the cause of any defect and if the defect is one for which the contractor is not liable under the contract the cost of the work carried out by the contractor in searching shall be paid to him. In terms of clause 45, if any circumstances occur which fairly entitle the contractor to an extension of time for the completion of the Works the engineer shall grant such extension of time as

is appropriate as a claim in accordance with clause 51. During the execution of the Works - the plaintiff experienced problems in the execution of the Works relating to the concrete operations: the engineer instructed the plaintiff to cease concreting activities (i.e. suspend the progress of the Works); the plaintiff incurred expenses and suffered loss as a result of this suspension and the plaintiff was required to carry out tests and search for defects; the plaintiff was not liable for the defects under the contract and the cost of carrying out the tests was not covered by clause 26(7)(a); the costs of searching for defects and carrying out the tests amounted to R925 178,82 and the additional time related Provisional and General allowances amounted to R1 696 089,62;

(10) 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.

In terms of clause 39 the engineer may at any time before the issue of the certificate of completion require any variation of the form, quality or quantity of the Works or any part thereof and the value of such variations shall be taken into account in ascertaining the amount of the contract price. In terms of clause 40 all variations ordered by the engineer in accordance with clause 39 shall be calculated by the engineer, after consultation with the contractor, in accordance with certain principles stipulated in the clause. During the execution of the Works - the earthworks were suspended by the engineer in terms of clause 42(1); the plaintiff carried out testing in terms of clause 26; the plaintiff searched for defects in accordance with clause 30; the plaintiff effected variations required by the engineer in accordance with clause 39. The plaintiff incurred expenditure of R1 745 679,44 as a result of the suspension of the earthworks. The plaintiff is entitled to additional time-related Provisional and General allowances of R577 020,18 and is entitled to an additional amount of R7 601 195 in respect of all variations required by the engineer;

(11) Claim D is a claim for payment of R7 987 186,90 in terms of clause 49 of the GCC.

In terms of clause 49(1), except as provided in clause 49 or elsewhere in the contract, the rates and prices stated in the tender would be final and binding throughout the period of the contract. In terms of clause 49(2) the value of certificates issued in terms of clause 52(1) (excluding the value of the special materials referred to in sub-clause (3)) would be increased or decreased by applying a 'Contract Price Adjustment Factor' calculated according to the formula and conditions set out in the Contract Price Adjustment Schedule. In terms of clause 49(3) price adjustments for variations in the cost of special materials would be made in the manner set out in the Contract Price Adjustment Schedule. One of the variables in the Contract Price Adjustment Schedule formula was the 'Labour Index'. It was a tacit term of the contract that if this Labour Index was discontinued another reasonable measure would be applied. The Labour Index was discontinued and the applicable statutory minimum wage rate, being another reasonable measure, must be applied. Recalculation of the certificates issued in terms of clause 52(1) results in an increase of R7 987 186,90 payable by the defendant to the plaintiff;

(12) The plaintiff duly submitted claims to the engineer appointed under the contract in relation to each of claims A-D and the plaintiff has complied with all procedural requirements of clauses

51 and/or 60 (whichever may be applicable) leading to the procedures of clause 61 of the GCC;

(13) The plaintiff has also complied with the following procedural requirements of clause 61(1) of the GCC:

(i) In terms of clause 61(1)(a) the plaintiff may dispute a ruling given or deemed to have been given by the engineer in terms of clauses 51 and 60, provided that a Dispute Notice disputing the validity or correctness of the whole or a specified part of the ruling has to be delivered by the plaintiff to the engineer within 42 days;

(ii) In terms of clause 61(1)(c) the engineer is to give his decision on the matters raised in the Dispute Notice within 42 days, failing which he shall be deemed to have given a decision affirming, without amendment, the ruling concerned;

(iii) Either the plaintiff or the defendant may then within 28 days after receipt of the notice of the decision or after the decision is deemed to have been given dispute same by written notice to the engineer with a copy to the other party, whereupon the matter shall be referred

immediately to mediation in terms of clause 61(2) (clauses 61(1)(d) and (e));

(14) The provisions of clause 61(2) dealing with mediation have been replaced by way of Amendment 1 (14 November 2000) and at a later stage by way of Amendment 2 (March 2004);

(15) *Inter alia* the following provisions of Amendments 1 and 2 are relevant for purposes of the special plea of prescription:

(i) Where the dispute shall, but for the amendments, have been referred to mediation in terms of clause 61(1)(e), it is to be referred to the DRB established in terms of each of the two Amendments for its recommendation on the relevant claim (clause 2 of both Amendments);

(ii) Recommendations of the DRB are to be final and binding on the parties only to the extent that there is written acceptance signed by them, setting out in full detail that which is accepted by the parties (clause 11 of Amendment 1; clause 12 of Amendment 2). That is to be done within 30 days of the DRB handing down its recommendation (clause 12 of Amendment 1; clause 13 of Amendment 2);

(iii) Clauses 13 of Amendment 1 and 14 of Amendment 2 both read as follows:

> 'To the extent that a recommendation or part thereof is not accepted in writing by the Parties, either Party shall be entitled to refer any matter so unresolved to Court pursuant to clause 61(2)(g) of the Conditions, provided that such Party shall, within 60 days of the Board handing down its recommendation, give written notice to the other Party and to the Board of its intention to do so.';

(iv) In the event of neither party giving such notice within the 60 day period aforesaid, the recommendation or part thereof that has not been accepted by the parties in writing shall lapse and the decision of the engineer or part thereof not altered by acceptance of the recommendation shall become final and binding upon the parties (clause 14 of Amendment 1; clause 15 of Amendment 2);

