

MDA PRESENTS



FIRST AID FOR CONTRACTS



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FIDIC 2017 SAYS ADJUDICATION INTERRUPTS PRESCRIPTION...BUT IS THIS PERMISSIBLE UNDER SOUTH AFRICAN LAW?

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Clause 21.4.1 of the latest edition of the FIDIC contract (2017) states that the reference of a dispute to adjudication shall, unless prohibited by law, be deemed to interrupt the running of any prescription period.

Prescription is a legal principle in terms of which a debtor's liability to pay an outstanding debt¹ is extinguished after the passing of prescribed time periods. In South Africa, prescription is governed by the Prescription Act, 68 of 1969 (the "Act"). The period for prescription of a debt is three years and commences from when such debt was due.

The standard forms of construction contracts used in South Africa provide for multi-tiered dispute resolution, whereby you go through interim processes (referring claims to the Engineer and referring a

dispute to adjudication) before reaching the final process (arbitration). Getting to the point of arbitration could take time and by the time you get there, three years since the debt was due may have transpired, placing one at risk of prescription.

The Act provides for circumstances which interrupt or delay prescription but is silent on whether a reference to adjudication interrupts / delays prescription.

FIDIC 2017 makes provision for parties to expressly agree to an interruption to prescription upon entering the contract. The question is, is this permissible in South Africa?

The Act does not expressly prohibit parties from making such an agreement.

¹ The term "debt" is not restricted to claims sounding in money – It means whatever is due under an obligation

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And it appears that the courts haven't had to answer this question directly. The courts have held that parties may adjust the period of prescription so long as it does not negate the institution of prescription and does not conflict with the principles of public policy.² In applying these conditions, the courts have held that prescription cannot be waived before the prescription period has commenced to run – for example, agreeing in a contract that prescription will not apply to any debts that arise under that contract – doing so would completely undermine the institution of prescription.

So where does this leave clause 21.4.1 of FIDIC which, although agreed prior to any prescription period running, does not remove one's right to prescription per se but merely allows for an agreement that adjudication will interrupt it?

The Constitutional Court has applied the constitutional principle of fairness to prescription to ensure that a rigid application of the prescription legislation does not result in injustice³.

I would suggest that similar principles could be applied to a case where a party disputes the validity of clause 21.4.1 for the following reasons:

- Firstly - The Act's main practical purpose is to promote certainty in the ordinary affairs of people. Where a dispute is referred to adjudication, all uncertainty about its existence is removed and prescription should obviously not continue running while the contractual provisions take their course.
- Secondly - If a party attempted to proceed to arbitration directly, an arbitrator would determine that he / she has no jurisdiction as the contract provides for adjudication. It would not be fair for prescription to continue to run when a party is forced to proceed with interim measures first.
- Thirdly – The courts have previously decided that prescription should be delayed by an interim procedure requiring a party to a building contract to refer a dispute to an engineer for determination first.⁴

Although clause 21.4.1 reads easily and could be permissible under South African law, there are still underlying issues to contend with, for example:

- The clause provides no guidance on the conditions of the interruption. Does the prescription period run afresh from when the adjudication is referred? Or, does is the prescription period placed on pause from the time the adjudication is referred and if so, for how long?

² *De Jager En Andere v Absa Bank Bpk* 2001 (3) SA 537 (SCA)

³ *Links v Department of Health, Northern Province* 2016 (4) SA 414 (CC)

⁴ *Murray & Roberts Construction (Cape) (Pty) Ltd v Upington Municipality* 1984 (1) SA 571 (A).

- When a party is in breach of contract, that party cannot enforce its contractual rights until it has properly performed its obligations. Therefore, if a party is in breach of a material term of the contract themselves, they may not be able to rely on the term which provides for the interruption of prescription.

I foresee that most parties to the FIDIC 2017 contract will interpret clause 21.4.1 simply, namely adjudication interrupts the prescription period, and there won't be any issues. The issues will arise where parties are grasping at straws to either avoid claims or avoid prescription, and this is where their attorneys may come up with some clever arguments around the applicability of this clause. We'll have to wait how things pan out in such a scenario.