Republic of South Africa

IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE DIVISION, CAPE TOWN)

Case No 24107/2012

In the matter between

SECURE ELECTRONICS Plaintiff

vs

THE CITY OF CAPE TOWN Defendant

JUDGMENT DELIVERED ON 13 SEPTEMBER 2017

KUSEVITSKY AJ:

BACKGROUND:

[1] The Plaintiff instituted a claim against the Defendant, the City of Cape Town for payment of the amount of R 4 555 733.16 for moneys allegedly due in terms of a written contract that the parties had entered into in August 2007 pursuant to the award of a tender by the Defendant to the Plaintiff for the installation of an Electrical and Electronic Extension of the CCTV Surveillance System along the Klipfontein Corridor and the N1 Freeway.

[2] The Defendant filed a plea in the normal course and in answer to the Plaintiff's claim, the Defendant denied that it was entitled to pay the sum claimed,

alternatively, that Plaintiff's claim might have been extinguished by prescription in terms of the Prescription Act, No. 68 of 1969 ("The Act"). It was agreed between the parties that this issue would be determined before the main hearing of the matter to be heard at another time and it was duly ordered as such on the 9 January 2017.

[3] The parties also placed a list of Agreed facts before Court. For purposes of this hearing, I was informed that the special plea would be adjudicated on the basis that the standard contract entitled "General Conditions of Construction" ("GCC"), formed part of the contract between the parties as alleged in paragraph 18 of Plaintiff's particulars of claim and that the Defendant only admitted the GCC constituted the agreement between the parties for the purposes of this hearing.

[4] The Plaintiff contends that the GCC makes provision for a Contractor's entitlement to compensation for *inter alia* delays and that bar finalization of the mechanism provided for in clause 48 of the GCC, or the issue of payment certificate, the Contractor would not be entitled to a payment of a claim. Put differently, it contends that if regard is had to the peremptory provisions contained in clause 48, the issuing of a payment certificate is a condition precedent before Plaintiff would have become entitled to the payment of a claim arising from the provisions of clause 18 or 39 of the GCC. Defendant on the other hand contends that the Plaintiff's claim was extinguished by prescription in that the Plaintiff's summons was served on 7 January 2013 and that the Plaintiff's claim became due more than three years prior to 7 January 2013 at which time the Plaintiff had knowledge of the claim or could have acquired such knowledge by the exercise of reasonable care. In the alternative and in the event that I find that the claim has to be assessed in terms of the

contractual provisions provided for in the GCC, then that is not the end of the enquiry. The Defendant contends that in that event, the policy of unilateral delay finds application in that the further contention is that a claimant cannot rely on its own inaction to delay the running the prescription.

[5] The issue that this court is called to determine is therefore a crisp one, leaving the remaining issues to be determined at a later date in the event that this court finds that Plaintiff's claim has not prescribed.

[6] Section 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 that prescription shall commence to run as soon as the debt is due.

[7] The word 'debt' 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 – ***See also Group Five Construction (Pty) Ltd v Minister of Water Affairs and Forestry*** (3916/05) [2010] ZAGPPHC 36 (5 May 2010)

[8] It is not for me to traverse the merits of the matter. The parties have however, for these proceedings agreed to certain facts as recorded in their "Statement of Agreed Facts". These are as follows.

[9] The Plaintiff submitted a delay claim in November 2007 in which it claimed the amount of R648 600.00 from the Defendant. It was subsequently paid that amount in the period February 2008 to July 2008. This claim is not in dispute. On 10 October 2008, the Plaintiff wrote to the Defendant and informed it, *inter alia*, that a future delay claim was a 'definite consideration' if a solution with regard to the works on the N1 section thereof was not found soon. On 7 October 2009, the Plaintiff threatened a delay claim against the Defendant and on the 28 October 2009, representatives of the Plaintiff stated that a delay claim would be completed before the end of the week. On 13 January 2010, representatives of the Plaintiff stated that a delay claim would be sent soon. It is common cause that the Plaintiff submitted the delay claim to the Defendant on 3 February 2010 which was sent by registered post on 12 March 2010 and received by the project Engineer, one Wessels on 7 April 2010. This claim was submitted pursuant to clauses 18,39 and 48 of the GCC.

