HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION, PRETORIA)

CASE NO: 75594/2013

REPORTABLE: NO.
OF INTEREST TO OTHER JUDGES: NO
REVISED.
DATE: 14 APRIL 2022

In the matter between:

JAN ADRIAAN VENTER	Plaintiff
and	
KUDUSKOP ESTATE (PTY) LTD	First Defendant
KUDUSKOP ECO ESTATE (PTY) LTD	Second Defendant
MORNÈ CHRISTOPHER VILJOEN	Third Defendant
SYLVIA ANNELEA VILJOEN	Fourth Defendant
JACOBUS FREDERICK VILJOEN	Fifth Defendant
JACOBUS CAROLUS LODEWICUS COETZEE	Sixth Defendant
JACOBUS FREDERICK VILJOEN	Seventh Defendant
ALBERTUS JOHANNES COETZEE	Eighth Defendant

J U D G M E N T

This matter has been heard in open court and otherwise disposed of in terms of the Directives of the Judge President of this Division. The judgment and order are accordingly published and distributed electronically.

DAVIS, J

[1] Introduction

This is the judgment in respect of an issue separated in terms of Rule 33 (4) from the rest of the disputes in an action instituted by an attorney for the recovery of his fees. The separation was in respect of a special plea of prescription raised by one of the eight defendants. Separation was ordered by Fourie J on 29 October 2014. The matter was subsequently allocated to me in January 2022 to be dealt with and case managed in terms of the Commercial Court Practice Directives of this Division.

[2] The special plea

The Sixth defendant's special plea is that, in respect of the plaintiff's three claims, the mandates which formed the subject matter of the three claims, being claims for payment of accounts for the rendering of professional services and disbursements, had been completed on 30 March 2007, 8 August 2007 and on 21 April 2010 respectively. It was further pleaded that the claims "fell due" on these three dates, alternatively within a reasonable time thereafter, such a reasonable time being not more than 30 days. Summons had only been served in January 2014, that is more than 3 years after these dates. Accordingly the sixth defendant pleaded that the claims had become prescribed in terms of section 11 of the Prescription Act 68 of 1969.

[3] The contract between the parties

3.1 The plaintiff's three claims are governed by a "Cost Agreement" entered into with the plaintiff's predecessor, being an erstwhile partnership of attorneys. Upon termination of the partnership on 30 June 2009 and by way of a written agreement of session and delegation, the client files and mandates of the defendants were transferred to the plaintiff, with the acquiescence of the defendants.

3.2 The relevant clauses of the "Cost Agreement" are clauses 12 and 14, which read as follows:

> "*12. All accounts shall be in writing [and] be specified as set out supra and shall, depending on your needs, be submitted on an interim basis or non-*

recurrently which accounts shall be payable within 14 days after delivery thereof after which interest at out bank overdraft rate shall be levied …

14. This agreement is furnished to yourselves with regard to the new instructions received. Should you, or any of your authorised representatives submit subsequent instructions to us, such instructions shall be dealt with on exactly the same conditions contained herein unless an amended agreement has been concluded for purposes of such instructions".

3.3 The "specifications" for the accounts referred to the tariffs and amounts of fees and the "yourselves" referred to the respective defendants as clients of the plaintiff (and his predecessor).

[4] The chronology

4.1 As with all matters pertaining to disputes in respect of extinctive prescription, chronology is all-important. At a case management meeting held before me on 22 February 2022, it was agreed and directed, in terms of Chapter 5 of the Commercial Court Practice Directives, read with Rule 38 that the evidence of the only witness on whose evidence the plaintiff would rely (being that of the plaintiff himself) would be delivered by way of an affidavit. Dates for the delivery of the affidavit and the exchange of heads of argument were also agreed on and consequently directed and the hearing of argument proceeded before me on 4 April 2022 during court recess. The sixth defendant, being the only defendant who had raised a special plea, objected to the tendering by the plaintiff of affidavits by two other defendants. These defendants took no part in the proceedings, however and their affidavits had been procured some time ago already. The plaintiff thereafter disavowed any reliance on those affidavits, as did the sixth defendant. The sixth defendant chose not to deliver any affidavit and accordingly the plaintiff's affidavit constituted the only evidence placed before the court.