(16) The plaintiff duly submitted various claims, including claims A-D to DRB1, which, by agreement between the parties, dealt only with the merits thereof, not the quantum;

(17) No recommendation of the DRB acting either in terms of Amendment 1 or in terms of Amendment 2 in regard to claims A to D has become final and binding by the parties' written acceptance as intended in clause 11 of Amendment 1 or clause

12 of Amendment 2 (save that this admitted fact does not apply in respect of the claim referred to in 22(c) of the particulars of claim which is dealt with separately);

(18) Both parties did not accept in writing the recommendation of DRB1 and/or DRB2 in respect of any of the claims (clauses 12 and 13 of Amendment 1; clauses 13 and 14 of Amendment 2). The plaintiff gave notice in writing within 60 days of each DRB recommendation of the plaintiff's intention to submit the disputes to court and as a result, the parties were entitled to pursue the dispute without the decision of the engineer becoming binding upon them. (Clause 14 of Amendment 1; clause 15 of Amendment 2);

(19) The plaintiff has complied with the procedural requirements of Amendment 1 and Amendment 2 set out above for its entitlement to give notice of its intention to refer each of claims A-D to the Court, and gave such notice timeously in regard to each of such claims on the following dates –

(i) <u>Claim A</u>

DRB1 gave its recommendation on 22 August 2001 and on 6 September 2001 the plaintiff gave notice of its

intention to have the matter resolved by court proceedings;

(ii) Claim B

DRB1 gave its recommendation on 22 October 2001 and on 30 October 2001 the plaintiff gave notice of its intention to have the matter resolved by court proceedings;

(iii) Claim C

DRB1 gave its recommendations (on the merits only) on 7 February 2002 and on 22 February 2002 the plaintiff gave notice of its intention to have the matter resolved by court proceedings. After attempts to settle all claims between the parties, the quantum of only the component of Claim C referred to in paragraph 22(c) of the particulars of claim was submitted to DRB2. DRB2 gave its recommendation in September 2004 and on 6 October 2004 the plaintiff gave a further notice of its intention to refer the dispute to Court, none of the other claims having been submitted to either DRB1 or DRB2 in regard to quantum;

(iv) Claim D

DRB1 gave its recommendation on 15 March 2002 and on 20 March 2002 the plaintiff gave notice of its intention to have the matter resolved by court proceedings;

(20) As at the date of delivery by the plaintiff to the engineer of claims A-D (being claims for additional payment or compensation in terms of clause 51(1) or clause 60, to the engineer acting in his capacity as such in accordance with the GCC) none of claims A-D had prescribed;

(21) None of claims A-D have been ruled on in favour of the plaintiff by the engineer as intended in clause 51(5) or 60(2) of the GCC and all of them have become susceptible to the further processing thereof in terms of clause 61. They 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. Claims A-D were included in the contractor's final statement to the engineer as contemplated in clause 52(9) of the GCC and they were all unresolved matters in dispute under clause 61 as at the date of the issue of the engineer's final approval certificate dated 5 March 2003, as contemplated in clause 52(9) and 52(10);

(22) The only part of the contract relevant to prescription is the GCC annexed to the particulars of claim as POC3(1) – POC3(52) including the appendix thereto annexed to the admitted facts and Amendment 1 and Amendment 2 referred to in paragraph 6 of the particulars of claim and annexed thereto as POC5(1) to POC5(14) and POC6(1) to POC6(12) respectively.

[11] In addition to these admitted facts the plaintiff tendered the evidence of Mr Badenhorst Bartholomeus Theron, Mr Paul James Hopper and Mr Michael Harry Lomas and the defendant tendered the evidence of Mr Ewert Jurgens Viljoen. The witnesses testified with reference to the agreed trial bundle, exhibit A. Mr Theron testified about the background or surrounding circumstances of the contract. He was for a time the plaintiff's project manager at the Works. Neither party referred to his evidence during argument and I find it of no assistance in understanding or interpreting the contract. Accordingly I shall not consider it further. The plaintiff called Mr Lomas and Mr Hopper to prove the facts alleged in paragraph 22(c) of the amended particulars of claim. Mr Viljoen also testified on this issue. This evidence will be considered later.

[12] The parties' principal contentions regarding prescription are as follows:

(1) The defendant contends that on a proper interpretation of the contract, each of claims A-D (including the paragraph 22(c)

component) became a debt due as intended in s 12(1) of the Act on the date upon which the plaintiff delivered the notice of its intention to refer the claim to court following the recommendation of DRB1 in terms of clause 13 of Amendment 1;

(2) The plaintiff contends that on a proper interpretation of the contract construed against the admissible background and/or surrounding circumstances:

(i) each of the plaintiff's claims became due on 4 March 2003, i.e. the date certified as the final completion date;

(ii) alternatively, the plaintiff contends that the plaintiff's claims became due when the plaintiff became entitled to submit those claims to the engineer and that the service by the plaintiff of those claims on the engineer interrupted prescription as contemplated by s 15 of the Act (which prescription has not yet occurred) and such interruption persists;

(iii) further alternatively, the plaintiff contends that the parties agreed to refer the component of claim C referred to in paragraph 22(c) of the particulars of claim (i.e. the claim for R7 601 195) for determination on quantum and that

they thereby settled the liability aspect of that part of claim C and the defendant thereby expressly, alternatively, impliedly, alternatively, tacitly, agreed to pay whatever amount was determined as the quantum on that part of claim C, alternatively, that the time period for the plaintiff to give notice of its intention to have that part of claim C resolved by court proceedings was extended accordingly. The plaintiff contends therefore that it is the second notice given on 6 October 2004, after the defendant did not accept the September 2004 recommendation of DRB2 on quantum, that applies, not the earlier notice dated 7 February 2002. The plaintiff contends therefore, that even if the defendant's contentions regarding the commencement of the running of prescription are upheld, the plaintiff's claim referred to in paragraph 22(c) of the particulars of claim has not prescribed;

