

IN THE HIGH COURT OF ESWATINI

CASE NO. 1091/2022

HELD AT MBABANE

In the matter between:

**ESWATINI POST & TELECOMMUNICATIONS
CORPORATION**

PLAINTIFF

AND

DON BOSCO GININDZA

DEFENDANT

NEUTRAL CITATION:

**ESWATINI POST & TELECOMMUNICATIONS
CORPORATION VS DON BOSCO GININDZA
(1091/2022) SZHC – 250 [19/09/2023]**

CORAM:

BW MAGAGULA J

HEARD:

17/07/2023

DELIVERED:

19/09/2023

SUMMARY:

Civil law – Special plea of prescription – Requirements thereof – Specific provision of Section 117 (b) of The Post and Telecommunication Act No. 11 of 1983 – Stipulates that a claim against the Defendant must be instituted within 12 months from the occurrence of the conduct complained of.

HELD:

The conduct complained of is the counter – claim for damages filed on the 26th August 2022. The Defendant's claim was filed outside the 12 month period.

HELD FURTHER:

Special plea upheld with costs the claim has clearly prescribed.

JUDGMENT

BW MAGAGULA J

BACKGROUND FACTS

- [1] The Plaintiff instituted a civil proceeding against the Defendant through summons dated 13th June 2022. Predominantly, the Plaintiff's claim is split into two. E18 000.00 (**Eighteen Thousand Emalangen**) being payment for clearing 12 motor vehicles under claim b E79 942.02 (**Seventy-Nine Thousand Nine Hundred and Forty-Two Emalangen** Two cents) is being

claimed custom claimed on twelve vehicles. The normal interest of 9 % *tempo mora* is claimed together with cost of suit own client.

- [2] Subsequent to the filing of notice of an intention to defend a plea coupled with counter claim was filed by the Defendant. After the counter claim had been filed the Plaintiff then filed a special plea to the counter claim on the basis that the claim had prescribe. It is the latter part that is subject of the issues before me.
- [3] The basis of the Special Plea is that the Defendant's counterclaim had prescribed, on account of the action not being instituted within the time limits stipulated in Section 117 (b) of the **Post & Telecommunication Act No. 11 of 1983 ("the Act")** which stipulates that a claim against the Plaintiff must be instituted within 12 months from the occurrence of the conduct complained of.
- [4] It is argued that Defendant's claim has been filed outside the 12-month period. The Defendant is alleged to have filed his claim some 8 years after the occurrence of the conduct complained of.
- [5] The central issue is the enforceability of a statutory time limitation provision. The provision prevent the institution of legal proceedings against the Plaintiff if the legal proceedings are not instituted within the time limit set out in the Act.

ISSUES FOR DETERMINATION

[6] The issue for determination by this Honourable Court is whether the time limitation provided in Section 117 (b) of the Act is enforceable.

PLAINTIFF'S ARGUMENTS

[7] The Plaintiff's Arguments are structured as follows:

7.1 It has been established that the defendant's counter-claim is prescribed in terms of Section 117 (b) of the Act;

7.2 Section 117 (b) of the Act is fair, just and enforceable in the circumstances;

7.3 The estoppel was not pleaded and cannot be raised in the Heads of Argument without any factual averments, establishing the elements of estoppel;

7.4 The Plaintiff concludes that:

7.4.1 The defendant's claim has prescribed in terms of Section 117 (b) of the Act;

7.4.2 Section 117 (b) of the Act is fair, reasonable and enforceable therefore, the Special Plea must be upheld with costs;

7.4.3 The Defendant did not plead estoppel and cannot raise estoppel in the Heads of Argument for the first time. Therefore, the issue of estoppel is not pending before Court.

- [8] Defendant argues that in terms of Section 117 (b) of the Act, legal actions or proceedings against the Plaintiff shall be brought within twelve months of the occurrence of the act, conduct or default being complained of. In the case of a continuing injury or damage, within six months after the cessation thereof. Section 117 (b) of the Act is reproduced in its entirety;

Limitation

117. Where any action or other legal proceeding is commenced against the Corporation for any act done in pursuance or execution, or intended execution, of this Act or of any public duty or authority, or in respect of any alleged neglect or default in the execution of this Act or any such duty or authority, the following provisions shall have effect-

(a) The action or legal proceeding shall not be commenced against the Corporation until at least one month after written notice containing the particulars of the claim, and of intention to commence the action or legal proceedings,

has been served upon the Managing Director by the Plaintiff or his agent;

(b) The action or legal proceedings shall not be instituted unless it is commenced within twelve months next after the Act, neglect or default complained of or, in the case of a continuing injury or damage, within six months next after the cessation thereof. (Own emphasis)

[9] Section 117 (b) of the Act is clear and unambiguous. The import of the provision is that legal proceedings against the Plaintiff must be brought within 12 months of the occurrence of the conduct being complained of and, regarding continuing injury and damages, within six months after the cessation thereof.