4.2 The plaintiff's affidavit spans some 13 pages and the portions thereof relevant to the issue of prescription, with reference to the remainder of the pleadings, conveyed the following:

- During August 2006, and while still a partner of the erstwhile partnership of attorneys, the plaintiff's partner, Mr Kruse, approached the plaintiff with a request to assist existing clients, being the current sixth and eighth defendants. These clients, who are brothers, intended establishing a residential estate (the estate) on a farm belonging to the Smangaliso Trust (the Trust) of which their brother-in-law was the controlling trustee. The brother-in-law and the other trustees were cited in the present proceedings as the third, fourth and fifth defendants. The estate was intended to be the Kuduskop Estate, for which purpose Kuduskop Estate (Pty) Ltd and Kuduskop Eco Estate (Pty) Ltd have been incorporated. These two companies are the first and second defendants in this action. The sixth defendant had been appointed by the trust as the developer of the estate.

- The plaintiff said that, due to the existing professional relationship with the sixth and eighth defendants (also referred to as the Coetzee brothers) and the fact that the trust "was not in the financial position to embark on and pay" for the costs involved in the necessary Land Use Change Application which had to be launched, a joint venture was established between the Coetzee brothers and the trust. The joint venture then concluded a Contingency Agreement with the attorneys in terms of which the fees due to the attorneys for the rendering of professional services would be paid by way of the proceeds of the sales of three erven in the proposed estate.

- The affidavit then proceeded as follows:

> "*5. After successful procurement of the land use rights for the Estate, and therefore execution of the contingency brief, subsequent events not envisaged in the Contingency Agreement culminated in:*
>
> > *5.1 An Appeal lodged against the Estate Approval to the Eastern Cape Development Appeal Tribunal by several Objectors, which Appeal suspended the land use rights obtained;*

5.2 The necessity to formally amend some of the conditions incorporated in the initial Estate Approval obtained;

5.3 The refusal of Environmental Authorisation for the development of the Estate and consequently the necessity to Appeal such refusal or to apply for exemption from complying with such onerous statutory Environmental requirements in respect of the Estate; and

5.4 A high Court Review Application which was launched by the Environmental Authorities of the Eastern Cape Province, against the Exemption Approval which I ultimately procured on behalf of the Joint Venture, in favour of the Estate.

6.

None of these subsequent events were provided for in the Contingency Agreement and I refused to further deal with same on a contingency basis on behalf of the Joint Venture and consequently demanded signature of my Firm's standard Cost Agreement and confirmation that all my professional fees earned in respect of these subsequent events, shall be governed by the signed Cost Agreement at my normal professional rates …

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I consequently on that basis successfully nullified the Appeal, procured the amendment of the land use rights sought and successfully obtained a Decision from the Eastern Cape Development Tribunal by virtue of which the Estate was excluded from the provisions of the National Environmental Management Act 1998. The aforegoing required several

personal appearances in Port Elizabeth before the relevant Tribunal and Appeal Tribunal.

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I also, on behalf of the Joint Venture, over a protracted period of more than 2 (two) years, successfully opposed a subsequent Review Application launched by the relevant Environmental Authority against Exemption Approval obtained and ultimately procured a positive Environmental Authorisation in favour of the Estate …

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My involvement in these subsequent events, as already alluded to above, entailed several attendances of hearings and negotiations in Port Elizabeth, which pertained to matters which either suspended the execution of the land use rights obtained in terms of my contingency brief or were required as prerequisites for realisation of the Estate and at all relevant times were sanctioned by the representatives of the Joint Venture on the basis of my signed Cost Agreement, and all my appearances in Port Elizabeth were indeed attended by them or some of them.

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11.1 My aforementioned successes however did not culminate in a final proclamation of the Estate, since a diversity of administrative actions were still to be executed in terms of the Conditions of Approval imposed and applicable other sets of legislation before the procured land use rights lawfully could vest in the Farm of the Trust, and would have enabled the Farm owner (the Trust) to dispose of erven in such Estate.

11.2 One such requirement, i.e. the issue of a Water Use Licence was dealt with by the Department of Water and Sanitation in terms of the National Water Act 1998, for purposes of which a Water Consultant was appointed by the Joint Venture.

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I was at all relevant times mindful of the fact that the ultimate final vesting of the procured land use rights and selling on the erven would have rendered it not only possible but convenient for the Joint Venture (who in the interim established the First and Second Defendants as commercial vehicles for its intended development), to pay my fees in terms of the Contingency Agreement and in terms of the signed Cost Agreement.

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I consequently, after conclusion of the High Court proceedings in 2009, frequently enquired about progress made in that regard (i.e. the finalisation of the approved land use rights), was told that the procurement of a Water Use Licence was a tedious process, which indeed suspended the execution of the land use rights, and although I was repeatedly requested to hold my accounts in abeyance, I, in the interim, after the relevant files were ultimately allocated to me on instruction of the Defendants after my Firm as partnership was dissolved, instructed my office to draw my Bills of Cost in respect of the subsequent events embarked upon by way of the signed Cost Agreement.