(iv) The defendant disputes the correctness of the plaintiff's contentions regarding the claim referred to in paragraph 22(c) of the particulars of claim on the following grounds:

(1) The defendant disputes that the 'referral agreement' alleged pursuant to the amendment of the particulars of claim of March 2010 was

concluded and contends that the only operative agreements between the parties dealing with the treatment of these claims were Amendment 1 and Amendment 2;

(2) The defendant contends that the contents of the referral agreement alleged is in conflict with Amendments 1 and 2 and that any evidence which may be sought to be led by the plaintiff in support of the referral agreement would be inadmissible in terms of the parol evidence rule;

(3) All compulsory dispute resolution procedures prescribed by the contract as a precondition for litigation through court proceedings had been concluded; and

(4) The fact that the parties made a further attempt to settle the part of claim C referred to in paragraph 22(c) of the particulars of claim by submitting the quantum thereof to the second DRB did not detract from the right to refer the matter to court which the plaintiff already enjoyed pursuant to its notice of 22 February 2002.

[13] The legal position regarding the payment of the contract price is well-established. The contract is a civil engineering contract (i.e. it has a substantial civil engineering component) and is a contract of *locatio conductio operis faciendi.* In terms of the contract the plaintiff was commissioned by the defendant to deliver a finished product of work, the dam and Appurtenant Works, for remuneration – see **LAWSA Vol 2 Part 1 2 ed** para 457. The general rule in such contracts is, that, in the absence of contractual provisions to the contrary, the remuneration is due and payable only when the contractor has completed the entire work. Consequently, before completion of the work, the contractor's claim for payment of the remuneration will be met with the *exceptio non adimpleti contractus* – see ***Dalinga Beleggings (Pty) Ltd v Antina (Pty) Ltd*** **1979 (2) SA 56 (A)** at 63A-D; ***BK Tooling (Edms) Bpk v Scope Precision Engineering (Edms) Bpk*** **1979 (1) SA 391 (A)** at 418A-419H; ***Martin Harris & Seuns OVS (Edms) Bpk v QwaQwa Regeringsdiens*** **2000 (3) SA 339 (SCA)** para 36; ***Sifris en 'n Ander NNO v Vermeulen Broers*** **1974 (2) SA 218 (T)** at 222H-223D; ***Simmons NO v Bantoesake Administrasieraad (Vaaldriehoekgebied)*** **1979 (1) SA 940 (T)** at 946A-B. If the contract so provides the contractor will be entitled to claim payment before completion of the entire work – see ***Dalinga Beleggings (Pty) Ltd v Antina (Pty) Ltd supra*** at 63B-C; ***Martin Harris & Seuns OVS (Edms) Bpk v QwaQwa Regeringsdiens supra*** at 355C-D; ***Simmons NO v Bantoesake Administrasieraad (Vaaldriehoekgebied) supra*** at 946C. One example of a contractual

stipulation providing for payment of remuneration before the contractor has completed his performance in terms of the contract is the provision for interim payments. Incorporating such a provision in the contract is standard practice and is done to enable the contractor to finance the work. The incorporation of such a provision does not make the contract divisible. Before the contractor will be entitled to the final payment he must complete the work in terms of the contract – see ***Mouton v Smith* 1977 (3) SA 1 (A)** at 5E; ***Martin Harris & Seuns OVS (Edms) Bpk v QwaQwa Regeringsdiens supra*** at 355C-D; ***Simmons NO v Bantoesake Administrasieraad (Vaaldriehoekgebied) supra*** at 946D-E. When issued, an interim payment certificate creates, in favour of the contractor, a separate and independent cause of action subject to the terms of the contract – see ***Martin Harris & Seuns OVS (Edms) Bpk v QwaQwa Regeringsdiens supra*** at 355E-F; ***Joob Joob Investments (Pty) Ltd v Stocks Mavundla Zek Joint Venture* 2009 (5) SA 1 (SCA)** paras 27 and 28; ***Thomas Construction (Pty) Ltd (in Liquidation) v Grafton Furniture Manufacturers (Pty) Ltd* 1986 (4) SA 510 (N)** at 514I-515B.

[14] Consistent with the legal position the GCC provide that –

(1) The plaintiff shall –

(a) design (to the extent provided in the Contract), execute and complete the Works and remedy any defects therein in accordance with the provisions of the contract, and

(b) provide all superintendence, labour, material, Constructional Plant, Temporary Works, including the design thereof, all requisite transport and all other things, whether of a temporary or permanent nature, required in and for such design, execution and completion of the Works and for the remedying of any defects, so far as the necessity for providing the same is specified in or reasonably to be inferred from the Contract (GCC6(1));

(2) 'Works' means 'the Permanent Works together with the Temporary Works'; 'Permanent Works' means 'the Permanent Works to be constructed in accordance with the Contract' and 'Temporary Works' means 'the Temporary Works required in connection with the construction of the Permanent Works in accordance with the Contract' (GCC1(p), (v) and (z));

(3) the plaintiff shall in carrying out its obligations comply with the engineer's instructions on any matter relating to the Works (GCC6(3));

(4) as consideration for the construction, completion and defects correction of the Works, the defendant shall pay to the plaintiff the Contract Price in terms of the provisions of the Contract (GCC11);

