REPUBLIC OF SOUTH AFRICA

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

CASE NO: 2013/29145

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

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DATE SIGNATURE

In the matter between:

EKURHULENI METROPOLITAN MUNICIPALITY **PLAINTIFF**

And

VIP CONSULTING ENGINEERS (PTY) LTD **1ST DEFENDANT**

NILOTI CONSTRUCTION & CARPENTRY CC **2ND DEFENDANT**

J U D G M E N T

WRIGHT J

1. The plaintiff has instituted action against the defendants. The first defendant, VIP has delivered a special plea of prescription which is to be determined by me. The second defendant takes no part in the present proceedings. Mr LP

Mkize appeared for the plaintiff and Mr AP den Hartog for VIP. Neither side led any evidence.

COMMON CAUSE FACTS

2. The plaintiff appointed VIP as consulting engineers to a particular building project on 12 February 2007. The appointment was pursuant to a letter of that date setting out VIP's functions. Included in these functions were the obligation to provide construction administration, site supervision and the monitoring of the building project. In particular, VIP was to manage certification of payments by the plaintiff to contractors. VIP had to see to the successful completion of the project.

3. The plaintiff concluded a construction agreement with the second defendant. Building commenced and from time to time VIP signed certificates in favour of the second defendant on the strength of which the plaintiff made payments to the second defendant.

4. On 18 August 2010 VIP issued a certificate to the effect that the second defendant had abandoned its contract with the plaintiff, had failed to proceed with due diligence and had unlawfully subcontracted its obligations. VIP proposed that the plaintiff give the second defendant fourteen days to prepare and submit an action plan. VIP proposed further that if the second defendant failed to do as suggested by VIP the plaintiff terminate its agreement with the second defendant.

5. On 19 August 2010 VIP wrote to the plaintiff attaching a negative payment certificate. VIP said that the certificate, in an amount of R8 810 455,59 was a correction of previous payment certificates based on incorrect quantities of completed works and on incorrect calculations. VIP stated that its certificate was based on VIP's estimate of the value of permanent works completed to date of certificate. In effect, VIP was saying to the plaintiff that the plaintiff had overpaid the second defendant in the amount of the certificate.

6. On 23 August 2010 the plaintiff, having received VIP's letter of 19 August 2010 and its accompanying certificate wrote to VIP stating, among other things, that the plaintiff would hold VIP responsible for any fruitless

expenditure it may incur due to the incorrect certification by VIP of amounts owed by the plaintiff to the second defendant.

7. On 1 March 2011 VIP wrote to the plaintiff recommending that the plaintiff terminate its agreement with the second defendant and, as a matter of urgency appoint another contractor for the completion of outstanding work.

8. On 22 February 2012 the plaintiff wrote to VIP saying that it was considering terminating its agreement with VIP.

9. On 16 August 2012 the plaintiff wrote to VIP terminating their agreement. On the same day the plaintiff sent a letter to the second defendant terminating their agreement.

THE CLAIM

10. The plaintiff claims damages for material breach of contract. VIP is alleged not to have done its job properly and to have colluded fraudulently with the second defendant in submitting false certificates to the plaintiff claiming payment of money not actually due by the plaintiff to the second defendant. The plaintiff alleges that it has suffered damages as a result of VIP's breaches, being the fair and reasonable cost of "*doing the remedial work and / or completing the works*" less "*funds left and / or available to complete the project or works under the construction contract to the tune of R1 908 570,62* " and less certain retention money.

11. The plaintiff alleges that VIP's breaches occurred between December 2008 and November 2009. The plaintiff does not allege when it engaged the services of new contractors to complete the works.

12. Particulars of claim do not allege a repudiation of the agreement by VIP nor is there an allegation that the agreement has been cancelled by the plaintiff. The claim is simply for compensatory damages for breach.

13. Summons was served on VIP on 16 September 2013.

THE SPECIAL PLEA

14. VIP's plea is that the plaintiff was aware of the breaches by 23 August 2010. The first defendant seems to have pleaded together section 12(1) of the Prescription Act 68 of 1969 (to the effect that prescription shall commence to run as soon as the debt is due) and part of section 12(3) (to the effect that a debt shall not be deemed to be due until the creditor has knowledge of the identity of the debtor and of the facts from which the debt arises). As summons was served more than three years after 23 August 2010 the claim is alleged to have prescribed.

15. VIP has not pleaded that the plaintiff's (unpleaded) cancellation of its agreement with VIP on 16 August 2012 was out of time.

