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**REPUBLIC OF SOUTH AFRICA
IN THE HIGH COURT OF SOUTH AFRICA,
GAUTENG DIVISION, JOHANNESBURG**

CASE NO: 11188/15

REPORTABLE: NO

OF INTEREST TO OTHER JUDGES: NO

REVISED: NO

Date of judgment: 18 August 2022

In the matter between:

MOODLIYAR & BEDHESI ATTORNEYS

PLAINTIFF

and

YASINE MADATT

FIRST DEFENDANT

BERNADETTE AUBREY MADAT

SECOND DEFENDANT

JUDGMENT

Olivier, AJ:

Introduction

1. The parties are embroiled in a dispute over the payment of legal fees and disbursements. The Plaintiff is a firm of attorneys based in Johannesburg. The First Defendant is Yasine Madatt; the Second Defendant is Bernadette Aubrey Madatt.

The Defendants are the natural parents and guardians of A [....]. M [....], born 16 July 2002. There are two claims – the Defendants are sued in their personal capacity, and also in their representative capacity as the natural parents and guardians of A.

2. The Defendants raise two special pleas of prescription to the claims against them. They allege that most of the claim against them in their personal capacity has prescribed, and that the entire claim against them in their representative capacity has prescribed. Linked to the second special plea is the joinder and citation of A, as a (third) Defendant in this matter.

3. The papers in this matter are voluminous – just shy of 2 700 pages on CaseLines. On the day of trial, the parties agreed in chambers that the special pleas of prescription should be heard separately, as the outcome would determine the future conduct of the trial.

4. In essence, the question is whether the Plaintiff still has valid claims against the Defendants in their personal and representative capacities, or whether the whole or part of one or both claims has prescribed. Central to this enquiry is determining the date on which prescription started to run (which is when the debt became due), and whether prescription was interrupted at any point.

Background facts

5. The case has a long history. On 14 October 2006 the Defendants, in their personal capacity and in their representative capacity on behalf of their minor daughter, signed a power of attorney with the Plaintiff, in terms of which the Plaintiff was mandated to institute an action against the MEC Health, Gauteng, for negligence during the birth of A at Coronation Hospital, which caused her to sustain life-altering injuries (“the first POA”).

6. The parties signed a second power of attorney (“the second POA”) on 15 January 2009. The terms of the second POA were the same, except that it provided for an increase in the hourly rate, and an annual escalation rate.

7. The mandate was terminated by the Defendants on 21 May 2012 (after enrolment but before the allocated trial date of 7 November 2012). The Defendants subsequently procured the services of a new firm of attorneys, who prosecuted the principal claim successfully.

8. The principal claim was instituted in the First and Second Defendants' personal capacity, and also in their representative capacity as parents and natural guardians of A. On 4 August 2015 the Defendants were awarded damages of R 2 000 000.00 in their personal capacity, and R 16 000 000.00 in their representative capacity on behalf of A. They were awarded costs, which amounted to approximately R 1 300 000.00, which was paid by the State Attorney.

9. The Plaintiff contends that it duly performed prior to termination of the mandate and is therefore entitled to claim its fees and disbursements from the Defendants.

10. The bill of costs was taxed and allowed in the amount of R 381 831.75 on 15 October 2013. It covers the period 14 October 2006 to 21 May 2012. Demand was made on 21 October 2013. Summons was issued on 23 March 2015. According to the combined summons, the Plaintiff claims a total amount of R R 381 831.75 from the Defendants in their personal and representative capacities, the latter the result of an amendment to the particulars of claim.

The legal principles

11. It is useful at this stage to give a brief overview of the relevant law. Prescription is regulated by the Prescription Act 68 of 1969 ("the Prescription Act"). It provides that a debtor has a specific period of time within which to institute a claim. If the action is not commenced within that period, the debt will prescribe. A prescribed debt will not support a claim. Failure to institute the claim within the required period cannot be condoned. The principle is simple, its application less so.

12. The Act makes provision for different categories of claim, each with a specific prescription period. The claim in this case does not fall into any of the special

categories in the Act. It is, therefore, a claim that prescribes after three years from the date that the debt becomes due and payable, unless it is regulated by other legislation. In the instant case, when the debt became due is in dispute, and is critical to the determination of whether the debt, or part thereof, has prescribed.