(5) the quantities set out in the Schedule of Quantities are the estimated quantities of the work and they are not to be taken as the actual and final quantities of the Works to be executed by the Contractor in fulfilment of his obligations under the Contract and that the engineer shall measure the quantities for the purpose of every payment certificate (GCC47);

(6) the plaintiff is entitled to receive monthly payments in respect of –

(a) the estimated value of the Permanent Works executed and calculated in terms of the Contract up to the date of the Contractor's statement;

(b) such amount as the Engineer may consider to be fair and reasonable for any Temporary Works or other special items for which separate amounts are provided in the Schedule of Quantities; and

(c) any amounts additional to those referred to which are due to the Contractor (GCC52);

(7) the engineer may by payment certificates make any correction or modification of any previous payment certificate which shall have been issued by him (GCC52(8));

(8) the plaintiff shall deliver to the engineer a final statement showing the value of the work done in respect of which a certificate of completion has been issued and shall supply such further information as the engineer may reasonably require and that the plaintiff shall not be entitled to any payment in respect of any matter which has not been included in such final statement save as provided for in clauses 30, 54 and 56 in respect of work executed during the Defects Liability Period or clause 61 in respect of any dispute (GCC52(9));

(9) when all contract work has been completed, all final measurements agreed or, failing agreement, determined by the Engineer and all defects remedied the Engineer shall, at the end of the Defects Liability Period (if any), issue to the defendant and the plaintiff a Final Payment Certificate, the amount of which shall be paid to the Contractor within 28 days of the date of such certificate, after which no further payments shall be due to the

Contractor (save in respect of matters in dispute, in terms of Clause 61, and not yet resolved) (GCC52(10));

(10) the Engineer may issue certificates of Practical Completion, Completion and Final Approval (GCC54 and 55) and that –

(a) a certificate of completion will be issued as soon as the work in the list provided to the plaintiff at the time of issue of the certificate of Practical Completion has been completed (GCC54(2) and (4));

(b) a Final Approval Certificate shall be delivered by the Engineer as soon as practicable after the completion of the whole of the Works or of the expiration of the Defects Liability Period, as the case may be, or as soon thereafter as any works ordered during such period pursuant to Clauses 30, 54 and 56 shall have been completed in accordance with the Contract (GCC55(1)); and

(c) the Works shall not be considered as completed in all respects unless a Final Approval Certificate shall have been delivered by the Engineer to the defendant and the plaintiff stating the date on which the Works have been completed and all defects corrected in accordance with the Contract (GCC55(1)).

[15] The plaintiff claims the additional amounts or compensation in terms of various clauses of the GCC. Although these amounts fall within the definition of Contract Price (i.e. 'the Tender Sum subject to such addition thereto or deduction therefrom as may be made from time to time under the provisions of the Contract' (GCC1(g))) the defendant contends that the amounts claimed are treated differently by the relevant clauses which govern claims for additional payments or compensation and the resolution of disputes concerning such claims. The plaintiff contends that these provisions (and others) do not deviate from the general principle already referred to which means that the plaintiff did not become entitled to claim payment of the additional amounts or compensation until the work had been completed and the final approval certificate issued.

[16] The dispute clearly relates to the interpretation of the contract and, in particular, the clauses containing the dispute resolution procedure. At the outset it must be pointed out that the defendant is not relying on an implied or tacit term of the contract and that the plaintiff's contention that the interpretation must take place in a manner consistent with the existing common law and that any deviation from the common law position would have to be in the clearest terms, is not correct. The contention is not borne out by the case referred to, ***Kaplan v Incorporated Law Society, Transvaal*** **1981 (2) SA 762 (T)** at 786G and is contrary to the leading authority, ***Coopers & Lybrand v Bryant***

1995 (3) SA 761 (A) at 767E-768E where the relevant principles are set out:

> 'According to the "golden rule" of interpretation the language in the document is to be given its grammatical and ordinary meaning, unless this would result in some absurdity, or some repugnancy or inconsistency with the rest of the instrument. ***Principal Immigration Officer v Hawabu and Another*** **1936 AD 26** at 31, ***Scottish Union & National Insurance Co Ltd v Native Recruiting Corporation Ltd*** **1934 AD 458** at 465-6, ***Kalil v Standard Bank of South Africa Ltd*** **1967 (4) SA 550 (A)** at 556D. …
>
> The mode of construction should never be to interpret the particular word or phrase in isolation (*in vacuo)* by itself. See ***Swart en 'n Ander v Cape Fabrix (Pty) Ltd*** **1979 (1) SA 195 (A)** at 202C (*per* Rumpff CJ):

"Wat natuurlik aanvaar moet word, is dat, wanneer die betekenis van woorde in 'n kontrak bepaal moet word, die woorde onmoontlik uitgeknip en op 'n skoon stuk papier geplak kan word en dan beoordeel moet word om die betekenis daarvan te bepaal. Dit is vir my vanselfsprekend dat 'n mens na die betrokke woorde moet kyk met inagneming van die aard en opset van die kontrak, en ook na die samehang van die woorde in die kontrak as geheel."

The correct approach to the application of the "golden rule" of interpretation after having ascertained the literal meaning of the word or phrase in question is, broadly speaking, to have regard:

(1) to the context in which the word or phrase is used with its interrelation to the contract as a whole, including the nature and purpose of the contract, as stated by Rumpff *supra;*

(2) to the background circumstances which explain the genesis and purposes of the contract, i.e. to matters probably present to the minds of the parties when they contracted …

(3) to apply extrinsic evidence regarding the surrounding circumstances when the language of the document is on the face of it ambiguous, by considering previous negotiations and correspondence between the parties, subsequent conduct of the parties showing the sense in which they acted on the document, save direct evidence of their intentions …'

These rules emphasise context and its effect on the meaning of words, a point trenchantly made in ***Aktiebolaget Hässle and Another v Triomed (Pty) Ltd* 2003 (1) SA 155 (SCA)** para 1 where the court said that when construing the language used in documents (including contracts) 'context is everything'.

