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PRESCRIPTION OF CLAIMS UNDER THE GCC 2015

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Prescription dictates the shelf-life of a claim. The word ‘prescription’ refers to the extinguishing (or expiry) of a debt, due to the lapse of a specified period of time. For the purposes of a claim arising under a construction contract, this period is generally three years.

If the claim is not correctly and timeously pursued within this three-year period, the right to claim falls away, and the creditor has no further entitlement. The claim is extinguished and cannot be revived.

This can be avoided by referring the claim to arbitration or court proceedings within the three-year period. How one goes about doing this correctly, will be addressed below.

The Prescription Act

Those who have had experience with claims submitted for extensions of time and additional costs under a construction contract, such as the SAICE General Conditions of Contract for Construction Works (GCC), will be aware of the contractual time limits (time bars) imposed on such submissions. For example Clause 10.1.4 of the GCC 2015 states that, should the Contractor fail to submit its claim within 28 days of the event giving rise to the claim having occurred, *“the Due Completion Date shall not be extended, the Contractor shall not be entitled to additional payment, and the Employer shall be discharged of all liability in connection with the claim”*.

There is a similar time bar provision relating to the submission of a notice disputing the Employer's Agent's ruling on this claim contained in Clause 10.3.1.5, and the submission of a notice disputing the Adjudication Board's decision on such dispute contained in Clause 10.6.1.2.

What most parties to a construction contract are not aware of, is the longer lead statutory time bar to be found under the Prescription Act No. 68 of 1969 (the Act). This Act applies to all construction contracts, whether the parties thereto are aware of it or not.

What Constitutes a Debt?

Chapter III of the Act relates to the prescription of debts. The Act does not give a definition of a 'debt'.

This concept has, however, been subjected to extensive judicial consideration. It is understood to have a broad meaning, which includes not only monetary claims, but other obligations which may become due under a contract¹, such as the Employer's obligation to provide access to and possession of the Site².

This meaning is sufficiently broad to include claims for both extensions of time and additional payment or compensation under Clause 10 of the GCC 2015.

The Prescription Period

In terms of Section 10(1) of the Act, a debt is extinguished by prescription after the lapse of a specified period. Section 11 specifies the relevant periods of prescription. Unless the debt falls into a

special category, Section 11(d) stipulates that a debt will prescribe after three years.

Generally, this will be the period applicable to claims made under Clause 10 of the GCC 2015.

When Does Prescription Start to Run?

In terms of Section 12(1) of the Act, and subject to certain specific exceptions, prescription starts to run as soon as the debt is due. In terms of Section 12(3) of the Act, a debt will not be deemed to be due until the creditor has (or should reasonably have acquired) knowledge of the identity of the debtor and of the facts from which the debt arises.

The claims process, from event to final resolution of a dispute, under the GCC 2015 is staggered. There are a number of notable dates, from which flow various consequences.

There is the date the event occurred, which may differ from the date the Contractor became (or should reasonably have become) aware of the implications of such event.

1 Leviton & Son v De Klerk's Trustee 1914 CPD 685

2 LTA Construction Ltd v Minister of Public Works and Land Affairs 1992 (1) SA 837 (C) in Christie's Law of Contract in South Africa (7th Edition) LexisNexis 2016, pg. 561

Then the date the Contractor's Clause 10.1 claim is due (28 days after the event occurred), the date the Employer's Agent's Clause 10.1.5 ruling is due (28 days after the Contractor submits its claim), the date the Clause 10.3 dispute notice is due (28 days after the event giving rise to the dispute i.e. the Employer's Agent's ruling), the date the Adjudication Board's decision is due (28 days after the submission of the last document to the Adjudication Board), and the date the notice of disagreement with the Adjudication Board's decision is due (between 28 and 56 days after receipt of the decision). Each of these dates may differ from the date the claim/ruling/notice or decision is actually delivered.

The date when a debt becomes due and the date when it is claimed, however, will not necessarily coincide³.

A debt will only be considered due when it is immediately claimable by the one party, and payable by the other⁴. This means that every fact that must be proved in support of the entitlement must have occurred⁵.

The test for whether or not a debt is immediately claimable, is summarised by Christie⁶ as when *"the creditor [has] the right to institute proceedings for its recovery at that time, and to do so its cause of action must be complete in the sense that every fact it has to prove to support its entitlement to judgment on its claim must have occurred"*.

This raises questions about whether a debt can be said to be due, when the provisions of the contract (such

as Clause 10 of the GCC 2015) require a claim to be made first to the Employer's Agent and then referred to adjudication, before it can be pursued in either arbitration or court proceedings. Caution, however, dictates that one should ensure that steps have been taken to delay or interrupt the running of prescription, within three years of becoming aware (or when you ought to have reasonably become aware) of a debt under a construction contract. This will ensure that there can be no argument on the issue.

This is supported by the attitude adopted by the courts in both Murray & Roberts Construction (Cape) (Pty) Ltd v Upington Municipality⁷ and the unreported judgment of Group Five Construction (Pty) Ltd v The Minister of Water Affairs and Forestry⁸, confirmed on appeal to the Supreme Court of Appeal⁹.