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During December 2010, I flew to Port Elizabeth for a different matter and met the Seventh Defendant, representing the Farm owner, and who ostensibly was, at the time, in control of the compliance requirements of the Estate, at the Airport, to discuss the progress made with the finalization of the Estate Approval, as well as the payment arrangement in respect of my fees in terms of the Contingency Agreement and the signed Cost Agreement with him.

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15.1 At the time, my Bill of Cost were only conceptually drawn by my internal staff, but reflected a fairly good indication of the fees due to me.

15.2 The Seventh Defendant was furnished with copies of the draft Bill of Cost (which at that stage were not final, had not been settled by my Cost Consultant and did not contain any VAT invoices or covering letters), which he undertook to discuss with the other members of the Joint Venture, and he requested me not to render such accounts before he had the opportunity to discuss same and the payment arrangements in that regard with his Joint Venture colleagues and myself …

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I indicated to the Seventh Defendant that the Bill of Cost shall be finalised in the new year and that I would, before formal rendering thereof, also endeavour to discuss same with the other members of the Joint Venture. My office finalised the Bills of Cost on 24 January 2011.

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I however unsuccessfully endeavoured to discuss such finalised Bills of Cost with the Coetzee brothers, who referred all enquiries to the Seventh Defendant, but I, during February 2011, ultimately succeeded to intercept the Sixth Defendant leaving the building where I practice, after he consulted with his now Attorney of record and my ex-partner, Mr Robert Kruse.

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During such discussion with the Sixth Defendant, I indicated to him what the ballpark aggregate amount of legal fees outside the ambit of the Contingency Agreement equated to and enquired what payment arrangements have been discussed with the other members of the Joint Venture.

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19.1 The Sixth Defendant intimated that the Estate had not as yet realised, that he is not in possession of my draft accounts, that no final payment arrangements have consequently been made and that he has had no discussion with the Seventh Defendant, who was in possession of the draft Bills of Costs since December 2010.

19.2 He undertook however to do so, especially in circumstance where one of the last impediments for establishment of the Estate, i.e. a Water Use Licence, had according to him, apparently at that stage successfully been procured. I cannot remember whether I furnished him with copies of my finalised accounts on that day, but suspect that I would have done so.

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All my subsequent enquiries to the representatives of the Joint Venture were however ignored. When I ultimately got hold of one of the members of the Joint Venture, he would refer me to the other and it became clear that there no longer was any cooperation between such members of the Joint Venture. I indeed detected animosity between them, realised that the finalisation of the Estate was at risk and therefore also the payment of my fees.

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21.1 In such circumstances I decided to formally draft a letter to all the members of the Joint Venture and to make sure that my now finalised accounts with VAT invoices dated 24 January 2011, were by registered post, served on all such members of the Joint Venture …

21.2 I received no response from such members of the Joint Venture except for an acknowledgement of receipt from the Seventh Defendant dated 11 April 2011 …

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My letter of 29 March 2011, to which my finalised Bills of Costs and VAT invoices dated 24 January 2011 were attached, strictly in accordance with my signed Cost Agreement, afforded the Defendants 14 (fourteen) days to pay same and therefore such accounts became due and payable on 12 April 2011.

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I was, despite repeated unsuccessful enquiries in that regard, and personal subsequent discussions with the Seventh and Eighth Defendants, not successful to procure payment of my

accounts, even on the basis that the formal realisation of the Estate should have realised during this period, and I indeed became aware of apparent Erf alienation actions embarked upon by the Joint Venture, which circumstances prompted me to issue summons in respect of such outstanding legal fees on 13 December 2013 …

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As a consequence, there were very good reasons why I, despite having received my first brief in 2006, and completed my instructions in 2009, only finalised my Bills of Cost in January 2011 and formally dispatched same to the Defendants on 29 March 2011. The Defendant were acutely aware of such reasons and were indeed the orchestrators thereof".

[5] The sixth defendant's argument and the evaluation thereof

5.1 It is trite that he who pleads extinctive prescription, bears the onus in respect thereof. This includes the proof of the date of inception of the period of prescription, i.e. when the period of extinctive prescription commences to run. See: Harms *Amler's precedents of Pleadings* under the topic "Prescription: Extinctive" and *Gericke v Sack* 1978 (1) SA 821 (A).