[17] It is common cause that all the claims originated either in clause 51 or clause 60 of the GCC. Clause 51 deals *inter alia* with claims for

additional payment or compensation and clause 60 deals with all other disagreements. Everything which must be done in terms of these clauses has a time limit, failing compliance with which, the plaintiff would be barred from pursuing the claim or dispute. The clauses will be considered in turn.

[18] Clause 51 contains the following relevant provisions –

> (1) Within 28 days after the circumstance, event, act or omission giving rise to a claim has arisen or occurred the contractor must deliver to the engineer a written claim setting out –
>
> (a) the particulars of the circumstance, event, act or omission giving rise to the claim;
>
> (b) the provisions of the contract relied upon; and
>
> (c) the amount of money claimed and the basis of calculation thereof ((1)(a));
>
> (2) Where the contractor cannot reasonably comply with these requirements it is required to comply with certain other minimum requirements ((1)(b));

(3) If the events or circumstances are ongoing the plaintiff must, each month, deliver to the engineer updated particulars of the claim ((1)(c));

(4) If the contractor was not reasonably aware of the relevant facts and circumstances the 28 day period commences to run from the date when the contractor should reasonably have become so aware ((2));

(5) To enable the extent and validity of the claim to be assessed the contractor and the engineer must record all facts and circumstances relating to the claim ((3));

(6) If the contractor fails to comply with the aforementioned provisions it is barred from making the claim ((4));

(7) Unless provided otherwise in the contract, within 56 days after the contractor has complied with its obligations regarding the making of the claim, the engineer must deliver a written ruling on the claim and any amount allowed by him must be included in the next payment certificate ((5));

(8) If the engineer fails to give his ruling within the period allowed (which may be extended by agreement) he is deemed to have given a ruling dismissing the claim ((6)); and

(9) If before the engineer's ruling on the whole claim any amount thereof is established to his satisfaction the amount must be included in the next payment certificate ((5)(b)).

[19] Clause 60 contains the following relevant provisions –

(1) within 20 days after a disagreement has arisen between the contractor and the engineer the contractor may give written notice to the engineer to consider such disagreement ((1));

(2) within 14 days of receiving the contractor's written notice the engineer must give a written ruling on the disagreement, failing which the engineer is deemed to have given a ruling dismissing the contractor's contention ((2)).

[20] Clause 61 provides for the contractor to dispute any ruling given or deemed to have been given by the engineer in terms of clauses 51 and 60:

(1) the contractor is entitled to give written notice to the engineer disputing the whole or a specific part of the ruling, but, unless the contractor does so within 42 days after receipt of the ruling, or, after a ruling is deemed to have been given, the contractor has no further right to dispute the ruling or any part thereof not disputed in the notice ((1)(a));

(2) the engineer must give his decision on the dispute by delivering it in writing to the contractor and the employer ((1)(c)) and must do so within 42 days after receipt of a notice from the contractor requiring him to do so, failing which, he shall be deemed to have given a decision affirming without amendment, the ruling concerned ((1)(c));

(3) the contractor and the employer both have the right to dispute the engineer's decision or any part thereof by giving written notice to the engineer but, unless they do so within 28 days after receipt of the decision or the deemed decision they shall have no further right to dispute any part of the ruling not specified in the notice ((1)(d));

(4) if either party gives notice disputing the engineer's ruling or any part thereof the dispute must be referred immediately to mediation in terms of clause 61(2) ((1)(e));

(5) a time limit is provided for the appointment of a mediator ((2)(a)); legal representation is not permitted ((2)(b)); a mediator must give his written opinion on the dispute as soon as reasonably practical ((2)(f)); the mediator's opinion becomes binding on the parties only to the extent agreed to in writing ((2)(f)); the dispute on any matter still unresolved must be resolved by arbitration or

court proceedings whichever is applicable in terms of the contract ((2)(g));

(6) if the contract provides for determination of disputes by arbitration, the matter shall be referred to a single arbitrator to be agreed upon by the parties, or, failing such agreement, within 28 days after delivery to the parties of the mediator's opinion, nominated by the President of the South African Institute of Civil Engineers ((3)(a));

(7) if the contract does not provide for the determination of disputes by arbitration the dispute shall be determined by court proceedings.

[21] The relevant clauses of Amendment 1 and Amendment 2 are set out in paragraph [10](14) and (15) above. The effect of these clauses is that instead of being referred to mediation, disputes have to be referred to the DRBs. Thereafter, because the parties agreed that disputes must be determined by court proceedings (see Appendix X to the Admitted Facts) they were obliged to institute such proceedings to determine the disputes.

[22] Clause 61 and the two Amendments do not indicate that court proceedings can be instituted only after completion of the Works even if they are payment of amounts which fall within the definition of

'Contract Price'. The scheme created for the determination of claims is:

(1) a ruling by the engineer; if disputed

(2) a decision by the engineer; if disputed

(3) a referral to the DRB; if disputed

(4) court proceedings.

