IN THE HIGH COURT OF SOUTH AFRICA

(WESTERN CAPE DIVISION, CAPE TOWN)

Case No: 15633/2019

In the matter between:

HUGH HUTCHINGS Applicant

and

ANNA CATHERINA HUTCHINGS Respondent

Date of hearing: 19 October 2020

Date of Judgment: 18 January 2021 (delivered via email to the parties' legal representatives)

JUDGMENT

HOCKEY, AJ

[1] The applicant seeks an order for an arbitration award ("the award") which was handed down on 22 January 2014 to be made an order of court in terms of section 31(1) of the Arbitration Act, 1969 ("the Arbitration Act").

[2] The award followed an arbitration between the parties wherein the respondent in the present matter raised a point *in limine* of prescription against a claim by the applicant. The point *in limine* was dismissed by the arbitrator, with costs. The arbitrator's award reads:

> *"The following award is made:*
>
> *a) the point* in limine *regarding prescription is dismissed.*
>
> *b) [The respondent] to pay [the applicant's] legal costs on party and party scale including costs of counsel.*
>
> *c) [The respondent] to pay the costs of the arbitration including the costs of the arbitrator."*

[3] Subsequent to the publication of the award, the parties were unable to settle the issue of costs, and the applicant now seeks to have the award made an order of court to enable a bill of costs to be taxed.

[4] The respondent opposes the relief claimed on the basis of a contention that the right to have the arbitration award made an order of court has prescribed in terms of provisions of the Prescription Act. The respondent raised points of law in its opposition by way of a notice in terms of rule 6(5)(d)(iii) of the Uniform Rules of Court ("the rules") as follows:

> *"1. The arbitration award was made on 22 January 2014:*
>
> *2. The arbitration award does not have the status of a Court Judgment;*

3. A three year prescription period in terms of section 11(d) of the
4. The applicant's claim for costs in terms of the arbitration award was extinguished by prescription on 22 January 2017;

5. There is accordingly no basis for the arbitration award to be made an order of court in terms of the relief sought."

[5] In **Bromton Body Corporate v Khumalo** 2018 (3) SA 347 SA it was held by Van der Merwe JA (at para 11) as follows:

"A claim that an arbitration award be made an order of court is not a 'debt' in terms of the [Prescription Act 68 of 1969]. In this regard the Constitutional Court has clearly endorsed the decision of this in Electricity Supply Commission v Stewards and Lloyds of SA (Pty) *Ltd 1981 (3) SA 340 (A) at 344E-G, namely that a debt in terms of the Act is an obligation to pay money, deliver goods or render services. ... The appellant's claim to make the arbitration award an order of court did not require the respondent to perform any obligation at all, let alone one to pay money, deliver goods or render services. The appellant merely employed a statutory remedy available to it."*

[6] It follows that there is no basis to hold that the arbitration award in this matter created a new debt and prescription therefore did no commence running with the publication of the award on 22 January 2014.

[7] Mr Steyn who appeared for the respondent, persisted with an argument that there is no basis for the arbitration award to be made an order of court in terms of the relief sought, as the applicant's claim for costs in terms of the arbitration award has prescribed.

[8] I agree with Mr MacKENZIE, who appeared for the applicant, that the respondent cannot raise the purported prescription of legal costs as a basis for its claim that the applicant's case to have his arbitration award recorded as an order of court under section 31(1) of the Arbitration Act has prescribed, and that the respondent would need to institute an independent application for declaratory relief to that effect.

[9] In pursuit of his argument, Mr Steyn relies on a *dictum* from **City of Cape Town v Allie** 1981 (2) SA 1 (C) where the respondent attempted to recover costs under an arbitration award some five years after the award was made. In that matter, the respondent contended, as do the applicant in the present matter, that prescription could not commence to run until the bill of costs had been taxed. In respect of this contention, the court had this to say:

> *"The simple answer to this contention is that the right to apply to Court in terms of section 31 of the Arbitration Act 42 of 1965 for the award to be made an order of court arises upon the publication of the award. The taxation of costs awarded is not a condition precedent to the accrual of such a right or the falling due of the correlative publication to submit to it being made an order of court. Indeed, the costs have still not been taxed, yet respondent was plainly entitled to bring the application which it did. I express no opinion upon the question whether a debt for costs can become due before taxation within the meaning of section 12(1) of the Prescription Act No. 68 of 1969 in the sense that prescription against a claim for payment of the*

costs can commence running before taxation. This is not the issue as I see it."

[10] As a result, so it is argued, the right to have an arbitration award made an order of court and enforce it prescribes in terms of section 11(d) of the Prescription Act. Furthermore, it was submitted on behalf of the respondent that the cost award became due upon the publication of the arbitration award in January 2014 and that prescription commenced running from that date.

[11] But the argument submitted on behalf of the respondent is wrong. As already stated, it was made clear in **Bromton** that a claim that an arbitration award be made an order of court is not a 'debt' in terms of the Prescription Act. As for the argument that the costs award became 'due' with the publication of the arbitration award, regard must be had to section 12(1) of the Prescription Act which provides:

"(1) Subject to the provisions of subsections (2), (3), and (4), prescription shall commence to run as soon as the debt is due…"

[12] In **Western Bank v Van Vuuren** 1980 (2) SA 438 (T), it was held that *"debt is due"* meant that the debt is immediately payable, or that the debtor was under an obligation to pay the debt immediately.