13. According to section 12(1) and (2) of the Act, prescription will run as soon as a debt is due, or when the creditor becomes aware (or ought to have through the exercise of reasonable care) of the existence of the debt. A debt is due once the creditor can identify the debtor and the facts from which the debt arose. If the debtor prevents the creditor from gaining knowledge of the debt, prescription runs from when the creditor gains knowledge of the existence of the debt.¹

14. Prescription may be interrupted. This means that prescription will stop running and will start running afresh from the date of interruption. Prescription of the whole debt is interrupted if there is an acknowledgment of liability, whether explicitly or implicitly, by the debtor. Prescription can also be interrupted by “judicial operation” with formal service of a legal process (e.g. summons). Once the legal process has been served, the matter will be dealt with in terms of the Rules of Court. However, legal process in the prescription context has a limited meaning. It is not all processes that interrupt prescription. Service of summons interrupts prescription. It is a legal process that sets the claim against the defendant in motion.

15. A suspension of prescription differs from the interruption of prescription. In the case of the former, prescription does not start running afresh but rather, as the phrase implies, the running of prescription is “suspended” for a particular period of time. The Act, in section 13, identifies certain instances in which prescription can be suspended for a period of up to a year.

16. It is clear that the issue in this case is when the debt became due – at the time when the mandate was terminated, or earlier, during the course of the mandate, as and when the work was done and disbursements made.

¹ See e.g. *Macleod v Kweyiya* 2013 (6) SA 1 (SCA) para [9].

17. The Constitutional Court recently interpreted provisions of the Prescription Act that are relevant to the present case. In *Trinity Asset Management Pty Limited v Grindstone Investments 132 Pty Ltd*, the minority judgment of Mojaelo AJ sets out the relevant law in clear and simple terms:²

[36] The current Prescription Act provides that “a debt shall be extinguished after the lapse of [the applicable period]”³ which in this instance is “three years”,⁴ and that prescription “shall commence to run as soon as the debt is due.”⁵

[37] The term “due” is not defined in the Prescription Act. Its meaning was recently considered by the SCA in *Miracle Mile* where it was held:

“In terms of the [Prescription] Act, a debt must be immediately enforceable before a claim in respect of it can arise. In the normal course of events, a debt is due when it is claimable by the creditor, and as the corollary thereof, is payable by the debtor. Thus, in [*Deloitte Haskins*]⁶ at 532G-H, the court held that for prescription to commence running, ‘there has to be a debt immediately claimable by the creditor or, stated in another way, there has to be a debt in respect of which the debtor is under an obligation to perform immediately’. (See also *The Master v I L Back & Co Ltd* 1983 (1) SA 986 (A) at 1004F-H). In *Truter v Deyse* 2006 (4) SA 168 (SCA) ([2006] ZASCA 16) para 16, Van Heerden JA said that a debt is due when the creditor acquires a complete cause of action for the recovery of the debt, i.e. when the entire set of facts which a creditor must prove in order to succeed with his or her claim against the debtor is in place”.⁷

² 2018 (1) SA 94 (CC). Mojaelo’s exposition of the legal principles is referred to with approval in para [95] of the majority judgment of Cameron J.

³ S 10(1).

⁴ S 11(d). This is the applicable provision in this case as the debt does not fall into any of the other prescribed categories.

⁵ S 12(1).

⁶ *Deloitte Haskins & Sells Consultants (Pty) Ltd v Bowthorpe Hellerman Deutsch (Pty) Ltd* [1990] ZASCA 136; 1991 (1) SA 525 (A).

⁷ *Standard Bank of South Africa Ltd v Miracle Mile Investments 67 (Pty) Ltd* [2016] ZASCA 91; 2017 (1) SA 185 (SCA) at para 24.

[38] A debt is due when it is immediately claimable by the creditor and immediately payable by the debtor. In *Truter*⁸ the SCA held that, for the purpose of prescription, a debt is due when the creditor acquires a complete cause of action to approach a court to recover the debt.

[39] ...