[10] On 17 June 2010 the attorneys for the Plaintiff wrote to the Project Engineer and repeated the demand. Having assessed the delay claim, the Defendant informed

the Plaintiff on 17 December 2010 that, based on the Defendant's recalculation thereof, it amounted to R 395 416.67 and offered the amount of R 300 000.00 to the Plaintiff. Settlement offers were exchanged between the parties during the period January to February 2011 that did not come to fruition.

[11] In June 2011, the Defendant requested further information and documents from the Plaintiff in respect of the delay claim, in order to further assess the claim. The Plaintiff on more than one occasion, provided further information and documents to the Defendant in substantiation of the delay claim, and the last time that this occurred was on 24 November 2011. The Project Engineer was of the view that the information provided was not sufficient and that certain queries were not addressed. On 25 November 2011 the Defendant informed the Plaintiff that because it had failed to meet the deadline for the furnishing of information, the Defendant considered the matter closed and that the Defendant had been discharged of any liability in respect of the delay claim. Practical completion of the project (as amended) was achieved on 21 December 2010 and a certificate of completion was issued on 29 December 2012.

[12] Before dealing with the above facts, it is perhaps apt for me to deal with the nature of the Plaintiff's claim at this juncture.

[13] There are two types of delays envisaged in the GCC:

13.1 Delays which are the fault of the Contractor (in this case the Plaintiff), in which case the Contractor will incur penalties in

accordance with clause 43 in the event that the Contract is not completed by the Due Completion Date.

13.2 Delays, which are not the fault of the Contractor, which prevent him from completing on time, in which case the Contractor may claim for "an extension of time" to make the Due Completion Date later so that he will not incur penalties.

[14] The Plaintiff avers that its' claim is essentially a claim for compensation in terms of clauses 18, 39,48 and 49 of the GCC as a result of repeated delays that interrupted the progress of the works that it says were caused by the Defendant and/or its agents.

[15] In terms of clause 18 of the GCC, the contractor shall, in accordance with the contract of the requirements of the Engineer, afford on the site all reasonable opportunities for carrying out their work to *inter alia* the Employer (in this case the City of Cape Town), any subcontractor and other persons authorized by the Employer, and provided that adequate notice of the necessity therefor is given to the Contractor.

[16] If, pursuant to Clause 18.1 the Contractor on the written instruction of the Engineer, makes available to the Employer or to any such Contractor or to any such authority any roads or ways for the maintenance of which the Contractor is responsible, or provides any other facility or service of whatsoever nature to any of the said persons or authorities, the Contractor shall, unless otherwise provided in the

contract, be entitled to make a claim in accordance with Clause 48 for any delay or additional costs incurred by him.

[17] The claims procedure under the GCC is set out in clause 48 and provides that a claim is to be submitted to the Engineer who could invoke a procedure set out in clause 48. This clause provides *inter alia* as follows:

> "48.1 The following provisions shall apply to any claim by the Contractor in terms of the contract for an extension of time in terms of Clause 42 for the completion of the permanent works, or (in terms of any Clause making reference to Clause 48) for additional payment or compensation;
>
> 48.1.1 the Contractor shall, within 28 days after the circumstance, event, act or omission given rise to such a claim has arisen or occurred, deliver to the engineer a written claim, referring to this Clause and setting out;
>
> 48.2 If, in respect of any claim, the Contractor did not comply with the provisions of Clause 48.1 because he was not and could not reasonably have been aware of the implications of the facts or circumstances concerned, the period of 28 days referred to in Clause 48.1 shall commence to run from the date when he should reasonably have become so aware.
>
> 48.3 In order that the extent and validity of claims in terms of the clause may be properly assessed when they are submitted, the following provisions shall apply:
>
> 48.3.1 All facts and circumstances relating to the claims shall be investigated as and when they occur or arise. For this purpose the Contractor shall

deliver to the Engineer records, in a form approved by the Engineer, of all the facts and circumstances which the Contractor considers relevant and wishes to rely upon in support of his claims, including details of all Construction Equipment, labour and materials relevant to each claim. Such records shall be delivered promptly after the occurrence of the event giving rise to the claim concerned.

