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**IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA**

CASE NUMBER: 11525/2022

(1) REPORTABLE: YES/NO
(2) OF INTEREST TO OTHERS JUDGES: YES/NO
(3) REVISED
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DATE

In the matter between: -

PASSENGER RAIL AGENCY OF SOUTH AFRICA

Applicant

and

AECOM SA (PTY) LTD

First Respondent

MPFUMELELO BUSINESS ENTERPRISE (PTY) LTD

Second Respondent

KHUTHELE PROJECTS (PTY) LTD

Third Respondent

In Re:-

PASSENGER RAIL AGENCY OF SOUTH AFRICA Plaintiff

and

AECOM SA (PTY) LTD First Defendant

MPFUMELELO BUSINESS ENTERPRISE (PTY) LTD Second Defendant

JUDGEMENT

RIP AJ

Introduction

- [1] The Applicant launched a joinder application to the join the 3rd Respondent as a 3rd Defendant in the main action under Case No. 26388/2019.
- [2] The 3rd Respondent has opposed the application on the basis that any claim that the Applicant may have against it has become prescribed.
- [3] Consequently, the 3rd Respondent contends that it would serve no purpose to be joined to proceedings where the claim against it has prescribed.
- [4] The Applicant in setting out the reasons for the joinder alleges that on 12 April 2019, the Applicant issued summons in the main action against the 1st Respondent on the basis that there was a tacit agreement between the Applicant and the 1st Respondent in terms of which the 1st Respondent

- performed the obligations of the 3rd Respondent pursuant to the Consultancy Agreement.
- [5] The 1st Respondent denies that it performed the obligations of the 3rd Respondent in terms of the Consultancy Agreement.
- [6] The Applicant alleges that under the circumstances, it is thus uncertain as to which party between the 1st Respondent and the 3rd Respondent ought to be held liable for the damages caused.
- [7] It is based on this allegation that the 3rd Respondent should be joined to the main action as a 3rd Defendant as it is alleged that the 3rd Respondent has a direct and substantial interest in the relief sought by the Applicant.
- [8] It is further alleged by the Applicant that the 3rd Respondent can assist the Court in establishing its relationship with the 1st Respondent and providing the reasons why the 1st Respondent performed the obligations of the 1st Respondent in terms of the Consultancy Agreement.
- [9] Lastly, that to the extent that the 1st Respondent was a sub-contractor of the 3rd Respondent, the 3rd Respondent agreed to indemnify and hold harmless the Applicant against any loss, harm or damage which the Applicant may suffer.
- [10] In response thereto, the 3rd Respondent raises the issue of prescription and alleges that the Applicant's claim against the 3rd Respondent has become prescribed.
- [11] The 3rd Respondent alleges that the Applicant's cause of action is premised upon the final payment certificate annexed to the Particulars of Claim, as Annexure "KB3".

- [12] Further, that such payment certificate was issued on 4 March 2016 and came to the attention of the Applicant on 21 April 2016.
- [13] According to the 3rd Respondent, if one applies Sections 10 and 11 of the Prescription Act, then the claim of the Applicant has become prescribed within three years of 21 April 2016.
- [14] The Applicant in response thereto chose not to file a Replying Affidavit. It is trite that in motion proceedings the affidavits stand as the pleadings determining the issues between the parties.
- [15] The 3rd Respondent referred the Court to the matter of Nativa Manufacturing (Pty) Ltd v Key Max Investments 125 (Pty) Ltd & Others¹ where Keightley J held that:-

“[42] On the authority laid down by the SCA in Peter Taylor, I find that the service of the application for joinder on Marce did not constitute service of process whereby (a) creditor claims payment of (a) debt as required by Section 15(1) ...

[43] In order to effect an interruption of prescription, Nativa should have applied for joinder in time to ensure that it could have served the amended Summons and Particulars of Claim on Marce before the date on which the prescription period ended. It had three years in which to do so.

