

**IN THE HIGH COURT OF LESOTHO**  
**(Commercial Court Division)**

-

**HELD AT MASERU**

**CCT/161/2013**

In the matter between:

**TAU MONETHI**

**PLAINTIFF**

And

**SETS'ABI MOTSETSELA**

**DEFENDANT**

**Neutral Citation:** Tau Monethi v Set'sabi Motsetsela CCT/161/2013 [2021]  
LSHC 129 COM (17<sup>th</sup> November, 2021)

**JUDGMENT**

CORAM: MATHABA J

HEARD ON: 8<sup>th</sup> November 2021

DELIVERED ON: 17<sup>th</sup> November 2021

## **SUMMARY:**

*Contract – Payment for work done and building material – Plaintiff’s claim prescribed – Plaintiff in replication alleging that prescription interrupted by demands - Onus on the Plaintiff to prove allegations in replication – The date the cause of action prescribed is pleaded and not issuably denied – judicial admission of fact is conclusive and does not require evidence.*

## **ANNOTATIONS:**

### **LEGISLATION**

Lesotho High Court Rules of 1980

### **CITED CASES**

#### **LESOTHO:**

Fraisers Lesotho Ltd v Hata – Butle (Pty) Ltd LAC (1995-1999) 698

Ntoa Abiel Bushman v Lesotho Development and Construction (Pty) Ltd C of A (CIV) No.3 of 2015

Putsoa v Attorney General C of A (CIV) No. 1/1987

The Liquidator of Lesotho Bank v Tamuku Michael Molefe Nkalai (CCT/65/07) LSHC 49 (10 July 2012)

#### **SOUTH AFRICA**

Edwards v Woodnutt, N.O 1968 (4) SA 184

Mckenzie v Farmers' Co-operative Meat Industries Ltd 1922 AD 16

Read v Brown L.R. 22 QBD 128

Truter and Another v Deysel 2006 (4) SA 168

Willem Daniel Knoesen and One v Izette Huijink-Maritz and Others  
(5001/2018) [2019] ZAFSHC 92 (31 May 2019)

Yusaf v Bailey and Others 1964 (4) SA 117

## INTRODUCTION

[1] The sole issue for determination at this stage is the question whether the plaintiff 's claim against the defendant has prescribed.

[2] On the 2<sup>nd</sup> August 2013 the plaintiff issued out summons against the defendant claiming **M90,343.91** and interest at the rate of 18.5% per annum from 31<sup>st</sup> January 1997 until judgment is entered thereof. The pertinent portions of the declaration alleged as follows:

“(4)

The parties herein entered into a verbal agreement of construction, whereby the Plaintiff was engaged to build a house for the Defendant at Ha Thetsane for an amount of **M275,937-98** towards the end of 1996. The contract was to buy the building materials in terms of the agreement, therefore, the following materials bought (sic); loti bricks, beam of blocks, steel pipe to the amount of **M27,763-91**. Copies of invoices and the inventory works that were to be performed by Plaintiff herein (sic) annexed and marked **TM1, TM2, TM3** and **TM4** collectively.

(5)

Plaintiff constructed ground floor and walls and issued an invoice on the 31<sup>st</sup> January 1997 in the amount of **M62,580-00**. However, to his dismay the said invoice was never settled. The said issue put Plaintiff on a precarious situation as he was unable to pay his employees and materials from suppliers, as a result had

to discontinue the construction when awaiting payment which was not forthcoming. A copy is attached and marked **TM5**.

(6)

On the 21<sup>st</sup> October 1997 Plaintiff was served with an interim Court order amongst others interdicting him from interfering with the Respondent's site. A copy of the order is herein annexed and marked **TM6**.

(7)

Defendant's estate has been unjustly enriched by usurpation of the building material bought by Plaintiff and has failed to pay the work rendered by Plaintiff in spite of several demands made to that effect. Defendant has neglected, failed and/or refused to pay the outstanding amount".

## **THE SPECIAL PLEA OF PRESCRIPTION**

[3] In its plea to the summons and declaration that were amplified by further particulars, the defendant raised the special plea in the following terms:-

**"1. SPECIAL PLEA OF PRESCRIPTION**

1.1 Defendant pleads that the plaintiff's claim is based on work and labour rendered and done and materials provided for same on or before 31<sup>st</sup> January 1997.