48.5 Unless otherwise provided in the contract, the Engineer shall, within 28 days after the Contractor has delivered his claim in terms of Clause 48.1 as read with Clause 48.2, give effect to Clause 2.2 and deliver to the Contractor and the Employer his written ruling on the claim (referring specifically to the Clause), and the amount, if any, thereof allowed by the Engineer shall be included to the credit of the contractor in the next payment certificate." (my emphasis)

[18] According to Plaintiff, if regard is had to the peremptory provisions contained in clause 48, the issuing of a payment certificate was a condition precedent before the Plaintiff would have become entitled to the payment of a claim arising from the provisions of clause 18 or clause 39 of the GCC.

[19] In terms of these provisions, so the argument goes, the Plaintiff would only have been entitled to the payment of a claim in respect of the suspension or delay of the work after, *inter alia*, the Plaintiff had delivered a written claim to the Defendant's engineer in terms of clause 48.1.1, the engineer had properly assessed the claim in terms of the procedure set out in clauses 48.3.1 to 48.3.6 and made a decision in respect of the claim and if approved, included the amount of the claim in the next payment certificate as per clause 48.5.

THE DEFENDANT'S PLEA OF PRESCRIPTION

[20] As stated above, the Defendant has alleged that the Plaintiff's claim was extinguished by prescription in that the Plaintiff's summons was served on 7 January 2013 and that the Plaintiff's claim became due more than three years prior to 7 January 2013 at which time the Plaintiff had knowledge of the claim or could have acquired such knowledge by the exercise of reasonable care.

[21] The Defendant has therefore invoked the Prescription Act in order to allege that the claim has been extinguished. The Plaintiff's claim will, as a general proposition, have become extinguished if the debt was due three years before legal proceedings were instituted, subject to certain exceptions as set out in the Act. The Act also contains the deeming provision in respect of the knowledge of a party to whom a debt is due.

[22] In addition to the admitted facts, the Defendant relied on a bundle of correspondence of which the agreed facts were extracted and documents which has a bearing on the issue of prescription. The chronology is as follows:

22.11 On 7 November 2007 the Plaintiff submitted a delay claim for the amount of R648 600.00.

22.12 From February 2008 to July 2008, certain amounts in respect of delay claims were included in payment certificates and the amount of R648 600.00 was paid to the Plaintiff.

22.13 On 10 October 2008 the Plaintiff wrote to the Defendant and stated that a future delay claim was a "definite consideration".

22.14 On 7 October 2009 representatives of the Plaintiff attended a project meeting in which they invited an attorney who would deal with "legal aspects, delays, claims etc.".

22.15 On 28 October 2009 representatives of the Plaintiff attended a project meeting in which they stated that a delay claim would be completed by the end of the week.

22.16 On 13 January 2010 representatives of the Plaintiff attended a project meeting in which they stated that the delay claim would be sent "soon".

22.17 The terms of the GCC were invoked by the Plaintiff in its letter of demand addressed to the engineer dated 3 February 2010. That demand was sent by the same attorneys who had attended meetings in which the delay claim was threatened.

22.18 On 21 April 2010, Wessels responded and stated that the conditions applicable were those set out in the tender document and asked for a delay claim to be submitted in terms of those agreements.

22.19 On 17 June 2010 the Plaintiff's attorney responded and stated that the GCC applied.

22.20 During an exchange of correspondence regarding the claim the Plaintiff, in an e-mail on 15 February 2011, indicated that

the delay claim was made in accordance with clause 48 of the GCC.

22.21 On 12 April 2010 Wessels sent a letter to the Plaintiff's attorneys in which he stated that the delay claim was being considered and his evaluation of the claim would be sent to the Defendant.