5.2 The sixth defendant's case is as per its special plea and the argument is that the period of extinctive prescription started to run, at the latest 30 days after date of completion of the mandates by the rendering of the professional services which made up the subject matter of the three claims. The sixth defendant saw these mandates as separate to each other (as they have been accounted for) but even if the three mandates were part of one continuing mandate, namely to secure the necessary requirements to establish the estate (apart from the services which form the subject matter of the Contingency Agreement), then the last date of the performance thereof was 21 April 2010. The period of prescription would then have commenced on 21 May 2010 and by 20 May 2013 all claims in respect of which

prescription had not been interrupted by way of the institution of action, would have become prescribed. In this case, so the sixth defendant argues, that would include all the plaintiff's claims as action was only instituted on 13 December 2013 and served in January 2014.

5.3 The sixth defendant further argued that the plaintiff was overly nonchalant and so dilatory in the rendering of his accounts, that he should not be allowed to "capitalise" on the argument that his claims only arose at the time he delivered the accounts.

5.4 In this regard, the sixth respondent relied on the following quotation from the judgment in *Jakobo v Grimbeeck* (380/2013) [2014] ZAFSHC 117 (17 August 2014): "*The law expects a creditor such as the plaintiff to act reasonably and alert and as a reasonable person and not to sit back in a couldn't-care-less altitude*" (my translation). In that matter the plaintiff, however, had done nothing to pursue his claim for almost a decade. What is also important is to note however, is that Kruger J who had delivered that judgment, had subsequently granted leave to appeal on 23 October 2014 in *Jakobo v Grimbeeck* [2013] JOL 32790 (FB) (380/2013) inter alia on the basis that the plaintiff might have been excused for his inactivity due to the erroneous impression created by the defendant that "everything was in order", obviating the need for plaintiff to act. The judgment, at best, indicates that the consideration or determination of the inception of the period of prescription is fact-, and therefore, case-specific.

5.5 In this regard, in *Amlers Precedents of Pleadings* (op cit) the following is proclaimed (on which quotation the sixth defendant also relies), namely that "*… as a general rule, prescription begins to run as soon as the debt is due unless the debt is the result of a continuing wrong … this means that the debt must be immediately claimable by the creditor in legal proceedings and that the debtor must be under an obligation to perform*". See also: *Benson v Walters* 1984 (1) SA 73 (A) at 82 and *Uitenhage Municipality v Molly* 1998 (2) SA 735 (SCA). In the present case, the plaintiff would not have been able to institute legal proceedings prior to him delivering an account to his clients and the expiry of a period of 14 days thereafter.

Conversely, the clients would not have been under an obligation “to perform”, i.e. to make payment until such time as an account had been rendered.

5.6 In this regard counsel for the plaintiff, with reference to *Shraga v Chalk* 1994 (3) SA 145 (NPD) emphasised the distinction between the notion of when a debt arises and when it becomes due. This was also considered in *Deloitte Haskins and Sells Consultants (Pty) Ltd v Bowthorpe Hellerman Deutsch (Pty) Ltd* 1991 (1) SA 525 (A) at 532H and *Cape Town Municipality and another v Allianze Insurance Co Ltd* 1990 (1) SA 311 (C) at 321 B – C, lastmentioned with reference to the acquisition of knowledge of “*the entire set of facts which the plaintiff had to prove to succeed*”. Counsel also relied on the dictum that “*prescription does not necessarily [start to] run when the debt arises, but only when it becomes due*” made in *Primavera Construction SA v Government, North West Province* 2003 (3) SA 579 (BPD).

5.7 Whilst it might be argued that after performance of his mandate, the plaintiff should have been able to calculate his fees and therefore had or could reasonably have acquired knowledge of “the complete set of facts” to sustain a cause of action, the parties have agreed however, that despite this “set of facts”, the debt, being the obligation to pay for the professional services rendered, would not become due until 14 days after the rendering of an account. No account, no obligation to pay, or, to put it in the words of the Prescription Act, absent the delivery of an account and the expiry of a period of 14 days, the “debt” would not yet become due. This is also exactly what the Prescription Act, in section 12 requires: “*… prescription shall commence to run as soon as the debt is due*”.

5.8 The sixth defendant’s actual complaint or basis for its special plea, is that the plaintiff has delayed, not in instituting action (which was done within 3 years after the rendering of accounts as required by section 10(1) of the Act read with section 11(d) thereof), but in the rendering of his accounts.

