IN THE HIGH COURT OF SOUTH AFRICA
FREE STATE DIVISION, BLOEMFONTEIN

Reportable: YES/NO
Of Interest to other Judges: YES/NO
Circulate to Magistrates: YES/NO

Case no: 628/2017

In the matter between:

TUSK CONSTRUCTION SUPPORT SERVICES (PTY) LTD Plaintiff

and

TOKOLOGO LOCAL MUNICIPALITY Defendant

CORAM: VAN ZYL, J

HEARD ON: 8 - 9 OCTOBER 2019; 10 AUGUST 2022; 29 - 30 AUGUST 2023

DELIVERED ON: 29 FEBRUARY 2024

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[1] This is a claim for payment of two amounts, R800 000.00 and R113 427.55, together with interest and costs, based on a

cession *in securitatem debiti* executed by Thiza Construction CC (now in liquidation) (“*Thiza*”) in favour of the plaintiff.

[2] The defendant pleaded, *inter alia,* prescription, a *pactum de non cedendo* and various denials. However, after Mr Grobler, who appeared on behalf of the defendant, closed the defendant`s case, he indicated that the defendant is no longer persisting with the defence based upon an alleged pactum *de non cedendo.*

[3] The parties agreed that the special plea of prescription be adjudicated together with the other issues.

Background and the Pleadings:

[4] The plaintiff renders construction support services to emerging contractors. It concluded contracts with Thiza in relation to two projects, one at Winburg and one at Hertzogville, in terms whereof the plaintiff rendered construction support services to Thiza and for which the plaintiff obtained two judgments in this court, one for R800 000.00, dated 8 November 2011, and one for R113 427.55, dated 24 January 2012. The obtaining of the judgments is not in dispute.

[5] On or about 2 July 2010 Thiza concluded a written session *in securitatem debiti* (“t*he cession*”) *in* favour of the plaintiff in terms of which Thiza ceded all its rights in and to any amount which may be due or become due to it by any person for any reason whatsoever to secure any amount due by Thiza to the

plaintiff. As indicated earlier, the conclusion and the validity of the cession is no longer in dispute.

[6] The following disputes regarding the cession and the liability of the defendant are reflected in the pleadings:

1. The plaintiff pleaded the following at paragraphs 8, 9 and 10 of its particulars of claim:

> "8.
>
> On or about 1 August 2012 the defendant, represented by its Municipal Manager Adv. L.M.A. Mofokeng, in writing acknowledged the aforesaid cession and the defendant`s liability to make payment to the plaintiff in terms thereof. A copy of the aforesaid acknowledgement is attached hereto as annexure "D".
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> 9.
>
> At all relevant times the defendant was aware of the aforesaid judgments, Thiza`s indebtedness in terms thereof, and the cession in favour of the plaintiff.
>
> 10.
>
> The defendant was indebted to Thiza in an amount which exceeds the plaintiff`s claims in terms hereof.
>
> 11.
>
> Despite demand, the defendant has failed or refused to make payment to the plaintiff of any amounts due.
>
> 12.
>
> In the premises the defendant is liable to make payment of the aforesaid sums to the plaintiff.

2. The defendant pleaded to the aforesaid paragraphs as follows:

"5. **AD PARAGRAPH 8 THEREOF:**

5.1 Except to admit that a letter was sent on behalf of the Defendant on the 1st August 2012, the remainder of this paragraph is denied. Without detracting from the above the Defendant pleads as follows:

5.1.1 The letter does not constitute an acknowledgement of the cession or the Defendant`s liability to make payment; and

5.1.2 At the finalization of the project no retention money was due to Thiza Construction."

6. **AD PARAGRAPH 9 THEREOF:**

6.1 The defendant denies each and every averment contained in this paragraph and puts the plaintiff to the proof thereof.

7. **AD PARAGRAPHS 10, 11, 12 AND 13 THEREOF:**

7.1 The contents of these paragraphs are denied and the Plaintiff is put to the proof thereof."

[7] In respect of the special plea of prescription, the following averments are contained in the pleadings:

1. The defendant pleaded as follows at paragraph 1 of its plea:

"1. **AD SPECIAL PLEA – PRESCRIPTION:**

1.1 In terms of the Plaintiff`s particulars of claim the claim would have been due since **8 November 2011** and **24 January 2012** respectively.

1.2 Summons in this matter was served during **February 2017**, which is more than three years after the date that the amount would have become due.