Provided the contractor complies with the time limits the contractor is entitled to proceed from one step to the next to have a dispute about a claim determined. According to the GCC in their original form the institution of arbitration or court proceedings could have followed immediately after the parties had failed to resolve the dispute by accepting the mediator's opinion. After the parties agreed that disputes had to be settled by court proceedings this meant that only court proceedings could be instituted. The effect of the two Amendments is simply that court proceedings must be instituted if the parties do not resolve their disputes by accepting the DRB's recommendation.

[23] 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. The question is whether prescription began to run before the commencement of the dispute resolution procedures as contended by the plaintiff.

[24] If it is found that prescription did not commence to run after completion of the work the plaintiff contends that the running of prescription commenced before the parties began the dispute resolution procedures: i.e. as soon as the causes of action for the various amounts claimed were complete, but that the running of prescription was interrupted in terms of s 15(1) of the Act by service on the engineer of each claim.

[25] As already pointed out prescription does not begin to run until the debt is due: i.e. it is immediately claimable/payable – see ***Evins v Shield Insurance Co Ltd*** **1980 (2) SA 814 (A)** at 838-839; ***The Master v IL Back and Co Ltd*** **1983 (1) SA 986 (A)** at 1004F-H or, when the creditor's cause of action is fully accrued and the creditor is able to pursue his claim – see ***Deloitte Haskins & Sells v Bowthorpe Hellerman Deutsch*** **1991 (1) SA 525 (A)** at 532H-I. The learned author of **Christie** ***The Law of Contract in South Africa*** **5 ed** at 486 comments –

> 'The same test of recoverability has been expressed in different words: when the debt is recoverable, owing and already

payable; immediately claimable; when the creditor acquires a complete cause of action for its recovery; or when the cause or right of action accrues, which may be taken as synonymous expressions'

In ***McKenzie v Farmers' Co-operative Meat Industries Ltd*** **1922 AD 16** at 23 the court adopted the following definition of 'cause of action' –

'… every fact which it would be necessary for the plaintiff to prove, if traversed, in order to support his right to judgment of the Court. It does not comprise every piece of evidence which is necessary to prove each fact, but every fact which is necessary to be proved.'

and in ***Evins v Shield Insurance Co Ltd supra*** at 838F-H the court quoted with approval the following meaning of 'cause of action' in ***Abrahamse & Sons v SA Railways and Harbours*** **1933 CPD 626** –

'The proper legal meaning of the expression "cause of action" is the entire set of facts which gives rise to an enforceable claim and includes every fact which is material to be proved to entitle a plaintiff to succeed in his claim. It includes all that a plaintiff must set out in his declaration in order to disclose a cause of action. Such cause of action does not "arise" or "accrue" until the occurrence of the last of such facts and consequently the last of such facts is sometimes loosely spoken of as the cause of action.'

The parties clearly accept that the facts and circumstances giving rise to each claim had occurred by the time it was submitted to the engineer. However before each claim was enforceable it had to

proceed through the dispute resolution procedure. That was a contractual prerequisite for the enforceability of the claim and was clearly a part of the plaintiff's cause of action.

[26] Strictly speaking that is the end of the plaintiff's argument. Nevertheless, on the assumption that that conclusion is wrong, the second leg of the argument will be considered.

[27] The plaintiff contends that the submission of each claim served to interrupt the running of prescription in terms of s 15(1) of the Act. For the purposes of considering this contention it will be accepted that prescription commenced to run before the delivery of the claim to the engineer. S 15(1) of the Act provides that –

> 'The running of prescription shall, subject to the provisions of subsection (3), be interrupted by the service on the debtor of any process whereby the creditor claims payment of the debt'

and s 15(6) provides that –

> 'For the purposes of this Section, "process" includes a petition, a notice of motion, a rule nisi, a pleading in reconvention, a third party notice referred to in any rules of court, and any document whereby legal proceedings are commenced'.

The plaintiff contends that it is sufficient to interrupt prescription if the process served is a step in the enforcement of a claim for payment of the debt and that prescription was interrupted by the delivery to the

engineer of the written claim under clause 51(1). For this contention the plaintiff relies on ***Cape Town Municipality and Another v Allianz Insurance Co Ltd*** **1990 (1) SA 311 (C);** ***Primavera Construction SA v Government North West Province*** **2003 (3) SA 579 (B);** ***Naidoo & Another v Lane & Another*** **1997 (2) SA 913 (D);** ***First Consolidated Leasing Corporation (Pty) Ltd v Servic SA (Pty) Ltd*** **1981 (4) SA 380 (W)** and **LAWSA Vol 21 1st Reissue** para 147.

[28] The wording of the section does not support the contention. S 15(6) clearly provides that the process which interrupts the running of prescription must be a document whereby legal proceedings are commenced. It is obviously intended to be all-embracing. Furthermore the authorities relied on by the plaintiff do not support the contention. None of the cases referred to extends the meaning of process to include a claim delivered to an engineer pursuant to the provisions of a construction contract. In ***Cape Town Municipality v Allianz Insurance Co Ltd supra*** the plaintiff issued summons for a declaratory order that the defendant was liable to indemnify the plaintiff. The court held that the service of the summons interrupted prescription (330H-335C). In ***Primavera Construction SA v Government North West Province and Another*** the court did not decide that a claim for arbitration is a process which would interrupt the running of prescription for the purposes of s 15(1) of the Act (601E-603I). In ***Naidoo and Another v Lane and Another supra*** the court held that an application to join a defendant was not a process which interrupted the running of

prescription and that when the amended summons and particulars of claim were served on that defendant the claim had prescribed (918A-921H). In ***First Consolidated Leasing Corporation (Pty) Ltd v Servic SA (Pty) Ltd and Another supra*** the court held that service of an application for an interim attachment (without a claim for payment of a debt) was not service of a process whereby the creditor claims payment of the debt for the purposes of s 15(1) of the Act. Finally, **LAWSA Vol 21 1st Reissue** para 147 emphasises that s 15(1) requires service of a process by which legal proceedings are effectively commenced for payment of the debt in question.

