

**IN THE COURT OF APPEAL OF LESOTHO**

**HELD AT MASERU**

**C OF A (CIV) NO. 61/2013**

In the matter between:

**MOETI MAKOA**

**APPELLANT**

and

**TUMISANG MPATA**

**RESPONDENT**

**CORAM:**

**SCOTT, A.P**

**FARLAM, J.A**

**CLEAVER, A.J.A**

**HEARD:**

**6 OCTOBER, 2014**

**DELIVERED:**

**24 OCTOBER, 2014**

**SUMMARY**

*Building contract – interpretation  
of contractual time – bar provision*

## **JUDGMENT**

### **FARLAM JA:**

[1] The appellant in this matter appeals against an order made by Chaka-Makhooane J, sitting in the Commercial Division of the High Court, in terms of which she upheld what was erroneously described as a '*special plea of prescription*' raised by the respondent against the appellant's claim for damages for breach of a contract.

[2] The contract which the appellant alleged had been breached by the respondent was for the erection of a house, the breach alleged being that the house erected contained defects which were the responsibility of the respondent and which were drawn to his attention but which he failed to rectify.

[3] The contract contained a clause, clause 8, which read as follows:

'8. Defects and Liability Period: shall be six (6) months after completion of the work.'

[4] The appellant pleaded that the respondent was made aware of the defects of which he complained during the construction of the house and within six months after the completion of the house, which he alleged took place 'sometime in or around August to October 2011'.

[5] The summons in the action was issued on 24 July 2012 and served on the respondent on 30 July 2012.

[6] The respondent's special plea contained the following:

*'In terms of clause 8 of the contract on defects and liability period, Plaintiff's claim has prescribed in that ... the Summons [sic] ought to have been instituted six months after completion of the house'.*

[7] In what was described as an 'Ex tempore Ruling', given on 22 August 2013, the learned judge in the court a quo said:

*'I have found that the special plea of prescription raised by the defendant stands to be upheld. Assuming the house was indeed built in August,*

*2010, the liability period within which the claim should have been instituted ended in February, 2011.*

*The special plea is upheld with costs. Full reasons for the ruling to follow.'*

[8] The full reasons for the judge's ruling did not follow. According to an affidavit made by the appellant in support of an application for condonation for the late filing of the record in this appeal the appellant's counsel approached the judge's clerk on several occasions in order to obtain the full judgment. The failure of the judge to provide the full reasons promised in her *ex tempore* ruling is unacceptable.

[9] The special plea raised by the respondent was not correctly described as one of prescription because the rules relating to prescription entitle a debtor to resist the enforcement of a claim brought against him or her on the ground that the claim has been rendered unenforceable because of the lapse of a particular period of time laid down in a statute or the applicable common law: See Adriatic Insurance Co; v,O'Mant, 1961(3) SA 292 (SR) at

294 A-G and Cave t/a the Entertainers and the Record Box v Santam Ins Co Ltd 1984 (3) SA 732 (W) at 746 A-C

[10] The question arising for decision in this appeal is whether the respondent's contention that clause 8 of the contract shortened the period in which a claim in respect of defects under the contract could be brought by the appellant is correct.

[11] Mr Makholela, who appeared for the respondent, correctly conceded that clause 8 of the contract can be interpreted as meaning (a) that the respondent will only be liable in respect of defects brought to his attention not later than six months after the completion of the house and that the legal action in respect thereof must be instituted within that period; or (b) that the ordinary prescription period applies but the respondent will only be liable for defects manifesting themselves before the expiry of six months after the completion of the house.

[12] In my view the second of those interpretations is obviously the correct one in the circumstances of this case. The first interpretation, for which he argued and which the judge in the court below preferred, cannot be accepted because it leads to the absurd conclusion that a

defect of which the appellant becomes aware on, say, the last day of the six months period after the completion of the house cannot be the subject of a claim against the respondent unless he institutes action before midnight on that day. This could never have been the intention of the parties in agreeing to clause 8.

[13] It follows that the appellant's claim against the respondent was not time – barred and that the judge erred in upholding the special plea.

[14] The following order is made: The appeal is allowed with costs. The order made in the court below is set aside and replaced with the following:

‘The special plea is dismissed with costs.’

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**I.G. FARLAM**

**JUDGE OF APPEAL**

I agree

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**D.G. SCOTT**  
**ACTING PRESIDENT**

I agree

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**R.B. CLEAVER**  
**ACTING JUDGE OF APPEAL**

For appellant: Mr M.A Kumalo

For respondent: Mr L.T. Makholela