[44] In the circumstances, there is merit in Marce’s defence that Nativa’s claim against it has prescribed and that the joinder

¹ 2020 (1) SA 235 (GP) at 42

of Marce as the Third Defendant would serve no purpose. It follows that the joinder application must be dismissed.”

- [16] The Court in the Nativa matter referred to the Supreme Court of Appeal case of *Peter Taylor & Associates v Bell Estates (Pty) Ltd & Another.*²
- [17] Having considered the principles set out in the abovementioned Case Law, I am of the view that if the claim against the 3rd Respondent has indeed prescribed that it then would serve no purpose to join them to the main action.
- [18] Consequently, with prescription having been raised in the Answering Affidavit and the above-mentioned need to test whether there is a purpose in the joinder, I turn to consider whether I can make a determination on the papers before me as to whether the claim against the 3rd Respondent has indeed prescribed.
- [19] In the Applicant’s Heads of Argument the following is put forward, namely that although the payment certificate was issued on 4 March 2016, and sent to the Applicant on 21 April 2016, the Applicant did not suffer any damages at that stage because it did not make any payment. Therefore, the Applicant did not have a complete claim for damages against the 3rd Respondent and the debt was therefore not immediately claimable.
- [20] It is contended by the Applicant that it is only when the Applicant made payment to the 2nd Respondent (after the judgment in March 2019) in April 2019, that the debt against the 3rd Respondent became claimable and therefore due.

² 2014 (2) SA 312 (SCA)

- [21] The submission is then made in the Heads of Argument that the Applicant instituted its action on 12 April 2019, and that the joinder application was instituted on 12 February 2022, which is less than three years since the debt against the 3rd Respondent became due.
- [22] The difficulty that the Applicant faces is that even on its own version, as set out in the Founding Affidavit and argued in the Heads of Argument, the claim against the 3rd Respondent arose no later than 12 April 2019 and consequently, unless interrupted would have become prescribed on 12 April 2022.
- [23] I am of the view that as per the authorities referred to hereinabove, I am enjoined to find that the instituting of a joinder application does not interrupt prescription and accordingly find that the joinder application launched on 12 February 2022, in this matter, did not interrupt prescription in respect of the Applicant's alleged claim against the 3rd Respondent.
- [24] In argument before me the Applicant's Counsel referred me to the matter of *Njongi v Member of Executive Council, Department of Welfare, Eastern Cape*.³ In that matter, the Constitutional Court confirmed the principle that a Court is not entitled to raise the issue of prescription *mero motu*.
- [25] Further that such a principle stems from Section 17 of the Prescription Act, No. 68 of 1969, which provides as follows:-

“1. A Court shall not of its own motion take notice of prescription;

³ 2008 (6) BCLR 571 (CC)

2. *A party to litigation invokes prescription, shall do so in the relevant document filed of record in the proceedings; provided that a Court may allow prescription to be raised at any stage of proceedings.”*

- [26] The Constitutional Court noted that the relevant document in applications will usually be the Respondent’s Answering Affidavit.
- [27] Counsel for the Applicant attempted to argue that the Court is constrained from considering a later date for the commencement of the prescription period other than what is alleged by the 3rd Respondent in its Answering Affidavit and that to do so would be tantamount to the Court considering the issue of prescription *mero motu*.
- [28] Having considered the argument on behalf of the Applicant and the principles set out in the Constitutional Court case referred to above, I am of the view that this is not the case.
- [29] The issue of prescription has clearly been raised in this matter by the 3rd Respondent in its Answering Affidavit, which is the appropriate place to have done so in these proceedings.
- [30] Consequently, in considering whether the claim against the 3rd Respondent has prescribed, I do not believe that the Court is acting of its own motion, but rather considering a question that has been squarely raised by the 3rd Respondent.
- [31] Consequently, I find that I am entitled to consider the issue and I accordingly find that even on the Applicant’s own version, the claim has

On behalf of the Respondent:

Adv. T Jooste

Instructed by:

VFV ATTORNEYS