1.3 In the premises the Plaintiff`s claim has become prescribed in terms of **Section 11** of **Act 68 of 1969**."

2. The plaintiff thereupon filed a replication in which it responded as follows:

"1. The plaintiff admits that service of the summons on the defendant took place during February 2017.

2. All other averments therein contained are denied.

3. More particularly, but without derogating from the generality of the aforesaid denial, the plaintiff pleads as follows:

a. The plaintiff was unaware of any monies which became owing to or paid by the defendant after 1 August 2012.

b. The plaintiff, taking reasonable steps to ascertain the facts:

i. On 19 September 2013 addressed a request for information in terms of section 18(1) of the Promotion of Access to Information Act, Act 2 of

2000, to the defendant, a copy of which is attached hereto as annexure “R1”;

ii. The defendant, in contravention of the provisions of the Act, failed or refused to comply with the request.

iii. The plaintiff, thereafter, proceeded to apply for the liquidation of the principal debtor, Thiza Construction CC;

iv. The plaintiff then applied for and was granted permission to conduct an insolvency enquiry, and to that end, caused a subpoena to be issued inter alia, to Aurecon, the consulting engineer engaged by the defendant in respect of the project concerned.

v. On 24 October 2016 the plaintiff received copies of payment certificates 1 – 31, issued to the defendant, and confirmation regarding payments made by the defendant to Thiza, pursuant to the aforesaid subpoenas.

c. The plaintiff was, accordingly, unaware of the facts which gave rise to its claim against the defendant, before 24 October 2016, and could not have known of those facts having exercised reasonable care.

4. In the premises the plaintiff`s claim against the defendant has not become prescribed.”

The evidence:

[8] Mr Ellis, who appeared on behalf of the plaintiff, presented the evidence of two witnesses, which evidence has been

transcribed. The defendant closed its case without presenting any evidence.

[9] The first witness was Mr Werner Barnard, a civil engineer, employed by Aurecon. He was the overseeing engineer engaged by the defendant in respect of certain water purification works in Hertzogville, being one of the projects which is the subject matter of the contracts between Thiza and the defendant. He became involved with the project soon after it started, but was not involved in the tender process or the conclusion of the contract between Thiza and the defendant. Mr Barnard prepared the payment certificates showing the amounts due to Thiza by the defendant. Apart from one telephone call from the plaintiff during the execution of the contract, of which his recollection is vague, he did not have contact with the plaintiff. During the aforesaid telephone call, his stance was that he would not disclose any information about the project to third parties such as the plaintiff.

[10] At a later stage he was subpoenaed at the plaintiff's behest to testify in an insolvency enquiry in respect of Thiza in November 2016. When he received the aforesaid subpoena, he co-operated by sending a detailed letter to the liquidators, dated 24 October 2016, in which he tendered all the required information, as well as copies of 31 payment certificates, 30 of which certificates were issued to Thiza. Certificate 31 was issued, on the instructions of the defendant, in favour of another third party, Universal Mining and Civil Contractors (Pty) Ltd, trading as Amanzi Projects. The said certificate therefore

signified an indebtedness between the defendant and Thiza, but which was certified for payment to a third party.

[11] Mr Barnard was unable to say whether any contract, whether in the form of the General Conditions of Contract (2004 edition), or in any different format, was ever concluded between the defendant and Thiza.

[12] With regard to payment certificate 30, Mr Barnard testified that retention money in the amount of R967 600-05 was held back on instruction of the defendant, which was used to pay four court orders in two cases, which were not the court orders against Thiza in favour of the plaintiff. After payment of those court orders the retention money was, according to the said certificate and the evidence of Mr Barnard, depleted.

[13] In cross-examination Mr Barnard was referred to and testified about certain parts of the contents of the letter of 24 October 2016, which he addressed to the liquidators in response to the subpoena he received. In this regard I deem it necessary to quote the paragraphs from the letter which Mr Barnard was referred to during cross-examination:

> 3.c. The progress on site was very slow and after much effort the Contractor's termination was recommended by Aurecon (formal letter February 2012).
>
> d. Thiza Construction responded to the termination letter with an implementation plan to finish the contract and the Employer granted them extension.

e. The Contractor received a second letter (August 2012) of termination for non-performance and quality issues. The Contractor removed items (plant and materials) from site as they indicated that they have no funds available to do remedial works.

f. The Employer took to other resources in finishing the project. The Employer requested their own sub-contractors to assist and obtained new quotations to finish the project.

g. This implementation was finalized (November 2012) in that a sub-contractor, Mr C Van Eeden (Local Contractor) finished the project under the support and control of the Employer.

h. …

i. Thiza Construction was supposed to finish the project within 8 months. After 30 months, Thiza Construction left and abandoned the site. The Employer finished the project in March 2014 using their own resources."