1.2 The plaintiff's claim has prescribed and on this ground alone the plaintiff is non-suited in that in terms of section 3 read with section 4 of the Prescription Act No. 6 of 1861 no suit or action upon any liquid document of debt of such a nature as to be capable of sustaining a claim for provisional sentence is capable of being brought at any time after the expiration of eight (8) years from the time when the cause of action based on such liquid document first accrues.

1.3 In the premises the defendant specifically pleads that the plaintiff's cause of action prescribed commencing on 1 February 2005 and the running of the prescription has not been interrupted until (sic) to date."

[4] In response the plaintiff files replication and reacted as follows to the special plea:

**“(1)**

**SPECIAL PLEA OF PRESCRIPTION**

**AD PARA 1 THEREOF**

1.1 Contents therein are noted.

1.2 Contents therein are refuted. It is a trite principle that a claim does not prescribe where there has been interruptions of demands in between.

1.3 Contents there are denied. The true fact is that there have been several verbal demands by Plaintiff.

1.4 Contents therein are denied. However, Plaintiff prays the Honourable Court to grant judgment in his favour because the special plea is baseless.”

[5] While it is not necessary to deal with the merits of this matter, it may be useful to highlight that, on the merits, the defendant denies liability. The defendant argues that the parties had agreed that the plaintiff’s work would be evaluated upon reaching agreed milestones and payment had to be approved by supervising engineer through a signed certificate. He asserts that the plaintiff failed to complete agreed milestones and refused to be supervised by defendant’s engineer as a result of which the defendant accepted repudiation of agreement and appointed another contractor. He further argues that there were extensive remedial actions on the work done by the plaintiff at great cost for which he holds the plaintiff liable. In his replication the plaintiff denies that there was a third party appointed to certify his work before payment could be made. However, Mr. *Sekatle* divorced himself from denial and argued to the contrary in support of his submission that the claim has not prescribed.

## **EVALUATION AND LEGAL PRINCIPLES ON PRESCRIPTION**

[6] Section 3 of the Prescription Act No. 6 of 1861 reads:-

“Except as hereafter is excepted, no suit or action upon any bill of exchange, promissory note or other liquid document of debt of such a nature as to be capable of sustaining a claim for provisional sentence

shall be capable of being brought any time after the expiration of eight years from the time when the cause of action upon such liquid document first accrues: Provided that nothing in this Act contained shall extend to or affect any mortgage bond, general or special, or any judgment of any Court in Basutoland or elsewhere”

In terms of section 4(f), section 3 apply to respective suits and actions including “*for money claimed for work and labour done and materials provided for the same*”.

[7] In **The Liquidator of Lesotho Bank v Tamuku Michael Molefe Nkalai**<sup>1</sup> the Court said that the first task of the Court when faced with prescription argument is to ascertain the date from which prescription is to run. The date from which prescription is to run cannot be determined without first demystifying the meaning of the words “*when the cause of action first accrues*”.

[8] In **Mckenzie v Farmers’ Co-operative Meat Industries Ltd**<sup>2</sup> the Court described cause of action for purposes of prescription as “*...every fact which it would be necessary for plaintiff to prove, if traversed, in order to support his right to the judgment of the Court. It does not comprise every piece of evidence which is necessary to prove each fact, but every fact which is necessary to be proved*”. (emphasis added). The case was quoted with approval in **Truter and Another v Deysel 2006 (4) SA 168 at 174 para 19**.

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<sup>1</sup> CCT/65/07 page 2

<sup>2</sup> 1922 AD 16 at 23



[9] Again, in the unreported case of **Willem Daniel Knoesen and One v Izette Huijink-Maritz and Others**<sup>3</sup> the Court said the following:

“Cause of action: “was defined<sup>4</sup> by Lord ESHER, MR in *Read v Brown* 22 QBD 131 to be “every fact which it would be necessary for the plaintiff to prove if traversed, in order to support his right to the judgment of the court. It does not comprise every piece of evidence which is necessary to prove each fact, but every fact which is necessary to be proved”. See also *Cooke v Gill*, LR 8 CP 116. S 64(1) of Act 22 of 1916: means “every fact which is material to be proved to entitle a plaintiff to succeed in his claim” (*Lyon v SAR&H* 1930 CPD 276); but it can mean “that particular act on the part of the defendant which gives the plaintiff his cause of complaint”. “A *cause of action* accrues, when there is in existence a person who can sue and another who can be sued, and when all the facts have happened which are material to be proved to entitle the plaintiff to succeed” (per GARDINER, JP, adopting s 64 of *Halsbury*, xix, in *Coetzee v SAR&H* 1933 CPD 570). See *G North & Son v Brewer & Son* 1941 NPD 74; *Beaven v Carelse* 1939 CPD 323; *Abrahamse & Sons v SAR&H* 1933 CPD 626; *McKenzie v Farmers’ Co-op Meat Industries Ltd* 1922 AD 16; *Huletts v SAR&H* 1945 NPD 413.”

[10] Moreover, in **The Liquidator of Lesotho Bank**<sup>5</sup>, *supra*, the Court had this to say in clarifying what was meant by prescription:

“As a rule of thumb, therefore, a cause of action first accrues when the plaintiff first suffers loss or damage. That test establishes the date from which prescription is to run, it is a question of fact for the court to consider. There are many instances where this has been brought before the courts. In some cases the contract itself will set the time, though this is not the case here.

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<sup>3</sup> Case No:5001/2018[2019] ZAFSHC 92 (31 May 2019), page 16 to 17, para 41. Judgment of the High Court of South Africa – Free State Provincial Division delivered on the 31<sup>st</sup> May 2019

<sup>4</sup> Cause of action, <https://www.mylexisnexis.co.za/Index.aspx> on 26 May 2019.

<sup>5</sup> Page 5 to 6

In practical terms Mr. Ntlhoki is nearer the mark. The Act specifies ‘first’ as the qualifier. Looking at annexure ‘C’ to the Declaration (which purports to be a print out of the applicant/defendant ‘s statement of account), the applicant/defendant appears to have defaulted in his payments in June 1997. On the material before, this is the first time the plaintiff/defendant is ‘caused damage, (assuming the statement is accurate, of course). It is the time that the plaintiff’s ‘cause of action first accrued’. As the action herein commenced on 24 August 2007 and June 1997 is to be the date when the cause of action ‘first accrued’, it is well outside the 8-year period”.

[11] According to the summons as amplified by further particulars, the plaintiff expected payment on the 31<sup>st</sup> January 1997. Accordingly, if the plaintiff was expecting payment on the 31<sup>st</sup> January 1997 and it was not made, that is therefore the date on which the cause of action first accrued. It therefore follows that on the 31<sup>st</sup> January 1997 the plaintiff had every fact material to be proved to be entitled to succeed in his claim. As the action here commenced on the 2<sup>nd</sup> August 2013 and the 31<sup>st</sup> January 1997 is the date on which the cause of action first accrued, it is well outside the 8-year period.

[12] I have already provided my analysis and conclusions based on the plaintiff’s own pleadings. However, I still find it necessary to proceed and examine if the defendant was able to prove his case as far as prescription is concerned in line with the decision of the Court of Appeal in **Ntoa Abiel Bushman v Lesotho Development and Construction (Pty) Ltd**<sup>6</sup> to the effect

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<sup>6</sup> C of A (CIV) No. 3 of 2015 page 9 to 10 para 19 to 21.

that a party that raises prescription must allege and prove the date of the inception of the period of prescription. I do so cognisant of the decision in **Yusaf v Bailey and Others**<sup>7</sup> where the Court held that the onus was on the plaintiff to satisfy the Court in terms of his replication to the special plea that his claim had not become prescribed before service of summons. It is apposite to indicate in the latter case, the facts in support of the replication were peculiarly within the knowledge of the plaintiff.

[13] In **Edwards v Woodnutt, N.O**<sup>8</sup> the Court indicated that unlike with exception where facts stated in the pleadings must be accepted, evidence may be led in the case of a plea in abatement. While acknowledging that objection to *locus standi* of plaintiff should have been raised by way of special plea and not exception as it was the case, the Court nonetheless entertained the objection without a need for evidence to be led because the defendant did not rely on a single fact which did not appear in the declaration or challenged any of the facts pleaded. It is therefore clear that each case must be treated on its own merits and that it is not in all the situations where a plea in abatement is raised that the defendant will be required to lead evidence.