22.22 On 21 April 2010 Wessels sent a letter to the Plaintiff's attorneys in which he stated that the documents which applied to the agreement were those attached to the bid document and asked for a claim to be submitted in terms of those Contract Conditions.

22.23 On 17 June 2010 the Plaintiff's attorney responded and stated that in his opinion the claim had been correctly submitted.

22.24 In October 2010 the final payment certificates were issued by Wessels in respect of the project.

22.25 On 10 December 2010 the Plaintiff's attorney wrote to Wessels and stated that all the documentation for the delay claim had been submitted and that a response was awaited.

22.26 On 17 December 2010 Wessels wrote to the Plaintiff and stated that an amount of R300 000.00 could be paid in

respect of the delay claim and enquired whether it would be acceptable to the Plaintiff.

22.27 On 9 February 2011 Wessels wrote to the Plaintiff and stated that R1.5 million be paid in respect of the delay claim.

22.28 On 25 May 2011 Wessels sent a letter to the Plaintiff in which he stated that the GCC 2004 did not apply and that the claim was rejected as it was based on the incorrect conditions of contract.

22.29 On 6 June 2011 the Defendant's employees discussed the request for a final invoice to be delivered by the Plaintiff. They specially stated that an interim invoice could be rendered and that the invoice could say that a final invoice would only be submitted once the claim had been resolved.

22.30 On 15 November 2011 Wessels wrote to the Plaintiff and stated that unless a detailed delay claim was submitted in the proper format within 10 calendar days the Defendant would consider the matter closed.

22.31 On 25 November 2011 Wessels rejected the claim. He did not make any specific mention of which contract would apply.

[23] Section 12(3) of the Prescription Act provides that a debt shall not be due until the creditor has knowledge of the identity of the debtor and of the facts from which

the debt arises. In this matter, Defendant argued that the debt was due when it was demanded in 2010.

[24] Counsel for Defendant in this regard referred me to the principles of prescription that was advanced in the matter of ***Trinity Asset Management (Pty) Ltd v Grindstone Investments 132 (Pty) Ltd, Case No. 12677/14.*** The first principle advanced is that a debt repayable on demand is in law considered to be payable immediately so that a formal demand is not necessary in order to complete the cause of action. In such circumstances, prescription starts to run immediately when the debt arises or immediately the loan is lent and advanced. The second principle advanced is the notion that a creditor cannot delay the commencement of prescription by failing to take a step that is in his power to recover the amount advanced by way of a loan. In ***Trinity***, the court held the following:

"[30] That the creditor cannot rely on his or her inaction to delay the running of prescription was confirmed in this court in ***Kotze v Ongeskiktheidsfonds van die Universiteit van Stellenbosch 1996 (3) SA 252 (C)*** where the court made the following observation at 261H:

> "Daarby is daar ten minste sterk indirekte steun vir die beginsel dat 'n skuldeiser nie deur sy eensydige willekeurige optrede die aanvang van die verjaringstermyn kan uitstel nie, en daar is vir dekades reeds met goedkeuring in ons regspraak daarna verwys, ofskoon dit miskien nie altyd nodig of in die huidige samehang was nie."

[31] Finally, on this point, this court, per Rogers J, as recent as 27 February 2015, in ***Johan de Bruyn v Derick du Toit Case No 1162/2015*** p3 made the following observation and specifically with reference to *Stockdale & another v Stockdale*, supra, relied on by the applicant:

> "*Stockdale* and earlier cases dealing with amounts payable "on demand" do not lay down a rule that such a debt becomes due for purposes of prescription only after demand has been made. On the contrary, and in keeping with the principle that a creditor cannot delay the commencement of prescription by failing to take a step within its power, it has been held on a number of occasions that a loan repayable on demand is immediately due for purposes of prescription. It is only where the giving of notice is a condition precedent for a claim, and thus a necessary ingredient of the creditor's cause of action, that the running of prescription is deferred until the giving of a notice." (my emphasis)

[25] The Defendant argued that there was a unilateral delay by the Plaintiff and that they could have taken steps to make the debt due but failed to do so due to their own inaction. It was contended that the earliest Plaintiff should have been aware of the claim was by October 2009 or *alternatively* the Plaintiff's delay amount would have been due on 7 January 2010.