[14] Mr Barnard testified in response to a question by Mr Grobler that Thiza basically abandoned the site during August 2012. When asked whether that is the reason why Thiza did not become entitled to the payment of the retention money or anything else, Mr Barnard confirmed same.

[15] Mr Grobler referred Mr Barnard to payment certificate 30, dated 29 August 2013, and in which Thiza Construction is indicated as the contractor. It certified an amount of R34 503.02 payable to Thiza. The following cross-examination occurred with reference to the said certificate:

"MR GROBLER: Okay, so this payment certificate was issued at the time … where Thiza had already abandoned the site?

MR BARNARD: That is correct, like I say we have no documentation at that stage, or any stage after the termination recommendation, what I perceive was that Thiza was still you know asking what is going on with the project, etc. etc., but that was the relationship between him and the employer, and of course we wanted to finish a project we have our scope and we have our budget that was left, so these were the payments that were certified by us, work done, currently like I say Mr van Eeden that I referred to in the letter….. he had no company name or anything like that, I suppose he was trading either under Thiza Construction or the employer.

MR GROBLER: Alright, so that explains why … the heading payment certificate no. 30 still records the contractor as Thiza Construction.

MR BARNARD: Yes.

MR GROBLER: But your payment certificate should not be understood as referring that this amount or whatever is therein indicated is due to Thiza, because they had abandoned site.

MR BARNARD: Like I say we did not have any documentation saying that a new contractor was appointed or anything of that case, so we kept on with our documentation."

[16] The second witness for the plaintiff was Mr Jaco Roux. He is the Legal Services Manager of the plaintiff and has been in its employment since 13 October 2010, some three months after the cession agreement was concluded. He is not involved in the operational side of the business of the plaintiff, but became involved when legal steps were taken against Thiza.

[17] He described the business of the plaintiff as "*construction support services*", which included the evaluation of tenders, assistance in procurement of goods and services for emerging contractors, the arrangement of performance guarantees and bridging finance.

[18] Mr Roux confirmed the indebtedness of Thiza to the plaintiff in the sum of R800 000.00 in respect of the Hertzogville project and R113 427.15 in respect of the Winburg project.

[19] Mr Roux confirmed that he addressed two letters to the defendant's Municipal Manager, Mr Mofokeng, wherein Mr Mofokeng was notified of the existence of the cession agreement. In a letter of 26 October 2010 Mr Roux, *inter alia*, stated the following:

> "We furthermore confirm that Thiza has ceded all its rights, title and interest in every and any amount which is now owed to it or which may in future become owed to them by any person for any reason at all as security for the payment by them for each and every amount due by Thiza to Tusk. A copy of the aforementioned cession is attached hereto marked as annexure "A".
>
> We confirm that the aforementioned cession is dated 2 July 2010.
>
> We hereby advise you formally of the aforementioned cession.
>
> Please note that in terms of the law of cession, you are from the date of receipt of this letter to acknowledge the aforementioned cession, as well as being obliged to make all and any payments due to Thiza to Tusk in its capacity as cessionary of all and any amounts due to Thiza.

Please note that should you proceed to make any payments to the contractor or any other cessionary that obtained a cession after 2 July 2010, that Tusk will be entitled to hold you liable for such payment as well.

Please note that we URGENTLY require you to acknowledge receipt of this document within 48 (forty-eight) hours from date of this letter and to confirm that you will act accordingly, in terms of this cession."

[20] In a letter of 22 November 2010. Again addressed to the Municipal Manager, Mr Roux referred to the letter dated 26 October 2010 and confirmed that the plaintiff had not yet received a response. Mr Roux recorded the bank account details of the plaintiff and further stated as follows:

"**WE RECORD THAT, SHOULD THE MUNICIPALITY PROCEED WITH PAYMENT TO THE CONTRACTOR DIRECTLY, TUSK WILL HOLD THE MUNICIPALITY LIABLE FOR ALL AND ANY DAMAGES SUFFERED AS A RESULT OF THE TOKOLOGO MUNICIPALITY IGNORING OUR CESSION IN THIS REGARD**."