[29] The clear wording of s 15(6) (see e.g. ***Associated Paint & Chemical Industries (Pty) Ltd v Smit*** **2000 (2) SA 789 (SCA)** para 19) is consistent with the clear wording of s 6(1)(b) of the Prescription Act 18 of 1943 which provided that prescription was interrupted by service on the debtor of any process whereby action was instituted. In ***Santam Insurance Co Ltd v Vilakasi*** **1967 (1) SA 246 (A)** the majority judgment said at 253H that –

'… It is clear that the service referred to in sec 6(1)(b) must be service whereby action is instituted as a step in the enforcement of the claim or right. The underlying reason why such a service interrupts prescription is that the creditor has thereby formally involved his debtor in court proceedings for the enforcement of his claim.'

And in ***Neon and Cold Cathode Illuminations (Pty) Ltd v Ephron*** **1978 (1) SA 463 (A)** the court commented on these provisions at 470G-471B as follows:

> 'Then sec. 6 deals with the interruption of the running of prescription. *Inter alia* it says in sec. 6(1)(b) that:
>
> > "Extinctive prescription shall be interrupted by service on the debtor of any process whereby action is instituted."
>
> "Action" is defined in sec. 1 as:
>
> > "Any legal proceedings of a civil nature … for the enforcement of a right"
>
> and "debtor" is defined as:
>
> > "a person against whom a right is enforceable by action"
>
> The effect of those provisions is, I think, that, in order to effectively interrupt prescription under sec. 6(1)(b), there must at least be (a) a right enforceable against the debtor in respect of which extinctive prescription is running, and (b) a process served on that debtor instituting legal proceedings for the enforcement of that very right or substantially the same right. RAMSBOTTOM, J. (later J.A.), said in ***Park Finance Corporation (Pty) Ltd v Van Niekerk,*** **1956 (1) SA 669 (T)** at p673B:
>
> > "The process referred to in sec 6(1)(b) must, I think, be a process by which action is instituted to enforce the right which would otherwise be rendered unenforceable by lapse of time. In other words, the action must be an action to enforce a particular right, so that if one person has two rights against another, the institution of an action to enforce one only will not interrupt prescription in respect of the other"

With respect I agree with the *dictum*, except that, in the light of other authorities to be mentioned later, I would qualify the phrase "the right which etc" by substituting therefor "the same or substantially the same right as would otherwise be rendered unenforceable by lapse of time". For the substance rather than the form of the previous process must be considered in determining whether or not it interrupted prescription.'

In ***De Bruyn v Joubert* 1982 (4) SA 691 (W)** at 696A-B and ***Naidoo and Another v Lane and Another* 1997 (2) SA 913 (D & CLD)** at 921D-F the court said that these *dicta* are equally applicable to the provisions of s 15 of the Act. I respectfully agree.

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[30] Since submission of a claim to the engineer clearly does not constitute service of a legal process whereby legal proceedings are commenced, delivery of the claims to the engineer did not interrupt the running of prescription. If prescription had commenced to run in respect of the claims before they were delivered to the engineer they have become prescribed.

[31] The last matter which must be considered is whether the parties entered into the 'referral agreement' as alleged in paragraph 22(c) of the plaintiff's amended particulars of claim and, if so, whether this affects prescription of the claim for R7 601 195. It is common cause that in March 2004 the parties entered into Amendment 2 and that at about the same time they agreed to submit claim 20 (the claim referred

to in paragraph 22(c) of the particulars of claim) and claim 34 (claim E in the particulars of claim) to DRB2 for a recommendation on the quantum of claim 20 and the validity and quantum of claim 34. The question is whether the agreement to refer these claims to DRB2 incorporated the terms alleged in paragraph 22(c) of the particulars of claim or was merely part of an ongoing process to settle all claims as the defendant alleges.

[32] In the plaintiff's amended particulars of claim the plaintiff alleges that during or about March 2004 and at Johannesburg (in plaintiff's further particulars this becomes Rivonia, Johannesburg alternatively Pretoria) the parties entered into a 'referral agreement' with the following material terms –

(1) the parties agreed to refer the para 22(c) claim to DRB2 for a recommendation on quantum;

(2) the defendant would pay in settlement of the para 22(c) claim whatever amount was ultimately determined as the quantum of the para 22(c) claim (following the procedure contemplated in the contract) (in plaintiff's further particulars it becomes clear that this would be by acceptance by the parties or by court proceedings);

(3) the time period stipulated in the contract for the giving by the plaintiff of either of its intention to have the para 22(c) claim resolved by court proceedings would be calculated with regard to the date of the quantum recommendation (in plaintiff's further particulars this would be done in terms of the referral agreement and Amendment 2).

Significantly, the plaintiff alleges that the agreement was concluded 'orally alternatively tacitly; alternatively tacitly as a term or terms of Amendment 2' and that the material terms were agreed 'expressly alternatively impliedly alternatively tacitly'. Nowhere does the plaintiff allege that the defendant admitted liability for the claim and that all that remained to be determined was its quantum.

Pleading in this manner is a clear indication that the pleader is very uncertain about the facts.

The defendant denies that such an agreement was entered into. The effect of the defendant's plea is that claim 20 (i.e. the claim set out in para 22(c) of the particulars of claim) and claim 34 (i.e. claim E in the plaintiff's particulars of claim) were referred to DRB2 in terms of Amendment 2, claim 20 on quantum only and claim 34 on both merits and quantum, as part of an ongoing attempt to settle all claims.