FINDINGS

16. In my view the special plea is bad. The plaintiff has not sued VIP for payment of the sum of R8 810 455,59. The plaintiff claims damages for breach of contract, crisply put, in the form of the fair and reasonable costs of completing the works. The plaintiff must have been entitled on receipt of the negative certificate 19 August 2010 to consider its position. It could not have been obliged to accept, without more, an about face by VIP in an amount of over R8m. VIP has not proved that by 23 August 2010 the plaintiff knew:

    16.1 that it would cancel its agreement with VIP or

    16.2 that it would engage replacement contractors to complete the work not completed by the second defendant or

    16.3 the cost of completing the works.

17. In **Minister of Public Works & Land Affairs v Group Five Building Ltd 1999 (4) SA 12 (SCA)** at page 25G Schutz JA, speaking for the majority of the court held that a stage is reached when a defaulting contractor in a building contract is entitled to no more chances and that that is the earliest stage at which the employer's damages claim could conceivably have become due. Applying this reasoning to the present case, the second defendant should, at VIP's suggestion in its letter to the plaintiff of 18 August 2010, have been afforded at least 14 days' opportunity to rectify its defects.

18. Mr den Hartog, for VIP argued that **Minister of Public Works** is distinguishable from the present case. He submitted that it is the second defendant, not VIP which is in the position of the defaulting contractor in **Minister of Public Works**. To my mind this is a distinction without a difference. The way the claim is pleaded piggy-backs the claim for damages against VIP on the claim for damages against the second defendant. Whether or not the plaintiff's claim is expiable or otherwise bad is not a question before me. VIP, having raised its special plea must take the particulars of claim as it finds them.

19. In **McKenzie v Farmers' Co-operative Meat Industries Ltd 1922 AD 16** at 22 the court held that the words "*cause of action*" meant "*Every fact which it would be necessary for the plaintiff to prove, if traversed, in order to support his right to the judgment of the Court. It does not compromise every piece of evidence which is necessary to prove each fact, but every fact which is necessary to be proved* ". In **HMBMP Properties (Pty) Ltd v King 1981 (1) SA 906 NPD** at 909E Thirion J held that in order to be able to institute action for the recovery of a debt the creditor must have a complete cause of action in respect of it.

20. One must draw a distinction between a debt and a cause of action. See **Evins v Shield Insurance Co Ltd 1980 (2) SA 814 AD** at 825E – H and **CGU Insurance Ltd v Rumdel Construction (Pty) Ltd 2004 (2) SA 622 SCA** at 628A – D. In **CGU** Jones AJA held that the debt is not a set of material facts or a cause of action. The debt is that which is begotten by the set of material facts.

21. The meaning of the words "*debt is due*" in section 12(1) is that there must be a debt immediately claimable by the creditor, or put differently, that there is a debt in respect of which the debtor is under an obligation to pay immediately. See **Van Reenen v Santam Limited 2013 (5) SA 595** at paragraph 12. It is artificial for VIP to suggest that by 23 August 2010 VIP was under an obligation to pay the debt claimed.

22. Mr den Hartog relied on the decision in **Munnikhuis v Melamed NO 1998 (3) SA 873 WLD** as authority for the proposition that the debt claimed in the

present case became due when the plaintiff received the negative certificate. He argued that the plaintiff did not need to know the quantum of its claim for the debt to have become due. In my view the decision in **Munnikhuis** does not assist VIP. Wunsh J, speaking for the full court said at 887F –H that "*The right to claim performance, and thus the time when the debt is due, may arise only …. in the case of property insurance, [on] the date when the extent of the physical loss is known – not the date of the final ascertainment of its pecuniary extent (**Cape Town Municipality and Another v Allianz Insurance Co Ltd 1990 (1) SA 311 C at 321F and 324A**), or when the creditor has performed, in whole or in part, as in the case of leases and contracts for work.*"

23. I would distinguish the present case on two bases. Firstly, it is not a claim for performance of an insurance contract. Rather it is one for damages following the breach of an engineering services agreement. Secondly, the plaintiff knew by 23 August 2010 only that VIP had made:

    23.1 an allegation of breach of contract by the second defendant and

    23.2 tacitly, an admission that VIP itself had made a mistake or mistakes in previous payment certifications.

24. At best for VIP, the plaintiff, by 23 August 2010 may have had a claimable debt against VIP for repayment of R8 810 455,59. That claim has not been pleaded.

Order:

1. The first defendant's special plea of prescription is dismissed with costs.

GC WRIGHT J
JUDGE OF THE HIGH COURT,
GAUTENG LOCAL DIVISION,
JOHANNESBURG

On behalf of the plaintiff:	Adv LP Mkize
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On behalf of the 1st defendant:	Adv AP den Hartog
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Dates of Hearing:	3 and 4 March 2015
Date of Judgment:	6 March 2015