[26] Defendant also referred me to the matter of ***Group Five Construction (Pty) Ltd v Minister of Water Affairs and Forestry*** (39161/05) [2010] ZAGPPHC 36 (5 May 2010) which dealt with a defence of prescription but where the issue surrounded the referral of the dispute to a dispute resolution mechanism. This case in my view is not relevant in this matter as it has not been seriously contended that the matter ought to have been referred to an alternative dispute mechanism. According to counsel for Defendant, if this had been the case, then prescription has not started to run because this dispute mechanism was never invoked. I did not understand this to be the Defendant's case and this was conceded by counsel for Defendant.

THE PLAINTIFF'S SUBMISSIONS

[27] The Plaintiff on the other hand contends that there is no basis for suggesting that Plaintiff knew or was aware of the claim as early as October 2009. Counsel for Plaintiff emphasised that the Plaintiff's claim would only have come into being upon completion of the process envisaged in clause 48 of the GCC. It was not a common law claim but a claim for an advanced payment created by a mechanism created in the contract. Absent that mechanism and completion of the process, the claim could never have been brought.

[28] Counsel for Plaintiff also submitted that there was no basis for a factual finding that Plaintiff was aware of the claim merely because the minutes of a Site Meeting held on the 7 October 2009 made reference to a legal representative "*who will be concerned with all legal aspects, delays, claims etc.* and which made reference to the date of 28 October 2009. Plaintiff submission in this regard was that the minutes merely reflect an intention to submit a delay claim and that on the face of it, it cannot sustain the basis of an argument by Defendant that Plaintiff was aware at that stage, of the claim.

[29] Thus it was argued there is no basis for a finding that the claim referred to forms the subject matter of the present action and in any event, any delay past the 7 January 2010 would be irrelevant because the cut-off date for purposes of prescription is 3 years prior to that. It is therefore for Defendant to prove that the prior knowledge of Plaintiff on the facts presented would be between 7 October 2009 to 7 January 2010.

[30] According to Section 12(1) of the Prescription Act, subject to the provisions of subsections (2),(3) and (4), prescription shall commence to run as soon as the debt is due. I was referred to ***Apalamah v Santam Insurance Co Ltd and Another 1975 (2) SA 229 (D) at 232E-G*** and ***Lawsa , 1st Re-Issue, Vol.21, para 142 at p.55*** which states that there is a vital difference between the coming into existence of a debt on the one hand and the recoverability thereof on the other.

[31] Furthermore, prescription begins to run not necessarily when the debt arises, but only when it becomes due, i.e. when it is claimable by the creditor and, as a corollary thereof, payable by the debtor. See ***LAWSA, para 142 at p56 and Loubser: Extinctive Prescription at p51***. As stated therein:

> *"To put the matter another way, it has been held that a debt is only due when the creditor's cause of action is complete. The notion involves two things, namely that the creditor is in a position to claim payments forthwith, and that the debtor does not have a defence to the claim for immediate payment. The cause of action must, of course, be complete at the stage when a summons is issued in respect thereof. The cause of action must similarly be complete at least when summons is served."*

[32] The Plaintiff contends that a delay claim comes into being upon the submission, assessment and determination thereof and if successful, the inclusion thereof in the next payment certificate as envisaged in clause 48 (5) of the GCC. It is only at this stage, it was argued, that the claim would come into being and become payable.

[33] Thus, by submission of the claim on 3 February 2010, so the argument went, the Plaintiff merely commenced and implemented the procedure to the claim.

[34] Plaintiff contends that in this instance, the issuing of a certificate is a pre-condition for payment.