[21] The aforesaid notification did not elicit a response from the defendant and the plaintiff then instructed its attorneys, Coetzer & Partners, to address a letter to the defendant, which they did on 16 February 2011. In the said letter the Municipal Manager of the defendant was again advised of the existence of the cession and the fact that he had not yet acknowledged receipt of the letters from the plaintiff. The plaintiff's attorneys further stated as follows:

"…it may be that you are proceeding to make payments to Thiza despite the knowledge that you have had of the cession since 26 October 2010.

We shall be serving this letter by fax and sheriff and we shall also be requesting copies of your financial records in terms of the Access to Information Act, 2000, indicating what payments, if any, were made to Thiza in contravention of our client's cession.

If you are in possession of a deed of cession that was lodged with you by any creditor of Thiza that is dated prior to 26 October 2010, you are requested to inform us of its existence and furnish us with a copy thereof."

[22] The Municipal Manager responded on 9 March 2011 by inviting the plaintiff to a round table conference on 15 March 2011. The plaintiff, through its attorneys, declined the invitation to a round table conference, but requested the defendant to make a proposal in writing. The Municipal Manager then responded by means of a letter dated 14 March 2011, addressed to the plaintiff's attorneys, wherein he, *inter alia*, relied on an alleged *pactum de non cetendo*, which is of no relevance anymore for purposes of the adjudication of this matter. The Municipal Manager further stated as follows:

"This effectively means that the cession signed between your client and Thiza Construction is of no force and effect insofar as Tokologo Local Municipality is concerned and thus cannot be enforceable upon the municipality and it is therefore rejected.

Take notice that until there is a Court Order to the contrary, Tokologo Local Municipality will continue to perform in terms of the Contract signed between itself and Thiza Construction.

Notwithstanding, we note that your client's claim and/or cession against Thiza Construction is for the amount of R113 427-55. We have to advise that the above project is a MIG Multi Year project and funding thereof is dependent on regular and uninterrupted progress, bar for natural forces

and/or disasters beyond human control. We have to emphasize that we cannot afford any delays therefore of any nature, hence we are willing to reserve the amount of R113 427-55 from future payments of Thiza Construction, for a period of at least three (3) months or so as to enable your client and Thiza Construction to settle the matter at Court. The reserving of funds will ensure that should the Court Order favour your client in this instance the said funds will be released to them without delay."

[23] In a letter to the Municipal Manager, dated 22 September 2011, the plaintiff's attorneys again referred to the pending litigation between the plaintiff and Thiza in respect of the Winburg project and sought confirmation of the respondent`s earlier undertaking. No response was forthcoming from the defendant.

[24] During or about July 2012 the sheriff served a writ of execution in respect of the judgment in favour of the plaintiff regarding the Winburg project on the defendant. On 31 July 2012 the plaintiff's attorneys wrote a letter to the Municipal Manager and provided him with the attorneys' banking details. On **1 August 2012** the defendant addressed a letter to the sheriff, Christiana, with reference to the judgment obtained in the Winburg project and stated as follows:

"The above matter as well as previous engagements between writer hereof and your goodself pertaining to the above matter has reference.

We undertake herewith to pay to yourselves all the money due to Tusk Construction Support Services from the retention money that will be due to Thiza Construction at the completion of the project. Please take note

that the retention money is only paid out a year after the completion of the project.” (My emphasis)

[25] On 28 February 2013 the plaintiff’s attorneys again wrote to the defendant and reminded it of the cession, the two outstanding judgments and its undertaking to make payment to the sheriff in favour of the plaintiff of monies and retention due to Thiza by the defendant. It was also stated that according to the instructions of the plaintiff`s attorneys, the project was due to be completed in the coming two weeks. Similar letters were addressed by the plaintiff’s attorneys to the defendant on 11 June 2013 and again on 2 July 2013. In the last letter the following was stated by the plaintiff’s attorneys:

“We hereby request, as a matter of urgency, that you provide us with an undertaking that the said monies will be paid directly to us, as well as an indication as to when the retention monies will be payable.”

The defendant failed to respond.

[26] On 24 July 2013 the plaintiff’s attorneys addressed a letter to Morobane Attorneys, who represented the defendant at the time. In the said letter the following was stated:

“We have obtained judgment against Thiza Construction CC and have already duly attached any monies and retention due to them by Tokologo Municipality by means of a writ of attachment under case number 1162/2011 from Bloemfontein High Court.

We have been instructed by Mr Vusi from the Municipality that you are acting on behalf of the Municipality in this matter.