[33] The evidence on this issue consisted of the correspondence in exhibit A which preceded the referral of the two claims to DRB2 and the evidence of the witnesses. The plaintiff tendered the evidence of Mr. Lomas who was the plaintiff's CEO at the time and Mr. Hopper who was the plaintiff's commercial director at the time. The defendant tendered the evidence of Mr. Viljoen who was the engineer. The correspondence in exhibit A is obviously the most reliable evidence as to what took place and what was discussed and agreed and must be preferred to the memories of the witnesses who testified some 6 years after the event and had no other means of refreshing their memories than the letters themselves. It is striking that the correspondence does not purport to confirm an agreement with the terms alleged in the particulars of claim and that save for the submission of the claims to DRB2 does not even refer to an agreement or understanding about any of the other alleged material terms. It is also striking that the particulars of claim which accompanied the summons on 2 December 2005, when the facts of the matter must have been fresh in the minds of the witnesses, did not allege the agreement now alleged. This was also not alleged in the other action which the plaintiff instituted against the defendant, but withdrew, and was only alleged in the amended particulars of claim delivered in March 2010. Against that background the plaintiff's witnesses were unimpressive and not credible and as far as the plaintiff's case is concerned unhelpful. The evidence of Mr. Vijoen was far more preferable.

[34] Not surprisingly, in view of the manner in which the agreement was pleaded, neither of the plaintiff's witnesses testified that the agreement alleged had been entered into expressly on a specific occasion. Mr. Lomas was involved in attempting to settle all the plaintiff's claims with the defendant and when it became clear that no overall settlement could be achieved and that claims 20 and 34 would have to be submitted to DRB2 in terms of a second Amendment he handed over the matter to Mr. Hopper. The real thrust of Mr. Lomas' evidence was that he had negotiated at a high level with senior officials of the Department and that they had admitted that the defendant was liable for claim 20. However Mr. Lomas did not state that they expressly admitted liability on a specific occasion. He testified, as I understood his evidence, that this was his understanding. Perusal of the correspondence shows that Mr. Lomas did not record an express admission or even an understanding that the defendant was liable. Significantly, neither Mr. Lomas nor Mr. Hopper testified that Mr. Lomas conveyed the fact of the admission to Mr. Hopper. It is clear that Mr. Hopper was not aware of such an admission. It is also clear that Mr. Hopper did not consider that the defendant accepted liability for whatever amount was determined. His letter of 15 January 2004 (A25-26) shows that he understood that the recommendation of DRB2 would be given to the parties and they would then meet in order to discuss the settlement of the claims. Neither the correspondence nor the evidence of Mr. Hopper shows that the parties considered all the matters alleged to be material terms of the referral agreement. Mr.

Hopper readily conceded that the submission of the quantum of claim 20 to DRB2 was not on the basis that the defendant had accepted liability and that the submission of claim 20 to DRB2 was simply another attempt to see whether a settlement could be achieved.

[35] Mr. Viljoen's evidence was clear and coherent and accords with the contents of the correspondence in exhibit A. He confirmed what the correspondence indicates: that claims 20 and 34 were referred to DRB2 as part of an ongoing process to settle all the claims.

[36] In the premises the plaintiff has not proved that an agreement was entered into as alleged in paragraph 22(c) of the particulars of claim. It is clear from the evidence that the parties simply agreed to submit the claims to DRB2 in an attempt to try and settle all the claims. It cannot be found that any of the material terms alleged was a tacit term of that agreement.

[37] Neither can it be found that the doctrine of quasi-mutual assent is applicable. The plaintiff relies on the following statement of the principle in ***Smith v Hughes*** **(1871) LR 6 QB 597** at 607 –

> 'If, whatever a man's real intention may be, he so conducts himself that a reasonable man would believe that he was assenting to the terms proposed by the other party, and that other party upon that belief enters into the contract with him, the man thus conducting himself would be equally bound as if he had intended to agree to the other party's claims'

It is clear that the plaintiff's representative, Mr. Hopper, did not propose the alleged terms of the referral agreement to Mr. Viljoen and he therefore did not conduct himself as if he had accepted these terms.

[38] In the absence of the agreement alleged the plaintiff's contention that the parties agreed to extend the period for the giving of notice to refer the para 22(c) claim to court cannot be upheld. Prescription therefore ran from the date of the first notice and the para 22(c) claim has prescribed.

[39] The defendant has therefore shown that the plaintiff's claims A, B, C and D have prescribed and the defendant's special plea must be upheld.

[40] The parties agree that costs must follow the result and that the costs of two counsel should be allowed. Both sides were represented by two counsel.

Order

[41] I The defendant's special plea of prescription in respect of claims A, B, C and D is upheld;

II Claims A, B, C and D are dismissed;

III The plaintiff is ordered to pay the costs of this hearing including the costs consequent upon the employment of two counsel.

B.R. SOUTHWOOD
JUDGE OF THE HIGH COURT

CASE NO: 39161/2005

HEARD ON: 16 April 2010 to 20 April 2010

FOR THE PLAINTIFF: ADV. G. HARPUR SC
ADV. N. LANGE

INSTRUCTED BY: Ms. S. Lancaster of Macrobert Inc.

FOR THE DEFENDANT: ADV. R.J. RAATH SC
ADV. P.M. MTSHAULANA SC

INSTRUCTED BY: Mr. McGregor of the State Attorney, Pretoria

DATE OF JUDGMENT: 5 May 2010