[10] In *casu*, the defendant's counterclaim is based on clearing services Plaintiff rendered to the defendant in **September 2014**.¹ The Plaintiff's conduct being complained of occurred in **September 2014**, which is almost 9 (nine) years ago. It is common cause that the defendant's counterclaim was served on the Plaintiff's attorneys of record on **26 August 2022**.² Given that the defendant's claim is premised on the Plaintiff's conduct that occurred in **September 2014**, in accordance with Section 117 (b) of the Act, the defendant should have brought its claim against the Plaintiff before **September 2015**.

¹ Book of Pleading page 33

² Book of Pleadings page 32 and 33

[11] The defendant brought his claim against the Plaintiff on 26 August 2022, that is, 8 (eight) years after the occurrence of the conduct being complained of and 7 (seven) years after the defendant must have brought his claim.³ It follows that the defendant's claim prescribed since it was brought after 12 (twelve) months from the occurrence of the conduct being complained of.

DEFENDANT'S ARGUMENT

[12] The Defendant's arguments against the Special Plea are as follows-

12.1. The Plaintiff seeks an order dismissing the Defendant's counterclaim saying it is time-barred in terms of Section 117 (b) of the Post and Telecommunication Act No. 11 of 1983.

12.2 There are a number of reasons for the inclusion of time limitation clauses, one of which is that without rules in place to manage the time limits in litigation, there would be inordinate delays in finalizing these disputes which would not be in the interest of justice.

12.3 However, in the interest of justice, enforceability of limitation clauses should apply equally on both parties to the contract so as to promote fairness.

³ Book of Pleadings pages 32 and 33

12.4 The Plaintiff, by instituting the present action against the Defendant despite having knowledge that the cause giving rise to such action is time-barred, actually opened itself up to be countersued on the same cause of action by the Defendant.

12.5 If something is good, acceptable, or beneficially for one person, it is or should be equally so for another person as well.

12.6 Since there are several constitutional rights and values which are implicated when contracts are entered into, a balancing exercise is required to determine whether enforcement of the contractual clauses, such as the Section relied upon by the Plaintiff in the present case, would be contrary to public policy.

12.7 To allow the Plaintiff's defence of time-barred to stand against the Defendant's counterclaim when both claims are founded on the same facts, would surely be constitutionally unjust, unfair and contrary to public policy.

12.8 Hence, the Plaintiff should be estopped from relying on Section 117 (b) of the Act as its defence against the Defendant's counterclaim.

ADJUDICATION

[13] In general, a prescriptive provision is enforceable unless it is unreasonable and unfair.

[14] The importance and purpose of statutory time limitation provisions were eloquently stated by the South African Constitutional Court in **Mohlomi v Minister of Defence**,⁴ where it held as follows:

“Rules that limit the time during which litigation may be launched are common in our legal system as well many others. Inordinate delays in litigation damage the interests of justice. They protract the disputes over the rights and obligations sought to be enforced, prolonging the uncertainty of all concerned about their affairs. Nor in the end is it always possible to adjudicate satisfactorily on cases that have gone stale. By then witnesses may no longer be available to testify. The memories of ones whose testimony can still be obtained may have faded and become unreliable. Documentary evidence may have disappeared. Such rules prevent procrastination and those harmful consequences of it. They thus serve a purpose to which no exception in principle can cogently be taken.”

⁴ 1996 (12) BCLR 1559 (CC)

[15] Public policy requires the enforcement of prescriptive provisions because prescriptive provisions serve the interest of justice by ensuring that legal proceedings are instituted without any inordinate delays and that disputes between parties are resolved timeously thus bringing about certainty between the parties regarding their legal issues. Section 117 (b) of the Act requires that legal proceedings against the plaintiff be brought within the stipulated time, in that way, it prevents stale claims and protracted litigation and therefore is in line with the public policy requirement that legal proceedings must be resolved timeously.

[16] Statutory time limitation clauses protect Defendants against having to marshal a defence against an old claim. Government entities and public utilities, such as the Plaintiff, are normally protected by statutory limitation provisions which impose a shorter period of prescription than the one that ordinarily applies.