Kindly as a matter of urgency confirm when the monies due to Thiza Construction CC will be paid to our client. The monies due to Thiza Construction CC are due to our client in terms of cessions signed by Thiza Construction CC (these cessions have already been lodged on your client) as well as the attachment by the Sheriff."

[27] On 25 July 2013 Morobane Attorneys responded by relying on the alleged *pactum de non cedendo*, which is of no consequence anymore.

[28] On 19 September 2013 the plaintiff commenced the process in terms of the Promotion of Access to Information Act, Act 2 of 2000 ("PAIA") to obtain information regarding the amount of payments to which Thiza had become entitled. The defendant failed or refused to comply with the request. The plaintiff did not pursue an application to court in terms of PAIA, but instead, decided to follow the process of liquidation against Thiza. A liquidation application was lodged during January 2014 and a provisional liquidation order was issued on 6 February 2014, which order was confirmed on 22 May 2014.

[29] The plaintiff called upon the liquidators to convene an insolvency enquiry and to subpoena Mr Barnard, as also testified by Mr Barnard himself. Prior to the date of the insolvency enquiry, Mr Barnard delivered the letter and the payment certificates referred to earlier in the judgment and the insolvency enquiry was subsequently not proceeded with. The plaintiff received the last mentioned information on 24 October 2016 and served summons on the defendant during 28 February 2017.

[30] With regard to the necessity to have held the insolvency enquiry Mr Roux testified as follows:

"WITNESS: The purpose of the enquiry would have been to establish the nature of any of the business of Thiza, whether there would be any claims still outstanding, any proceeds. Understandably Thiza was not giving its co-operation and we were struggling to get any information from the municipality as well.

MR GROBLER: So I am just going to ask you this question again. You said that after Mr Barnard gave you this letter, this two-page letter and he gave you payment certificates 1 to 31 there was no need to proceed with the enquiry?

WITNESS: That is correct.

MR GROBLER: So one can assume that having said, provided you with these documents you knew what you wanted to know?

WITNESS: That is correct.

MR GROBLER: The purpose for which the enquiry had been convened had been served.

WITNESS: That is correct."

[31] During further cross-examination Mr Roux was asked why it took more than two years after the final order of liquidation before the insolvency enquiry was held. Mr Roux responded as follows:

"I remember there was a time lapse. We were struggling firstly to get the response from the Master's office and I am not going to, it is difficult to be specific regarding timelines, but it was a struggle. In the end it was

agreed that the enquiry would be convened in Sasolburg, which was the domiciled addressed of Thiza and the surety and it was quite a struggle firstly to get the Master to agree and then all the logistics, etc. But to confirm how long it actually took, that will be difficult for me to state."

[32] Mr Roux also testified that when the defendant did not respond to the process in terms of PAIA, they had to take a decision whether to pursue an application in terms of PAIA or whether to follow the route of a liquidation application. He testified that the application in terms of PAIA would also have taken some time. Eventually they decided to follow the route of a liquidation.

The cession:

[33] A cession *in securitatem debiti* is described, in general terms, as follows in **LAWSA**, Volume 3, at para 179:

"Rights, in common with other marketable assets, can be employed as objects of security. In the same way that an owner can pledge a corporeal movable, a creditor of a right can by means of a cession *in securitatem debiti* cede it to his or her own creditor as security for the debt owed to the latter until the debt so secured has been redeemed. In the interim the cedent has no *locus standi* to deal with or enforce the right, while the cessionary, although the only party entitled to performance, may not as a rule exercise all the powers of a *dominus*: he or she ought not to recover performance nor alienate the debt, but is only permitted to act on the claim if the cedent defaults, unless the parties have agreed, either expressly or tacitly, that he or she may or must do so in the meantime."

[34] If a debtor makes payment to the cedent, whilst aware of the existence of the cession, its debt towards the cessionary is not

discharged. In **LAWSA**, Volume 3, at para 81 the position of the debtor is set out as follows:

"The debtor now faces two parties: the cedent, as owner of the right, and the cessionary, as its holder. The cedent is not as a rule entitled, during the subsistence of the security, to recover or receive performance of the principal debt; only the cessionary may do so. Yet if the debtor does effect, say, payment to the cedent in ignorance of the cession, the debt will be deemed to be discharged to the detriment of the cessionary who is left with a depleted security. Payment made by the debtor, with knowledge of the cession, to the cessionary, is a regular payment by a debtor to the true creditor and will likewise release the debtor, to the detriment of the cedent, who is left with only a personal claim against the cessionary. And, if payment to the cessionary releases the debtor, so too should set-off as between the debtor and the cessionary. Once the secured debt has been repaid by the cedent to the cessionary the cession *in securitatem debiti* has fulfilled its primary function and the right reverts to the cedent. The erstwhile cessionary is no longer the true creditor, but, if the debtor who has been informed of the cession *in securitatem debiti* but not of its termination pays him or her, the debtor will enjoy immunity against any further claim by the cedent. Conversely, if the debtor, having been informed of the redemption of the secured debt, insists on paying the cessionary, such debtor does so at his or her peril." (My emphasis)

[35] When a debtor who is aware of a cession elects to make payment to the cedent, the debtor is not released of its obligation to make payment to the cessionary. This principle was set out in **Goode, Durrant & Murray (SA) Ltd v Glen and Wright, NNO** 1961 (4) SA 617 (C) at 621 G – H:

"What was transferred to the applicant were rights of action against the company's debtors. Once the debtors were informed of the cession they would be obliged to pay the cessionary and not the cedent. The

cessionary would be entitled to institute action against any debtor who failed to pay his debt, or, having knowledge of the cession, paid the cedent." (My emphasis)

[36] From the evidence it is evident that the defendant had been duly informed and was aware of the existence of the cession as early as 26 October 2010. The letter of 1 August 2012, which was referred to in the pleadings, and which was addressed by the Municipal Manager of the defendant to the Sheriff, apparently as a result of the writ of execution and the attachment which followed the judgment in respect of the Winburg project, serves, in my view, as further confirmation of the defendant's knowledge and acknowledgement of the cession and Thiza`s indebtedness to the plaintiff.

[37] It is furthermore evident that payment certificates 4 to 30 were issued to and in favour of Thiza on dates after the defendant gained knowledge of the cession. Those payment certificates signify debts owing by the defendant to Thiza which were and are subject to the cession and are therefore due by the defendant to the plaintiff.

[38] Payment certificates 4 to 30 stretch over the period of 23 November 2010 to August 2013. Mr Grobler submitted that Thiza left and abandoned the site during August 2012 already and that the subsequent payment certificates, therefore, do not constitute debts due by the defendant to the plaintiff. In this regard Mr Grobler relied on the evidence of Mr Barnard and certain parts of the letter Mr Barnard addressed to the liquidators, dated 24 October 2016. I dealt with that evidence above. However, what is also evident from the said letter and

which Mr Barnard was not referred to in cross-examination, is that at paragraphs 3.h and the subsequent paragraph c. of the letter it is stated that the Employer, hence the defendant, never terminated the contract with Thiza. When this is read with the evidence of Mr Barnard that Thiza was still enquiring about the project, that Mr Barnard apparently does not know what the relationship was between Thiza and the defendant at that stage, that Mr Van Eeden was possibly trading under the name of Thiza, that Aurecon had no knowledge of or documentation indicating that a new contractor had been appointed and that he therefore continued issuing the payment certificates in favour of Thiza, it is, in my view, apparent, in the absence of evidence to the contrary, that Thiza, in some or other way, continued with the contract. Some of the payment certificates in Exhibit “A”, dated after August 2012, were also still accompanied by tax invoices which reflect the logo of Thiza and were, on face value thereof, issued by Thiza to the defendant. Furthermore, different to the case pleaded by the defendant, there indeed was retention money in favour of Thiza, but it was depleted by the payment thereof to a third party.

[39] In the circumstances and in the absence of evidence to the contrary, payment certificates 4 to 30 indeed constitute debts due by the defendant to Thiza, as already indicated earlier.

[40] Mr Grobler submitted that in terms of the cession, the onus remained upon Thiza to have collected and receive the money from the defendant, from which money Thiza itself would have paid the plaintiff. He submitted that nothing in the cession

entitles the plaintiff to claim those monies directly from the debtors. I cannot agree with these submissions. As correctly pointed out by Mr Ellis in response to the said submissions, paragraph 5 of the cession specifically determines that once the said debtors were notified of the cession, the entitlement of Thiza to collect the monies itself, lapsed and the entitlement became that of the plaintiff:

> "5. Until any of my/our debtors … who owe me/us money have been notified of this cession, any money which I/we collect from such debtors will be collected and received by me/us on behalf of Tusk. … (My emphasis)

I have already found that the defendant had been so notified of the cession by the plaintiff.