[35] In advancing this proposition, Plaintiff referred to **McKenzies Law of Building and Engineering Contracts and Arbitration** which states that:

> *"The object of progress certificates is to provide for periodic payment to the contractor. Progress certificates give and are intended to give only an approximate value of work done and materials delivered and are not, in the absence of agreement, intended to be conclusive in favour of either party."*

> > *"Not only may the issue of a certificate indicate when payment is due, but in certain cases the issue of a certificate is a condition precedent to payment. For a certificate to be treated as a condition precedent for payment, the contract must provide for it clearly; such an intention must either be demonstrated by express words, or be clear upon reading the document as a whole. Moreover, when the granting of a certificate is a purely administrative function, the production thereof is not a condition precedent to the recovery of payment."*

[36] Plaintiff contends that the contrary applies in this matter as the issuing of a certificate as envisaged in clause 48 is a pre-condition for payment.

[37] Once the claim has been submitted, the engineer is mandated to make a decision in terms of clause 48.5. This clause, I was told, should be read in

conjunction with clause 2.2 of the GCC which states that whenever the Engineer intends, in terms of the contract, to exercise any discretion or make or issue any ruling, contract interpretation or price determination, he shall first consult with the Contractor and the Employer in an attempt to reach agreement. Failing agreement, the Engineer shall make a fair decision in accordance with the contract taking into account all relevant facts and circumstances.

[38] It was argued that if this is taken into account, it is therefore clear that what the Engineer must do before a delay claim is permitted and allowed in the next payment certificate and is not merely an administrative function and it is on this basis that the proposition advanced is that the issuing of a certificate is a pre-condition of payment.

[39] Plaintiff contends that absent the contractual provisions applicable in this matter, there can be no question of any claim or entitlement to a claim. The right to payment is contractual and in the absence of such provisions in the agreement, the contractor has no common-law right to such interim payments. It has been firmly established by the courts, that such interim payments are not settlement of the Employer's obligations in respect of portions of work done, but advance payments against the totality of work still to be done. See ***Thomas Construction (Pty) Ltd (in Liquidation) v Grafton Furniture Manufacturers (Pty) Ltd 1988 (2) SA 546 (A).***

[40] Thus, the argument goes, whether it is in respect of work done or for delays, the principle remains the same. The court in ***Mouton v Smith 1977 (3) SA 1(AD) at 5*** also commented on the nature of an interim payment stating that the object of

these provisions is to furnish the contractor with funds every month during the progress of the work to enable him to perform it properly and expeditiously, leaving any possible over or under payment to be adjusted in a subsequent interim certificate or ultimately in the final certificate.

[41] I was also referred to the case of ***Martin Harris & Seuns OVS (Edms) Bpk v Qwa Qwa Regeringsdiens 2000 (3) SA 339(A)*** where a building contract provided that the appellant would be paid after a progress certificate was issued by an architect in respect of work already performed by the appellant and the respondent in that matter alleged that the claim had prescribed because prescription began to run when each separate piece of work had been completed. The court held as follows:

> *"... that the position could be summarised as follows: (1) where a contractor, who was in the appellant's shoes, had completed work and applied for the issuing of a progress certificate, his claim for payment of the percentage of the value of the work (retention excluded) for which the contract made provision and which the architect had certified arose only when the certificate was issued to him; (2) the contractor was only entitled to claim for the balance of the payment which was either not certified or which was disputed and which was not accommodated in a later certificate when the entire job had been completed. Where the contractor did not immediately apply for a progress certificate, it merely means that he had not demanded earlier payment. Prescription of the appellant's claim for payment of the portion of the work, as for all other portions which had not appeared in any certificate, began to run at the earliest when the work as a whole was completed. (Paragraphs [37] and [38] at 355H – 356B.)"*

[42] It is evident that the Plaintiff's Attorney, Gunter & Associates, submitted the claim to the Engineer, Transport Telematics Africa (Pty) Ltd ("TTA") on 3 February 2010.

[43] On 12 April 2010, TTA informed the Plaintiff that it was in the process of evaluating the claim and that it would submit its recommendation to the Defendant within the next two weeks.

[44] On the 12 April 2010, the engineer wrote a letter to Gunter & Associates which *inter alia* stated as follows:

> "We are in the process of evaluating the claim and will submit our recommendation to our client within the next two weeks."