[17] Public policy favours the timely resolution of matters and also champions proper administration of justice and quality adjudication which are realized, in part, through prescription. The existence of limitation provisions is a clear indication of public policy's acceptance and tolerance of time limitation provisions. The enforcement of statutory prescription is in the interest of justice and in line with public policy in that it imbues certainty and ensures the quality of adjudication. The question then becomes when are time limitation clauses enforceable?

[18] In **Barkhuizen v Napier**,⁵ the South African Constitution Court had to determine the constitutionality of a time limitation clause in a short-term insurance policy, more particularly, whether the time limitation clause offended public policy. The South African Constitutional Court held that a time limitation clause is in line with public policy if it avails the party seeking to avoid the prescription an adequate opportunity to seek legal redress. The Court's reasoning was that the requirement of an adequate and fair opportunity to seek judicial redress is consistent with the notions of fairness and justice which inform public policy. Put in another way, a limitation clause is compliant with public policy if the party resisting the prescription was given sufficient opportunity to seek judicial redress.

[19] The majority judgment in **Barkhuizen v Napier** by **Ngcobo J**, regarding the enforceability of limitation clauses, authoritatively stated as follows-

*"It would be contrary to public policy to enforce a time limitation clause that does not afford the person bound by it an adequate and fair opportunity to seek judicial redress."*⁶

[20] The Court went on to outline the two-pronged test regarding the enforceability of limitation clauses and held that:

"There are two questions to be asked in determining fairness. The first is whether the clause itself is unreasonable. Secondly, if the clause is reasonable, whether it should be enforced in the light of the

⁵ *Barkhuizen v Napier* (7) BCLR 691 (CC)

⁶ *Barkhuizen v Napier* (7) BCLR 691 (CC) paragraph 51

circumstance which prevented compliance with the time limitation clause”⁷

[21] According to the test laid out in **Barkhuizen v Napier**, a time limitation clause would be fair and enforceable if it is reasonable. The enforcement of a time limitation clause will depend on the circumstances that prevented compliance with the time limitation clause. The first leg of the test concerns whether the time limitation clause is reasonable. If the time limitation clause is reasonable, the second leg asks whether the time limitation clause must be enforced given the circumstances hindered compliance with the limitation clause.

[22] I agree with the principle of **Barkhuizen v Napier** and as in my view it sound and it's a fair policy rationale enforcing time limitation provisions this Court adopts the test set out in **Barkhuizen** for the following reasons:

22.1 Firstly, both cases concern prescription of claims. In **Barkhuizen v Napier**, the prescription was provided by the contractual clauses and in this case, the prescription is in terms of a statutory provision. The effect of a time limitation clause is the same whether it stems from a contract or statute. The effect of a time limitation clause is that a party is barred from seeking legal relief if the legal proceedings are not instituted within the stated time.

⁷ **Barkhuizen v Napier** (7) BCLR691 (CC) paragraph 56

22.2 Secondly, at issue in both cases is the constitutionality of a limitation clause in whether its enforcement was contrary to public policy.

Lastly, both cases stem from contracts that were voluntarily entered into by the parties.

[23] In terms of the **Barkhuizen** test, the first question involves weighing up two considerations. On one hand, the parties' right to seek judicial redress and on the other, the public policy requirement that parties should be bound by contractual obligations which they entered freely and voluntarily, which is expressed in the *maxim pacta sunt servanda*. *Pacta sunt servanda* is a fundamental factor that has to be taken into account in considering the fairness of the provision because it gives effect to the parties' freedom to contract and their right to dignity. At the core of freedom of contract and the right to dignity is self-autonomy, which is the ability to regulate one's affairs even to one's own detriment.

23.1 *In casu, in terms of Section 117 (b) of the Act, the Defendant had 12 (twelve) months within which to lodge its claim against the Plaintiff.*

23.2 *The Defendant is a businessman who is well versed in the business of importation of motor vehicles and the operation of*

the law. The Defendant is well-informed about his legal rights and what to do to enforce these legal rights. The Defendant also has the means and access to professional legal advice. As a matter of fact, in his counterclaim, the Defendant alleged that he had engaged his attorneys as early as 12 March 2015. In light of the Defendant's above-mentioned circumstances, the 12-month period was sufficient for the Defendant to institute legal proceedings against the Plaintiff.

23.3 Section 117 (b) of the Act regulates legal proceedings brought against the Plaintiff including contractual and dilictual claims, in effect, Section 117 (b) of the Act is an implied term of the contract between the Plaintiff and Defendant. The public policy principle of pacta sunt servanda requires that contract must be enforced. The enforcement of Section 117 (b) of the Act is in line with public policy because it advances the principle of pacta sunt servanda. The 12-month period within which to seek legal redress I terms of Section 117 (b) of the Act is reasonable for a litigant in the position of the Defendant.