[14] In *casu* the defendant is therefore required to prove the date of the inception of the period of prescription while it is for the plaintiff to satisfy the Court in terms of his replication that the running of the prescription was

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<sup>7</sup> 1964 (4) SA 117 at 119 F- H

<sup>8</sup> 1968 (4) SA 184 at 186 C - H

interrupted by demands. It is common cause between the parties that the claim is based on work and labour rendered and done and materials provided for same on or before 31<sup>st</sup> January 1979<sup>9</sup>.

[15] The defendant has specifically pleaded that the “*plaintiff’s cause of action prescribed commencing on 1<sup>st</sup> February 2005 and the running of the prescription has not been interrupted until (sic) to date*”<sup>10</sup>. In reaction to this straightforward assertion by the defendant, the plaintiff did not pointedly dispute the date on which the cause of action is alleged to have prescribed, he simply said that “*The Contents therein denied. The true fact is that there have been several verbal demands by plaintiff*”<sup>11</sup>.

[16] In his spirited submissions, Mr, *Sekatle* never disputed the date on which prescription is alleged to have commenced. As it has already been indicated elsewhere in this judgment, Mr. *Sekatle* backtracked on the plaintiff ‘s denial in the replication that the claim was supposed to be approved by supervising engineer before payment could be effected. He made a self-defeating argument that “*prescription will start to run after the approving or disproving of the Plaintiff’s claim, which by itself is suspension by its own nature and it never happened in this matter in issue, meaning that Plaintiff could sue anytime on the basis of the afore-going.*”<sup>12</sup>

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<sup>9</sup> Plaintiff ‘s Declaration page 3 to 4 and paras 4 and 5. Defendant’s Plea page 24 of the record para 1.1. Plaintiff’s Replication page 29 and para 1.

<sup>10</sup> Defendant’s Plea page 24 para 1.3

<sup>11</sup> Plaintiff’s Replication page 29 para 1.3.

<sup>12</sup> Plaintiff’s Heads of Argument paragraph 4.

[17] The main contention of the plaintiff, as I understood Mr. *Sekatle*'s argument, came to this: In terms of the agreement between the parties, payment had to be authorised by the supervising engineer who never approved or disapproved the plaintiff's claim in this case. As a consequence, so the argument proceeds, the plaintiff could sue anytime since the supervising engineer never approved or disapproved the claim.

[18] It bears repeating that Mr. *Setlake* 's argument is diametrically opposed to the plaintiff 's case as pleaded in the replication. Though the plaintiff conflates architect and supervising engineer in the replication, he denies that his work had to be evaluated and that his claim had to be approved. He argues that the first claim was still paid without such an approval<sup>13</sup>. The ground upon which the plaintiff resisted the special plea was that the prescription was interrupted by several verbal demands<sup>14</sup>. It was therefore not appropriate for Mr. *Sekatle* to argue the case which his client never pleaded and had strenuously rejected in his replication.

[19] In terms of Rule 20 (5) of the High Court Rules<sup>15</sup>, "When in any pleading a party denies an allegation of fact in the previous pleading of the opposing party, he shall not do so evasively but shall answer issuably and to the point. Rule 20 (5), *supra*, applies *mutatis mutandis* to replication and all

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<sup>13</sup> Plaintiff's Replication, page 30 of the record, para 3.2 to 3.4

<sup>14</sup> Plaintiff' Replication, page 29 of the record, para 1.

<sup>15</sup> High Court Rules of 1980

subsequent pleadings whether in convention or reconvention.<sup>16</sup> In addition, in terms of Rule 22(4) of the High Court Rules<sup>17</sup> “*Every allegation of fact in the declaration, which is not stated in the plea to be denied or to be not admitted, shall be deemed to be admitted. If any explanation or qualification of any denial is necessary, it shall be stated in the plea*”. (emphasis added)

[20] Considering the importance of pointed answers and issuable denials in pleadings as stated in **Fraisers Lesotho Ltd v Hata – Butle (Pty) Ltd**<sup>18</sup>, as well as the fact that the Rules applicable to a plea are applicable to a replication, I have no hesitation in concluding that Rule 22(4) of the High Court Rules applies with equal force to a replication as well. In the absence of a clear denial, it is therefore my considered view that the plaintiff admitted the fact that his cause of action prescribed commencing on 1<sup>st</sup> February 2005. Even if my conclusion that Rule 22(4) applies to a replication as well is wrong, that does not detract from the fact that the cause of action prescribed commencing on the 1<sup>st</sup> February 2005 if the plaintiff expected payment on the 31<sup>st</sup> January 1997 as he alleged.