[45] During June 2010 further correspondence ensued and at 21 June 2010, the engineer advised the Employer that they would consider Gunter & Associates' letter and *"will make a recommendation to you as to a response."*

[46] In a letter dated 17 December 2010, sent by the engineer to the Plaintiff, the following is stated:

> " With reference to the delay claim received from Secure Electronics attorneys on the 7th April 2010, dated the 3rd February 2010 and taking into account consideration various factors that impacted on the program of this project, we recommend the following:
>
> There are two major items that impacted on the timeline of this project, namely the Environmental Impact Assessment ("EIA") and the revised design for the N1 section.
>
> The project can be divided into two phases, namely the Klipfontein section and the N1 section. The above mentioned two factors have limited impact on the Klipfontein section.
>
> We have requested in writing from Secure Electronics what impact the EIA would have on the project and on the 30th September 2008, Ms Rasool responded that she will not claim due to delays caused by the EIA. Taking this into consideration, *we will evaluate the delay claim on the factors relating to the N1 section only*." ("my emphasis")

[47] On the 25 January 2011 and 9 February 2011, offers and counter offers were made between the parties, which did not come to fruition. Despite this correspondence, it seems that on the 24 February 2011, the engineer emailed the Employer and advised the following:

> ".... I am of the opinion that Secure have not any grounds for a delay claim as stated in their initial letter. Attached is the clause under which they are trying to claim. The final decision is however yours."

[48] The Employer responded as follows:

> "Yes we can invoke procedures & technicalities but so can SE. We have violated a number of their rights, deviated from the tender & have flouted contractual law on our part as well and TTA is complicit as well. I have spoken to Dave Burger that overseas all capital projects for TRAMP and he will assist me with a report to the SCMBAC. Why would you want to complicate our lives by obstructing, stalling and delaying resolution of this issue. My own observations are that SE went out of their way to accommodate us on a number of issues when they didn't have to do so. The delays were way above and beyond what any of us expected as any objective person would agree. I'd like to settle the matter as soon as possible." (my emphasis)

[49] On the 10 March 2011, the Employer sent an email to the engineer and advised as follows:

> " ....TTA must provide a report regarding the delay with the breakdown as per Tarah King's email and taking the rates into consideration if the claim is justified or not. We will then consult our contract specialists for their opinion and if they agree then I will write the Deviation report. If we can't agree then we will refer to Legal services. Could you please provide the report by next week Friday, or sooner if possible."

[50] On the 25 March 2011, the Engineer wrote to the Employer and advised them, relying on clause 48 which states that the Contractor is required to deliver, within 28 days of an event causing a delay, a written claim referring to such circumstances, that they are rejecting the claim on the basis that, as they only received the claim on the 7 April 2010, it fell outside the 28 day period as stipulated in clause 48.4 which states that the Contractor shall not be entitled to additional payment and the Employer will not be liable.

[51] On the 02 June 2011 the Employer wrote to the Plaintiff and advised as follows:

> "With regard to the delay claim, we have had a discussion and consultation and I am waiting for a response from our contracts experts in the city."

[52] On the 03 June 2011, Plaintiff replied as follows:

> "...Tarah indicated to me that ...TTA verbally communicated to her that the City of Cape Town will not be paying the delay claim..."

[53] On the 06 June 2011 the Employer wrote to one Dave Buerger advising him of Plaintiff's aforesaid response and advised him:

> "I have not given any instructions to TTA (the consultant) to inform the contractor that their delay claim will not be paid."

[54] On the 06 June 2011 Buerger responded as follows:

> " ...I would suggest that you ask Secure Electronics to submit an invoice which they can call an interim invoice and they can cover themselves in a covering letter by

saying exactly that i.e. "This is an interim invoice and our final invoice will only be submitted upon satisfactory resolution of our outstanding claim".

[55] At this point it is still evident that the assessment of the delay claim was very much alive.