[24] It is this Court's view that time limitation clause provided in Section 117 (b) of the Act is reasonable and it must be enforced.

[25] A finding that the provision is reasonable triggers the second leg of the test. We now turn to address second leg of the test.

[26] The second in the **Barkhuizen** test of fairness involves an enquiry into the circumstances that prevented compliance with the reasonable time limitation clause.

26.1 Practically, this leg of the test places the onus on the party seeking to avoid enforcement of the limitation clause to show reasons for the failure to comply with the reasonable time limitation clause.

26.2 In *casu*, the Defendant alleges no reason for his non-compliance with the time limitation clause. In addition, the Defendant does not furnish any explanation for the 8 (eight) year delay in prosecuting the claim against the Plaintiff.

26.3 Without factual averments regarding the reasons for the non-compliance with the time limitation clause and the protracted delay in instituting the proceedings against the Plaintiff, this Honourable Court is left to speculate on the reasons for non-compliance and the delay. In these circumstances, it would be impossible for this Honourable Court to determine whether the enforcement of the time limitation clause against the Defendant would be unfair and thus contrary to public policy.

26.4 Furthermore, the refusal to enforce the time limitation clause without the Defendant furnishing the reasons for non-compliance and the delay would result in the Defendant avoiding compliance with a contractual provision implied by law which would be

contrary to the doctrine of *pacta sunt servanda*. Also, not enforcing the time limitation clause will prevent the application of a statutory provisions, Section 117 (b) of the Act. It follows that not enforcing the provision will be contrary to public policy in that it would allow a situation not permissible under the statute and would offend the doctrine of *pacta sunt servanda*.

26.5 In light of the lack of the necessary averments, this Honourable Court cannot hold that the enforcement of the time limitation provision is unfair or unjust against the Defendant.

[27] It is on the basis of the foregoing that Section 117 (b) of the Act is enforceable. In the circumstances of this case, the Defendant was given an adequate and fair opportunity to have his claim resolved and determined by a court of law. The Defendant failed to make out a case why the provision should not be enforced in that he failed to furnish the Court with the reasons for the non-compliance with the time limitation clause. Further, the Defendant does not state why it took him 8 years to institute the claim against the Plaintiff. There is no basis for not enforcing the reasonable statutory provision.

ESTOPPEL

[28] It is trite that the essence of estoppel is that a person who makes a representation is precluded from denying the truth of a representation previously made to another person if the latter, believing in the truth of that representation, acted thereon to his prejudice.

[29] In a South African decision⁸, it was held law that the party relying on estoppel must plead and prove its essential elements.

[30] In *casu*, the issue of estoppel was not raised in the pleadings. Hence, the Defendant has not established the requirements of estoppel. The defendant was content with raising the issue of estoppel for the first time in his Heads of Arguments.

CONCLUSION

[31] Due to the foregoing reasons, the Defendant's counter claim against the Plaintiff prescribed as the Defendant instituted the proceedings after the time period stipulated in Section 117 (b) of the Act. The prescription in terms of Section 117 (b) is reasonable and enforceable in the circumstances. It is reasonable in that it afforded the Defendant adequate time to institute the proceedings. I further agree with the Plaintiff's argument that it is enforceable because the Defendant failed to furnish reasons and adduce evidence regarding the non-compliance with the provision and the delay in bringing it's claim.

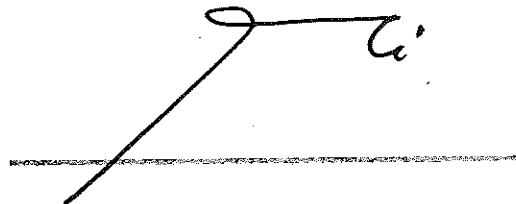
[32] It is again the court's conclusion that the Defendant failed to make out a case for estoppel, the Defendant did not plead estoppel and did not establish

⁸ Absa Bank Limited v IW Blumberg & Wilkinson [1997] 2 ALL SA 307 (A) at page 313.

essential elements of estoppel. The Defendant only raised the issue of estoppel for the first time in the heads of argument and in oral arguments before court.

ORDER

- (a) The Special plea is upheld.
- (b) The Defendant's counter claim is dismissed.
- (c) Costs to follow the event.

A handwritten signature in black ink, appearing to be 'BW Magagula', is written over a horizontal line.

BW MAGAGULA

JUDGE OF THE HIGH COURT OF ESWATINI

For the Plaintiff:	S. Mkhumane (Magagula & Hlophe Attorneys)
For the Defendant:	M. Masilela (Masilela Attorneys)