[41] In the circumstances (subject to my finding regarding prescription), the plaintiff is entitled to payment from the defendant of the debts of Thiza due to the plaintiff.

Prescription:

[42] Section 12 of the Prescription Act, Act 68 of 1969 ("the Act") determines when prescription begins to run:

> (1) Subject to the provisions of subsections (2), (3), and (4), prescription shall commence to run as soon as the debt is due.
>
> (2) If the debtor wilfully prevents the creditor from coming to know of the existence of the debt, prescription shall not commence to run until the creditor becomes aware of the existence of the debt.

(3) 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: Provided that a creditor shall be deemed to have such knowledge if he could have acquired it by exercising reasonable care.

[43] The party who raises prescription must allege and prove the date of inception of the period of prescription. See **Gericke v Sack** [1978] 2 All SA 111 (A), 1978 (1) SA 821 (A). See also **Lancelot Stellenbosch Mountain Retreat (Pty) Ltd v Gore NO and others** [2015] ZASCA 37.

[44] Mr Grobler submitted that in this instance where it is clear from the particulars of claim that the claim had prescribed, the plea contained in the replication has the result that the onus to prove that the claim had not prescribed rests upon the plaintiff. I have to agree with this submission, considering the following *dictum* in **Absa Bank Beperk v De Villiers** 2001 (1) SA 481 (SCA) at 487 A - C:

"Na my mening moet die antwoord gevind word aan die hand van algemene beginsels. Waar dit duidelik is, sonder meer, dat die verjaringstydperk verstryk het, het die verweerder 'n volkome verweer: die eis is finaal uitgewis. Indien op stuiting van verjaring of uitstel van die voltooiing van verjaring staatgemaak wil word, is die posisie nie net dat die eiser sal moet begin nie. Indien dit op die getuienis van 'n besondere saak onseker is of stuiting, of die gebeure waarna in art 13(1) verwys word, plaasgevind het al dan nie, sal die eis in daardie situasie noodwendig moet faal. Die repliek wat deur so 'n eiser geopper word is dus 'n aparte geskilpunt ten opsigte waarvan daar 'n afsonderlike bewyslas (in die sin van die algehele bewyslas) bestaan: *Pillay v Krishna and Another* 1946 AD 946 te 953. In die onderhawige saak het appellant dus die bewyslas gedra om uitstel van voltooiing van verjaring ingevolge art 13(1)*(g)* te bewys."

[45] Summons was served during February 2017.

[46] I agree with the contention of Mr Ellis that the two dates mentioned by the defendant in its plea, being the dates on which judgments were taken against Thiza, are insignificant for purposes of these proceedings. It is not knowledge of the debt of the cedent (Thiza) that is required, but knowledge of the debt of the debtor (the defendant).

[47] In **Minister of Finance v Gore NO** 2007 (1) SA 111 (SCA) at para [19] it was held that prescription does not begin to run until the plaintiff becomes aware of the minimum facts that he or she needs to prove to succeed in his or her claim. A suspicion is not enough. I agree with Mr Ellis that one such minimum fact is the debt owed by the defendant to the plaintiff. In this instance that would be when monies are payable by the defendant to Thiza or when ceded monies had been paid by the defendant to Thiza with knowledge of the cession. As correctly described by Mr Ellis in his heads of argument, this fact was kept a closely guarded secret by the defendant until 1 August 2012 when the Municipal Manager undertook to make payment from the retention monies owed to Thiza a year after completion of the contract. Had prescription began to run earlier, the Municpal Manager`s letter of 1 August 2012 constituted an acknowledgement of debt which interrupted prescription so that it started to run afresh.

[48] Be that as it may, as a result of that undertaking and promise the plaintiff was entitled to wait until the project was finished.

The plaintiff, however, did not do nothing during that period, but followed it up with three letters form their attorneys to the defendant enquiring when payment was going to be made. Thereafter it was followed up with letter letters from the plaintiff`s attorneys addressed to the defendant`s attorneys, all to no avail.

[49] The plaintiff consequently had no knowledge of any monies which became owing to or paid by the defendant after 1 August 2012.

[50] The plaintiff subsequently commenced the process in terms of PAIA on 19 September 2013 in which it, *inter alia,* sought copies of all payment certificates and record of all payments made to Thiza, also to no avail. It then followed the liquidation route which led to the proposed insolvency enquiry, the subpoena to Mr Barnard and eventually the receipt of the payment certificates on 24 October 2016. I agree with the submission of Mr Ellis that it was only then that the plaintiff in possession of knowledge of the facts it needed to institute action. Summons was served within three years after 24 October 2016.