[40] A fundamental principle of prescription ... is that it will begin to run only when the creditor is in a position to enforce his right in law, not necessarily when that right arises.⁹

[41] A further principle has been developed, based on policy considerations, which provides that a creditor should not by his or her own inaction delay the running of prescription.¹⁰ This policy-based principle appears to have influenced courts to accept as a general rule that all debts payable on demand are immediately enforceable on the conclusion of the contract, and that it is at this point that prescription begins to run.¹¹

[47] In sum, the relevant principles may, in my view, be restated as follows. A contractual debt becomes due as per the terms of that contract. When no due date is specified, the debt is generally due immediately on conclusion of the contract. However, the parties may intend that the creditor be entitled to determine the time for performance, and that the debt becomes due only when demand has been made as agreed. Where there is such a clear and unequivocal intention, the demand will be a condition precedent to claimability, a necessary part of the creditor's cause of action, and prescription will begin to run only from demand. This, in my view, is not an incident of the creditor being allowed to unilaterally delay the onset of

⁸ *Truter v Deyse* [2006] ZASCA 16; 2006 (4) SA 168 (SCA) at para 16.

⁹ See Lubbe "Die Aanvang van Verjaring waar die Skuldeiser oor die Opeisbaarheid van die Skuld kan Besik" (1988) 51 *THRHR* 135.

¹⁰ *Uitenhage Municipality v Molloy* [1997] ZASCA 112; 1998 (2) SA 735 (SCA) at 742E-743B; *Benson v Walters* 1984 (1) SA 73 (A) at 86C; and *The Master v I L Back and Co Ltd* 1983 (1) SA 986 (A) (*I L Back*) at 1005G.

¹¹ See *Webb v Van der Wath* 1914 OPD 17 at 19; *Nicholl v Nicholl* 1916 WLD 10 at 12; *Cassimjee v Cassimjee* 1947 (3) SA 701 (N); *Lambrecht v Lyttleton Township (Pty) Ltd* 1948 (4) SA 526 (T) at 529; and *Damont N.O. v Van Zyl* 1962 (2) SA 47 (T) at 50D-51F.

prescription. It is the parties, jointly and by agreement seriously entered into, determining when and under what circumstances or conditions a debt shall become due.

The powers of attorney

18. The parties signed two powers of attorney. The first was signed on 14 October 2006, but not witnessed; the second POA was signed on 15 January 2009, and witnessed. Paragraphs 1—3 and 5 of each are the same, but paragraph 4 in the second POA increases the hourly rate from R900/h, to R1200/h; it provides also for an annual escalation rate of 15 per cent, which was absent from the first POA.

19. The relevant section of the second POA reads as follows:

We further agree to pay all fees and/or legal costs to be charged by our attorneys in the performance of this mandate, which fees and/or legal costs on the attorney and own client scale at the agreed rate of R 1200 per hour or such pro rata amounts in respect of parts of an hour, which rate shall increase at a rate of 15% per annum from date of signature hereof.

20. Plaintiff contends that they are regular fee agreements. Defendants submit that had the powers of attorney been true fee agreements, Plaintiff would have been bound by the rules of the relevant professional body to submit accounts within 3 months of completing the specific work or making the disbursements. However, Defendants' counsel made no reference to any specific rule to show that Plaintiff was bound to do what Defendants claim.

21. The Plaintiff's reply is that although nothing precludes an attorney from agreeing with the client that interim payments may be made, there is nothing in either of the agreements to that effect – nowhere does it say that fees will be charged every 3 months in the form of interim payments. It is only paragraphs 4 and 5 that address fees, and these make no mention of interim payments.

22. Defendants submit further that the powers of attorney are in substance contingency fee agreements, because Plaintiff argues that the fees were payable only on completion of the mandate.

23. In my view, this argument carries no water. The Contingency Fees Act 66 of 1997 stipulates certain requirements which a contingency agreement must meet. The powers of attorney do not comply, and would be invalid in terms of the legislation. Defendants referred me to *Mkuyana v Road Accident Fund*¹² where Van Zyl DJP analysed the elements of a contingency agreement, but I am of the view that it does not assist Defendants.

FIRST SPECIAL PLEA: The claim against the parents in their personal capacity

24. Defendants submit that all claims prior to 23 March 2012, the date that summons was issued, have prescribed in terms of section 11(d) of the Prescription Act. They pray that the Plaintiff's claim for legal fees incurred and due, owing and payable prior to 23 March 2012, be dismissed with costs.