5.9 At the risk of inviting criticism for repetition, I point out that, without pleading that the obligation to render accounts without delay was an implied or tacit term of the agreement between the parties, the sixth defendant simply pleaded, in respect of each claim and with reference to the respective dates of completion of the mandate

that "*the plaintiff's claim[s] fell due on [the date of completion of the mandates] alternatively within a reasonable period thereafter, such reasonable period being not more than 30 days*". In the absence of such a term, there was no contractual obligation on the plaintiff to render an account at a time other than at his convenience.

5.10 The converse was however, agreed: the sixth defendant as the client, could demand interim accounts at such times or intervals as he preferred. This is expressly catered for in clause 12 of the "Cost Agreement". This was the intention of the parties and neither the wording of the agreement nor the "background facts" point to a similar reciprocal obligation on the plaintiff. The "background facts" are those which a court is entitled to consider in respect of the issue of prescription which are, in this case, the evidence presented by the plaintiff. See *Stockdale v Stockdale* 2004 (1) SA 68 (CPD) in this regard. The evidence is that at no stage did the sixth defendant choose to demand the rendering of accounts.

5.11 On the other hand, it could very well be argued that it would be manifestly unjust if a plaintiff, or as in this case, an attorney, simply fails to render an account by which his fees would become due and payable for an inordinate period of time and say, six years later, suddenly render an account and expect it to be paid within 14 days. Even if one were then, on a generous and beneficial interpretation of the sixth defendant's special plea, to consider whether an implied or tacit term to the effect that an account should be rendered within a reasonable time after performance of the mandate, should be read into the "Cost Agreement", then no evidence has been placed before the court by the sixth defendant as to what that period would be or as to why 30 days would either in general or in the circumstances of this case, be a reasonable period.

5.12 On the contrary, the plaintiff has placed evidence before the court as to why the delay in the rendering of his accounts was reasonable in the circumstances:

- He was aware that the mandates which he had been called upon to perform under the "Cost Agreement" were all still aimed at enabling the clients to establish the estate. Despite the performance of his mandates, the

establishment of the estate was delayed by the water use rights issue, which was being handled by someone else.

- He stated that the clients had insufficient funds to pay for professional services until such time as the estate has been established and erven could be sold, or that it would be “inconvenient” for the clients to pay before the proceeds of such sales materialised.

- He had attempted to obtain clarity or negotiate payment terms or promises by way of providing “concept statements” or “ball park figures”.

- His efforts in ascertaining how and when his fees would be paid were hampered by apparent disagreements within the joint venture.

- He was on numerous occasions requested by his clients to keep the rendering of his accounts in abeyance (presumably because once rendered, the 14 day period to make payment would start running).

5.13 Even through there may be some gaps in time the plaintiff’s explanations, the delays in rendering or the withholding of accounts appear to have been more to the clients’ benefit than to their prejudice. I am unable to find, on the uncontroverted evidence of the plaintiff, firstly that he had been under an obligation to have rendered his accounts earlier than when he did or, secondly, that the time period that had elapsed prior to his eventually rendering his accounts, has been unreasonable.

[6] Conclusion

I therefore conclude that the sixth defendant has not discharged the onus to prove that the plaintiff has been under an obligation to render his accounts earlier than he did. The conclusion is then further that the running of prescription in respect of the debt which the plaintiff seeks to enforce in this action, only commenced 14 days after the date of the rendering of the accounts, that is on 12 April 2011. Action was instituted within three years from this date and accordingly the plaintiffs’ claims have not become prescribed.

[7] Costs

Although the special plea has not succeeded, it was merely a procedural, although substantial, hurdle in the course of the remainder of the plaintiff's race. It has repeatedly been held that "*in essence the decision [as to costs] is a matter of fairness to both sides*". See Van Loggerenberg*, Erasmus Superior Court Practice* at D5 – 6 and the numerous cases quoted in footnote 1 on that page. I find it to be fair that the costs of this hurdle should be dependent on the ultimate success in the case. In the exercise of my discretion, I therefore find that costs should be costs in the cause.

[8] Order

1. The sixth defendant's special pleas of prescription are dismissed.

2. Costs shall be costs in the cause.

N DAVIS
Judge of the High Court
Gauteng Division, Pretoria

Date of Hearing: 4 April 2022
Judgment delivered: 14 April 2022

APPEARANCES:

For the Plaintiff:	Adv J AVenter
Attorney for the Plaintiff:	E Y Stuart Incorporated, Pretoria
For the 6th Defendant:	Adv A J Schoeman
Attorneys for the 6th Defendant:	Kruse Attorney Inc., Pretoria