[21] For purposes of the adjudication of the special plea, it is worth repeating that the defendant asserted that *plaintiff’s cause of action prescribed commencing on 1<sup>st</sup> February 2005 and the running of the prescription has not*

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<sup>16</sup> Rule 24(7) of the High Court Rules, *supra*.

<sup>17</sup> *Supra*.

<sup>18</sup> LAC (1995 – 1999) 698 at 702 A- D.

*been interrupted until (sic) to date*<sup>19</sup>. Again, it is clear based on the facts alleged in plaintiff's declaration as amplified by further particulars that the plaintiff expected payment on the 31<sup>st</sup> January 1997<sup>20</sup>, the date on which he issued the invoice. In response to the question as to why he was claiming interest from the 31<sup>st</sup> January 1997 the plaintiff said that "*It is the time the payment was expected to have been made by Defendant*<sup>21</sup>". Clearly, the plaintiff considered the 31<sup>st</sup> January 1997 to be the date when the default commenced, hence he did not deny the defendant 's assertion that the cause of action prescribed commencing on the 1<sup>st</sup> February 2005. He rather asserted that the running of prescription was interrupted by demands.

[22] It is trite law that a judicial admission of fact is conclusive as a result of which it is unnecessary for the party in whose favour the admission was made to lead evidence to prove the fact and incompetent for the party that made the admission to contradict it<sup>22</sup>. Not only has the fact that the plaintiff 's cause of action prescribed commencing on 1<sup>st</sup> February 2005 not been denied, but the defendant is not relying on a single fact which does not appear in the pleadings for his argument in support of prescription.

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<sup>19</sup> Defendant's Plea page 24 para 1.3, *supra*,

<sup>20</sup> Plaintiff's Declaration, page 4 para 5, Request for Further Particulars, page 18 para 6.4 and Further Particulars, page 22 para 6.4

<sup>21</sup> Further Particulars, *supra*.

<sup>22</sup> Gordon v Tarnow 1947 (3) SA 525 at 531 – 532 and AA Mutual Assurance Association v Biddulph and Another 1976 (1) SA 725 AD at 725H-735B.

[23] I hold therefore that the defendant has alleged and was able to prove the date of the inception of the period of prescription as the 1<sup>st</sup> February 2005. As a result, the only salient issue to be investigated is whether the running of the prescription was interrupted by demands as the plaintiff alleged. This is the dispute before me as far as the special plea is concerned and I am not going to create a dispute where it does not exist.

[24] In **Putsoa v Attorney General**<sup>23</sup> though the Court of Appeal was dealing with a case of prescription under section 6 of the Government Proceedings and Contracts Act No. 4 of 1965, it observed that there was no provision under the Prescription Act No. 6 of 1861 “*that the delivery of a demand interrupts prescription*”. Having interrogated the Act, I have no reason not to align myself with this observation by the Court of Appeal. Mr. *Sekatle* did not even attempt to draw my attention to any such a provision during his addresses. Even if it were to be accepted that demands are competent to interrupt prescription, it was up to the plaintiff in line with its replication to at least prove when the demands<sup>24</sup> were made, inasmuch as the defendant by not denying in its plea that the demands were made, is deemed to have admitted that fact.

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<sup>23</sup> C of A (CIV) NO. 1/1987 at 2

<sup>24</sup> *Yusaf v Bailey and Others, supra.*



[25] For the above reasons, I find that the plaintiff's cause of action which first accrued on the 31<sup>st</sup> January 1997, has prescribed commencing on the 1<sup>st</sup> February 2005 and that the running of prescription was never interrupted.

## **ORDER**

[26] I accordingly uphold the special plea of prescription and dismiss the plaintiff's claim with costs on a party and party scale.

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**A.R. MATHABA J**  
Judge of the High Court

For the Plaintiff:  
For the Defendant:

Mr. Sekatle  
Mr. Fiee