25. Plaintiff's reply is that a creditor need claim only when there has been either performance, or termination of the mandate. Plaintiff's counsel referred me to *Blakes Maphanga Inc v Outsurance* in which the Supreme Court of Appeal held that:

The relationship between an attorney and client is based on an agreement of *mandatum* entitling the attorney, in the absence of an agreement to the contrary, to payment of fees on performance of the mandate or the termination of the relationship.¹³

26. In the rule 28 judgment,¹⁴ Cele AJ, referring to the *Benson* case, observed as follows:

¹² See 2020 (6) SA 405 (ECG).

¹³ *Blakes Maphanga Inc v Outsurance* 2010 (4) SA 232 (SCA) at para [16].

¹⁴ *Moodliyar and Bedhesi Attorneys v Yasmine Madat and another*, unreported judgment by Cele AJ, case no 11188/2015 (7 June 2018) ("Rule 28 judgment").

As a general proposition, it is in terms of our law that where the parties do not agree on a time for performance or payment, it is due on demand. I do not believe that this general principle finds application, in terms of the common law, in a relationship of an attorney and his or her client which is based on *mandatum*. In the absence of an agreement to the contrary, an attorney is not entitled to payment of fees and disbursements until the mandate has been performed, or until the employment of the services has been terminated.¹⁵

27. Plaintiff submits that since the mandate was terminated prior to its completion, on 21 May 2012, the plaintiff's fees and disbursements became due and payable on 21 May 2012, on and from which date prescription commenced running; therefore the claims against the Defendants would have prescribed only on 21 May 2015.

28. I am inclined to follow what was stated in the *Blakes Maphanga* case and the conclusion reached by Cele AJ in the Rule 28 application. In other words, in the absence of an agreement to the contrary, an attorney is entitled to payment of fees on performance of the mandate or the termination of the relationship. There is nothing in the powers of attorney indicating an intention to the contrary.

29. Accordingly, the **first special plea is dismissed**. The question of the correct rate at which the services and disbursements were charged is a matter for evidence

SECOND SPECIAL PLEA: The claim against the parents in their representative capacity as parents and guardians of minor daughter, A

30. In the original particulars of claim the Plaintiff had cited the parents only in their personal capacities. The Plaintiff gave notice to the Defendants on 21 August 2017 of its intention to amend its particulars of claim in terms of Rule 28 of the Uniform Rules of Court, to cite the Defendants also in their representative capacity as parents and guardian of A. The Defendants unsuccessfully opposed this

¹⁵ At para 31.

amendment, but successfully opposed other proposed amendments.¹⁶ The amendment was effected on 19 June 2018 pursuant to a court order granted on 7 June 2018.

31. Defendants argue that if a mandate is found to have existed between the Plaintiff and Defendants in their personal capacities, the Plaintiff's mandate was terminated on 18 May 2012 at which date, at best for the Plaintiff, prescription commenced running in terms of s 12(1) of the Prescription Act.

32. Plaintiff's notice of intention to amend, dated 21 August 2017, was served on Defendants' attorneys on 25 August 2017, being more than 3 years after commencement of prescription.

33. The period of prescription was completed by 18 May 2015 in terms of section 11(d) of the Prescription Act in respect of / vis-à-vis the "new" Defendant, A. The Defendants therefore pray that the Plaintiff's claim against them in their representative capacities be dismissed.

34. The original paragraph 4 cited the Defendants in their personal capacity only. The amendment added them to the proceedings in their representative capacity. Paragraph 4 now reads: "The Defendants are cited herein in their personal and representative capacities as guardian of the minor child, A [...] M [...] ("the minor")."

35. A [...] has not been cited by name as a third defendant in this action. The Defendants take issue with this, arguing that a joined party must be cited; in the present case, therefore, she should be cited as third defendant, duly represented by first and second defendant, in accordance with the amended particulars of claim.

36. I do not consider it necessary for A [...] to be cited by name as third defendant. It is clear from the amendment that the Defendants are cited in their representative capacity as parents and guardians of A [...]. The effect would be the same as if A [...] were cited specifically by name as a third defendant. Therefore, as

¹⁶ See *Moodliyar and Bedhesi Attorneys v Yasine Madat and another*, unreported judgment by Cele AJ, case no 11188/2015 (7 June 2018) ("Rule 28 judgment").

the parents are cited in their personal and representative capacities, A [...] need not be cited separately.