In both of these cases, the court accepted that prescription had started to run when the event arose, prior to submission of a claim to the engineer (Employer's Agent under the GCC 2015).

3 McKenzie's Law of Building and Engineering Contracts and Arbitration, 7th Edition, Juta & Company (Pty) Ltd, 2014, pg. 118

4 The Master v IL Back & Co Ltd 1983 (1) SA 986 (A) in Christie, pg. 565

5 McKenzie v Farmers' Co-op Meat Industries Ltd 1922 AD 16 23 in Christie pg. 565

6 Pg. 565

7 1984 (1) SA 571 (A)

8 2010 JDR 0512 (GNP)

9 Group Five Construction (Pty) Ltd v The Minister of Water Affairs and Forestry 2011 JDR 0161 (SCA)

Can Completion of Prescription be Delayed or Interrupted?

The completion/expiry of the three-year prescription period may be delayed or interrupted by a number of circumstances/events.

For the purposes of a construction claim, however, Sections 13(1)(f) and 15(1) of the Act are the most pertinent. In terms of these sections, the running of prescription may be:

- Delayed if the claim is the object of a dispute subjected to arbitration, or
- Interrupted by the service of any process (such as a summons) whereby payment is claimed.

Should either party dispute the Employer's Agent's Clause 10.1.5 ruling, however, Clause 10.5 first mandates reference of the dispute to adjudication (either standing or ad hoc). Only once the Adjudication Board has delivered its decision, do the parties have the right to refer the dispute to either arbitration or court proceedings (Clause 10.6.1), depending on which process was selected, by the parties, as recorded in the Contract Data.

A party pursuing a claim, must follow the process set out in the Contract Data, and cannot unilaterally elect to use a different process.

Delay of Prescription by way of Arbitration

In *Murray & Roberts Construction (Cape) (Pty) Ltd v*

Upington Municipality, the parties had contracted on terms similar to those contained in the GCC 2015, in that a staggered dispute resolution process, culminating in a reference to arbitration, was stipulated.

With this in mind, the Appellate Division found that, for the purposes of Section 13(1)(f) of the Act, the whole dispute resolution process (similar to that set out in Clause 10 of the GCC 2015), including submission of a claim to the engineer (Employer's Agent) for decision, must be considered one of arbitration.

Thus, if arbitration is selected in the Contract Data, simply submitting a claim to the engineer (Employer's Agent) for decision postpones the completion of prescription, until one year after the arbitration proceedings have ended.

Interruption of Prescription by way of Court Proceedings

Somewhat confusingly, under similar contractual provisions culminating in reference of a dispute to court proceedings rather than arbitration, in *Group Five Construction (Pty) Ltd v Minister of Water Affairs and Forestry*, the North Gauteng High Court (as confirmed on appeal by the Supreme Court of Appeal) found that, for the purposes of Section 15(1) of the Act, submission of a claim to the engineer (Employer's Agent) for decision, does not constitute service of process for the purposes of interrupting prescription.

It appears, therefore, that if court proceedings are selected in the Contract Data, in order to interrupt prescription, one must officially serve legal process (such as a summons) by way of the Sheriff of the Court. Simply following the preliminary procedure set out in Clause 10 of the GCC 2015 (referring the claim first to the Employer's Agent and then to the Adjudication Board) will not interrupt prescription.

The Reason for the Discrepancy

The reason for this discrepancy appears to rest in the wording of the two different sections of the Act:

- Section 13(1)(f) references a claim which is the object of a dispute subject to arbitration. This Section is broadly worded and can support an interpretation, which includes the contractual dispute procedure leading up to the arbitration itself.
- Section 15(1), however, specifically requires service of process, which process is defined in Section 15(6) as including "*a petition, a notice of motion, a rule nisi, a pleading in reconvention, a third party notice referred to in any rule of court, and any document whereby legal proceedings are commenced*". This is a narrow list, which does not lend itself to the inclusion of contractual dispute procedures leading up to the institution of court proceedings.

Conclusion

The Act applies to claims for both an extension of time and additional payment/compensation made in terms of Clause 10.1 of the GCC 2015, which claims constitute a debt for the purposes of prescription.

Prescription will start running on such a debt from the date the Contractor became (or should reasonably have become) aware thereof, and (barring certain special circumstances) will extinguish this debt after three years, unless the running of prescription is delayed or interrupted by the subjection of the debt to arbitration or the issue of process instituting court proceedings.

Whether a dispute is subjected to arbitration or court proceedings under the GCC 2015, will depend on the option selected by the parties, in the Contract Data.

A debt can be considered to have been subjected to arbitration (provided the contract in question makes provision for reference of the dispute to arbitration) once the Clause 10.1 claim has been submitted to the Employer's Agent.

On the other hand, prescription will only be interrupted by service of process, where that process constitutes "*a petition, a notice of motion, a rule nisi, a pleading in reconvention, a third party notice referred to in any rule of court, and any document whereby legal proceedings are commenced*" or similar.