



**THE SUPREME COURT OF APPEAL OF SOUTH AFRICA
JUDGMENT**

Case no: 379/2010

In the matter between:

GROUP FIVE CONSTRUCTION (PTY) LIMITED

Appellant

and

THE MINISTER OF WATER AFFAIRS AND FORESTRY

Respondent

**Neutral citation: GROUP FIVE v MINISTER WATER AFFAIRS
(379/10) [2011] ZASCA 17 (14 March 2011)**

Coram: HARMS DP, STREICHER, BRAND, SHONGWE and
THERON JJA

Heard: 1 MARCH 2011

Delivered: 14 MARCH 2011

**SUMMARY: Building Contract – claims for additional payment or
compensation – special plea of prescription**

ORDER

On appeal from: North Gauteng High Court (Pretoria) (Southwood J sitting as court of first instance).

The appeal is dismissed with costs including costs of two counsel.

JUDGMENT

SHONGWE JA (HARMS DP, STREICHER, BRAND and THERON JJA concurring):

[1] The appellant, Group Five Construction (Pty) Limited, instituted a claim against the respondent, the Minister of Water Affairs and Forestry, for moneys allegedly due in terms of a contract for the construction of the Injaka dam and appurtenant works for the Sabie River Government Water Scheme. Four of the claims arose from claims submitted by the appellant in terms of clause 51 of the contract, which entitled the appellant to claim for additional payment or compensation in prescribed circumstances. The fifth claim, claim E, did not arise for adjudication.

[2] The respondent raised a special plea of prescription and the court below decided to hear this issue separately. The parties placed a list of agreed facts before the court, and led evidence. However, the validity of the special plea depended in the main on an interpretation of the rather complicated contract which had to be read with two amendments agreed to between the parties. These amendments affected clause 61 of the main contract and provided for a new dispute resolution mechanism of submitting disputes to a dispute review board, in lieu of mediation, which was obliged, during the course of the contract, to attempt to settle disputes that arose between the contractor and the employer pursuant to the rejection by the engineer of claims submitted.

[3] The amendment provided in summary that the board had to make recommendations to the parties. These became final and binding on the parties if they were accepted by them in writing. To the extent that a recommendation was not acceptable in writing by the parties, either party was entitled to refer the unresolved matter to court provided that the particular party had within 60 days, given written notice of its intention to do so. Otherwise the decision of the engineer was to become final and binding.

[4] Therefore the crisp issue between the parties was whether the appellant's claims, which were the subject of this process, became 'due' at the stage when the said written notice was given or whether these claims only became due after completion of the 'works' as defined in the contract (as contended by the appellant). The relevance of the issue is to be found in section 12(1) of the Prescription Act 68 of 1969, which provides that prescription commences 'to run as soon as the debt is due'. It is common cause that if the appellant's causes of action were ripe and complete when the notices were given these claims had clearly become prescribed.

[5] Southwood J, in a detailed and thorough judgment, reported as *Group Five Construction (Pty) Limited v Minister of Water Affairs & Forestry* (39161/05) [2010] ZAGPPHC 36 (5 May 2010), came to the conclusion that the claims indeed became prescribed. In spite of a valiant attempt by the appellant's counsel to convince us otherwise, he missed the point in that he argued that the claims were based on an estimate and consequently represented an advance and not a complete claim 'of which the debtor is under an obligation to perform immediately'. We are satisfied that Southwood J's judgment is unassailable and that the argument does not warrant another judgment consisting of the same reasons albeit in different words.

[6] The appeal is dismissed with costs including costs of two counsel.

J SHONGWE
JUDGE OF APPEAL

APPEARANCES:

For Appellant:

G D Harpur SC
N D Lange

Instructed by:

Garlicke & Bousfield Inc
UMHLANGA ROCKSClaude Reid Inc
BLOEMFONTEIN

For Respondents:

R J Raath SC
P M Mtshaulana SC

Instructed by:

The State Attorney
PRETORIAThe State Attorney
BLOEMFONTEIN