37. It is useful to quote the following passage from the Rule 28 judgment of Cele AJ, dealing with the citation of Defendants in their representative capacity:

[19] ... Before the amendment, the only parties as Defendants are the parents to the exclusion of their minor daughter. In truth the amendment seeks to introduce the minor daughter as one of the Defendants. The Plaintiff could initially have achieved this either by citing the minor duly represented by her guardians or the guardians acting in their representative capacity for the minor. A claim against a minor, in what way she is represented, is clearly distinct from a claim against her guardians in their personal capacity. The fact that service of the summons in a claim against the minor would be effected on her guardian does not merge her claim into that of her guardian. It must follow that the amendment seeks to introduce a new party to these proceedings. The Defendants raise the question whether service on the Defendants in their personal capacity interrupted prescription. This is an objective test and the Court may only look to the summons and the Particulars of Claim, and not to: a) the annexures to the Particulars of Claim, or b) the subjective intention or knowledge of the parties. (My emphasis.)

38. I align myself with the view of Cele AJ that the amendment seeks to introduce a new party to the proceedings. Where a debt is owed in a representative capacity, it cannot be recovered from that person in a personal capacity.¹⁷

39. The Plaintiff relies on the *Blaauwberg* case¹⁸ in support its argument. In *Blaauwberg* the Supreme Court of Appeal considered s 15(1) of the Act, in particular whether prescription is interrupted by service of a summons in which the debtor is wrongly described but which is rectified after the prescriptive period. Of relevance is paragraph [18]:

¹⁷ See *Blakes Mapanga Inc supra* at para 14.

¹⁸ *Blaauwberg Meat Wholesalers CC v Anglo Dutch Meats (Exports) Ltd* 2004 (3) SA 160 (SCA).

[In] the context of s 15(1), though not necessarily in relation to the amendment of pleadings, the existence of another entity which bears the same name as that wrongly attributed to a creditor in a process is irrelevant. That is not the creditor's concern or responsibility. Second, an incorrectly named debtor falls to be treated somewhat differently for the purposes of s 15(1). That that should be so is not surprising: the precise citation of the debtor is not, like the creditor's own name, a matter always within the knowledge of or available to the creditor. While the entitlement of the debtor to know it is the object of the process is clear, in its case the criterion fixed in s 15(1) is not the citation in the process but that there should be service on the true debtor (not necessarily the named defendant) of process in which the creditor claims payment of the debt. The section does not say '... claims payment of the debt from the debtor'. Presumably this is so because the true debtor will invariably recognize its own connection with a claim if details of the creditor and its claim are furnished to it, notwithstanding any error in its own citation. Proof of service on a person other than the one named in the process may thus be sufficient to interrupt prescription if it should afterwards appear that that person was the true debtor. This may explain the decision in *Embling supra* where the defendant was cited in the summons as the Aquarium Trust CC whereas the true debtors were the trustees of the Aquarium Trust. Service was effected at the place of business of the Trust and came to the knowledge of the trustees. In the light of what I have said such service was relevant to proof that s 15(1) had been satisfied and was found to be so by Van Heerden J (at 700D, 701D).

40. I am of the view that *Blaauwberg* is distinguishable from the present case. That case dealt with the debtor who was incorrectly named. In the present case, a new debtor was introduced when the amendment to the Particulars of Claim was made. The Defendants, in their representative capacity, were added only when the amendment was effected.

41. The work done and disbursements incurred were done more than 3 years earlier than the date that the amendment was made, namely 19 June 2018.

42. In the result, **the second special plea is upheld**. The claim against the Defendants in their representative capacity is therefore dismissed.

Costs

43. Considering that the matter is to proceed to trial in respect of the claim against the Defendants in their personal capacity, I think it best that costs should be reserved for determination at the end of the trial.

IN THE RESULT, I MAKE THE FOLLOWING ORDER:

- a. The first special plea is dismissed. The claim against the Defendants in their personal capacity is postponed *sine die* for adjudication.
- b. The second special plea is upheld. The claim against the Defendants in their representative capacity as parents and guardians of A [....] M [....], is dismissed.
- c. Costs are reserved for determination at the end of the trial.

M Olivier
Acting Judge of the High Court
Gauteng Division, Johannesburg

This judgment was handed down electronically by circulation to the parties and/or parties' representatives by email and by upload to CaseLines. The date and time for hand-down is deemed to be 16h00 on 18 August 2022.

Date of hearing: 10 May 2022

Additional submissions: 30 May 2022

Transcribed record received:

2 August 2022

Date of judgment:

18 August 2022

Appearances:

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