[51] The plaintiff cannot be faulted for its decision to have taken the liquidation route. It could not have foreseen that it would take so long for the insolvency enquiry to be arranged. Mr Roux explained the delays that were experienced. In the absence of evidence to the contrary the delay cannot be considered to have been as a result of negligent inaction on the side of the

plaintiff, as submitted by Mr Grobler. See **Macleod v Kweyiya** 2013 (6) SA 1 (SCA).

[52] The plaintiff therefore proved that its claims had not prescribed.

[53] The special plea of prescription must therefore be dismissed.

Conclusion on the merits:

[54] The plaintiff is consequently entitled to judgment in its favour.

Costs:

[55] Mr Ellis submitted that the defendant should be ordered to pay all the costs incurred in the action as from 9 October 2019 and onwards. In this regard he pointed out that on 8 October 2019, when the trial commenced, the plaintiff closed its case at the end of the first day. The defendant applied for a postponement to the following day in order to find and call witnesses. Had the defendant then closed its case, like he eventually did, the matter would have been finalized on 9 October 2019. According to Mr Ellis all further costs were wasted and should therefore be borne by the defendant, irrespective of the outcome of the matter. Mr Ellis did however refer to the fact that the defendant tendered the wasted costs of 9 and 11 October 2019, which was already included in a previous costs order. As for the costs of the trial up to and including 9 October

2019, he submitted that there is no reason why costs should not follow the event.

[56] I cannot agree with the submissions of Mr Ellis with regard to the costs beyond 9 October 2023.

[57] With regard to the first tranche of the trial, which started on 8 October 2019, the plaintiff has already been penalized for the wasted costs of 9 and 11 October 2019. That leaves only the costs of 8 October 2019, which costs, in my view, are to be costs in the cause.

[58] With regard to the enrolment of the matter as a part heard trial for 10 and 12 August 2022, the matter was enrolled without the parties having contacted my secretary to ascertain whether I will be available on the said dates to deal with the trial. No arrangements were made by the parties with my secretary. The Judge-President, who allocates the cases, was unaware that it is a part heard matter and consequently allocated it to a different judge. A criminal trial on Circuit Court was allocated to me for that week, with the result that I was out of town for the whole week. The trial could consequently not continue. Although the plaintiff is *dominis litis,* also with regard to the enrolment of the matter, the weekly rolls of this Division are available at least 4 to 5 weeks ahead of time. Had the respective attorneys perused the rolls when it became available, it would have been evident that the matter could not be proceeded with on the said dates. In the circumstances I deem it fair and reasonable that the wasted costs of that enrolment are to be costs in the cause.

[59] The matter was subsequently enrolled, in conjunction with my secretary, to be heard on 29 and 30 August 2023. On 29 August 2023 I was requested that the matter stands down for argument to be presented on 30 August 2023. I conceded to the said request. In my view the costs of 29 August 2023, if any, and 30 August 2023 are also to be costs in the cause.

[60] There is no reason why the costs should not follow the event and consequently the costs of the aforesaid days which are to be costs in the cause are to be included in the costs to be paid by the defendant.

[61] Although the special plea of prescription was not separated from the other issues, I will, for the sake of clarity for taxation purposes, specify that the costs thereof are part of the costs of the action.

ORDER:

[62] I consequently make the following order:

1. The special plea of prescription, is dismissed.

2. The defendant is ordered to pay the plaintiff the amount of R800 000.00.

3. The defendant is ordered to pay interest on the aforesaid amount of R800 000.00, calculated at the rate of 15.5% per annum from 8 November 2011 to date of payment.

4. The defendant is ordered to pay the plaintiff the amount of R113 427.55.

5. The defendant is ordered to pay interest on the aforesaid amount of R113 427.55, calculated at the rate of 15.5% per annum from 24 January 2012 to date of payment.

6. The defendant is ordered to pay the costs of the action, including the costs of senior counsel, and which costs are to include, but which are not restricted to:

    6.1 The costs of the adjudication of the special plea;
    6.2 The costs of 8 October 2019;
    6.3 The wasted costs occasioned by the enrolment of the action for 10 and 12 August 2022; and
    6.4 The costs of 29 October 2023, if any, and 30 October 2023.

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C. VAN ZYL, J

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