[56] On the 25 November 2011, following further correspondence in the interim, the engineer wrote to the Plaintiff and advised that as Plaintiff have not met the deadlines for the submission of requested information, the Employer considered the matter closed and "*will be discharged of any liability in connection with this claim.*

[57] Plaintiff therefore contends that –

1. Prescription had not yet commenced to run in respect of the claim; alternatively
2. Prescription commenced to run on 25 November 2011 when TTA effectively rejected the claim.

[58] The Court in **Group Five** *supra* considered the issue of prescription based on agreed facts and stated as a general proposition of the law as follows at [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 – .... If the contract so provides the contractor will be entitled to claim payment before completion of the entire work – .... 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 – .... 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 – ...."

[59] The corollary of this must mean that until an interim payment certificate has been issued or finalized either way, that the cause of action only arises once this event has occurred.

[60] As stated in **Group Five *supra***, 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 –(my emphasis) 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' (my emphasis)

[61] 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." (my emphasis)

[62] It is common cause that the Plaintiff's summons was issued on 20 December 2010 and served on the Defendant on 7 January 2013. In terms of the statement of Agreed facts, on 25 November 2011, the Defendant informed the Plaintiff that because it had failed to meet the deadline for the furnishing of information, the Defendant considered the matter closed and that the Defendant had been discharged of any liability in respect of the delay claim.

[63] Based on the aforegoing, it is quite clear that the Plaintiff's cause of action would only effectively arise from the date upon which Defendant repudiated Plaintiff's claim which was on 25 November 2011. Put differently, the Plaintiff's cause of action would only have been completed once the claim mechanism as envisaged in clause 48 of the GCC was completed. Had the Engineer approved the claim, an interim payment certificate would be have issued and same would have had the effect of a liquid document. See ***Smith v Mouton 1977(3) SA 9 (W)***. However, this is not the case and instead the Engineer repudiated the claim on 25 November 2011. As summons was served on 7 January 2013, it follows that the Plaintiff's claim has not prescribed.

[64] As mentioned before, that however is not the end of the enquiry since reliance was placed on the fact that Plaintiff itself delayed the running of prescription by its own inaction. This would demand an interrogation of what had transpired during the period between 10 October 2008 through to the time when the delay claim was ultimately submitted on 3 February 2010 and received by the Engineer on 7 April 2010.

[65] From the bundle of correspondence provided by both parties, it is evident that on 10 October 2008, a letter was sent from the Plaintiff to the Defendant in which delays were complained about in a statement made to the effect that "*A future delay claim is [sic] definite consideration if a solution to the N1 Freeway work is not sorted out soon.*"

[66] On the 1 July 2009 an email was sent by the Plaintiff to the project Engineer and others in which the Plaintiff highlights its concern about the manner in which the project is proceeding. -

[67] On 7 October 2009 there is a project meeting in which representatives of the Plaintiff introduce an attorney which is appointed to deal with "legal aspects, delays, claims etc."

[68] Between November 2009 and January 2010, there is an indication that the delay claim would be sent 'soon'. On 3 February 2010 it is evident that a delay claim is sent and a letter of demand in respect of delays which, on a cursory glance suggests a myriad of issues raised. (It should also be noted that should the date of the letter of demand be used for the computation of the running of prescription, then Plaintiff's claim would still be competent.)

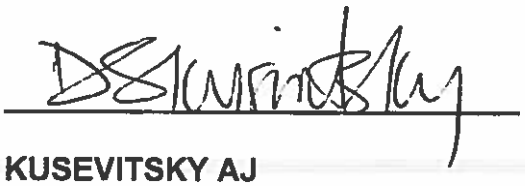
[69] Having regard to what transpired during this period, I cannot agree with the Defendant's submissions that Plaintiff sat on its hands and unilaterally delayed the running of prescription as it is evident, without delving into the substance of the correspondence, that the Plaintiff took positive steps, including appointing an attorney to deal with the possibility of a delay claim, to submit the delay which it ultimately did. In the circumstances, the argument relating to the doctrine of unilateral delay must also fail.

[70] With regard to the issue of costs, that is best left for the trial court to adjudicate.

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

I The Defendant's special plea of prescription is dismissed;

Ii Costs to stand over for later determination.



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