[13] In **Standard Bank of South Africa Ltd v Miracle Mile Investments (Pty) Ltd and Another** 2017 (1) SA 185 (SCA), it was held (at para 24):

> *"In terms of the current Act, a debt must be immediately enforceable before a claim in respect of it can arise. In the normal course of events, a debt is due when it is claimable by the creditor, and as the corollary the thereof, is payable by the debtor. Thus in* Deloitte Haskins & Sells Consultants (Pty) Ltd v Bowthorpe Hellerman Deutch (Pty) Ltd *[1990] ZACSA 136; 1991 (1) SA 525 (A) at 532 G-H, the court held that for prescription to commence running,*
>
> > *'The has to be a debt immediately claimable by the creditor or, stated in another way, there has to be a debt in respect of which the debtor is under an obligation to perform immediately'.*
>
> *(See also* The Master v IL Back and Co Ltd *1993 (1) SA 986 (A) at 1004 F – H.) In* Truter & another v Deysel *[2006] ZACSA 16; 2006 (4) SA 168 SCA para 16, Van Heerden JA said that a debt is due when the creditor acquires a complete cause of action for the recovery of the debt, ie when the entire set of facts which the creditor must prove in order to succeed with his or her claim against the debtor is in place or, in other words, when everything has happened which would entitle the creditor to institute action and to pursue his or her claim."*

[14] I agree with Mr MacKENZIE that in terms of the arbitration award, the respondent became liable for costs on publication of the award, but the actual costs can only become due once there is agreement on the amount of costs payable, or once a bill of costs had been taxed. What is of relevance is not when a debt arose, but when it becomes due.

[15] In **Santam v Ethwar** 1992 (2) SA 244 (SCA), the court considered whether a claim for costs in favour of the respondent (Ethwar), which arose out of a settlement

agreement, has become prescribed. The court framed the issue for determination thus (at 252 B-D):

> *"... the issue is whether the respondent's 'claim for costs' has become prescribed. This depends on whether the debt became 'due'* - within *the meaning of the word in section 12(1) of the Act* - *on the day of the settlement when the appellant's debt to pay the respondent's costs arose. If the answer is in the affirmative, as contended for by the appellant, prescription would have commenced running from that date, and respondent's right become prescribed before the notice of taxation was served. If not, prescription could, of course, not have started running then. It is common cause that nothing delayed completion of prescription in terms of section 13, or that anything interrupted its running under sections 14 or 15 of the Act. It is further common cause that if prescription did not begin to run on the day of the settlement the appeal has to fail."*

Further (at 253 B-G), the court held:

> *"Whether the respondent could have enforced compliance with clause (c) [of the settlement agreement] in the absence of an agreement or taxation depends on whether, on the one hand, agreement or taxation simply formed the formal method of liquidating and quantifying the amount of the indebtedness or whether, on the other, it was an agreed condition for payment or that payment was contingent thereon. Put differently, was agreement or taxation a simple procedural step to or was it of the essence of liability? It seems to me that the answer, perforce, has to be that the parties could not have intended that the respondent could recover her costs without a prior agreement or taxation. Any summons claiming payment of costs not agreed upon or not taxed would have been made by a successful exception. From a different angle: in* Van Vuuren v Boshoff *1964 (1) SA 395 (T) at 400E, Colman J held that a simple procedural step which the creditor,*

> without extraneous aid, *can take anytime, cannot delay the commencement of prescription. Agreement or taxation may, conceivably, be termed simple procedural steps, but both require extraneous aid of third parties over whom the respondent had no control. One can compare the case with one where a person undertakes to pay the amount fixed by an architect's certificate or by a referee or an arbitrator. Payment, no doubt, can only be 'due' once the amount has been so fixed (see also* Rogers NO en 'n ander v Erasmus NO en andere *1975 (2) SA 59 (T) 71 – 72.*
>
> *To test this conclusion. If the parties had settled the quantum of costs or if taxation occurred shortly before September 1995, can it be said that the claim would still have become prescribed on that date? I think not."*

[16] It is clear, therefore, that unless there is agreement as to costs or a bill of costs had been taxed, it is impossible to recover costs and it cannot be said that costs has become "due". Prescription cannot commence running until such time that the debt becomes due in terms of section 12(1) of the Prescription Act.

[17] Mr Steyn also relies on a dictum from the unreported judgement in **Botha and Others v Scholtz and Another**, (3424/2016) ZAFSHC 51 (9 March 2017), where it was held:

> *"In my view the first respondent does not enjoy an unlimited right to enforce his claim for costs insofar as he can only quantify his costs and present a bill for taxation as long as the judgment from which is right derives has not prescribed."*

Mr MacKENZIE argues that the dictum is misconstrued. I agree. I read it to mean that a judgment creditor is not limited to present his bill of costs for taxation only whilst the judgment wherein the cost order was made had not prescribed. Even if I am wrong in this interpretation, the prevailing precedent is still as set out in **Santam v Ethwar,** namely that costs become due only once there is agreement on the amount of costs payable or once taxation has taken place.

[18] The respondent's contention that the applicant's right to make the award an order of court has prescribed, must fail. There is no reason why costs should not follow the result.

[19] In the result, I make the following order:

a) The arbitration award dated 22 January 2014, attached to the founding affidavit as "HH2", is made an order of this court in terms of section 31(1) of the Arbitration Act, 1969.

b) The respondent is ordered to pay the applicant's costs of this application.

S. HOCKEY
ACTING JUDGE OF THE HIGH COURT

For applicant: Adv P MacKenzie
Instructed by: Pincus Matz Attorneys
For Respondents: Adv R Steyn

Instructed by: Cluver Markotter Attorneys