



IN THE HIGH COURT OF SOUTH AFRICA
FREE STATE DIVISION, BLOEMFONTEIN

Not Reportable

Case no: **5020/2022**

In the matter between:

MWELASE KORFFIE (PTY) LTD

Plaintiff

and

FREE STATE DEVELOPMENT CORPORATION

Defendant

Coram: JP Daffue J

Heard: 10 & 11 September 2024

Judgment reserved: 18 October 2024

Delivered: 11 April 2025

This judgment was handed down electronically by circulation to the parties' representatives by email and release to SAFLII. The date and time for hand-down is deemed to be 16H00 on 11 APRIL 2025.

Summary: A public company's defence of prescription was considered. The service provider claimed retainer fees in an amount of R6 million plus VAT in respect of a two-year period ending in July 2016 which claim was instituted in October 2022 only. It was recorded in the public company's books that an amount of R1.8 million was owing. The plaintiff submitted that payment would only become due once invoices had been issued, (which it failed to do for several months) or upon a report on ultimate completion of the contracted services. The court rejected the argument that the debt became due in 2022 only and found that it became due in August 2016, having interpreted the parties' agreement by making use of the unitary approach as well as the plaintiff's conduct after the conclusion of the agreement. The court held that prescription had not been interrupted in terms of s 14 of the Prescription Act 68 of 1969. It held further, relying on s 10(1) of the Prescription Act, that even if the public company had admitted liability, save for the amount of R1.8 million, such admission occurred after the claim had become prescribed and could not revive the debt. Judgment was entered into in favour of the plaintiff in the amount of R1.8 million plus interest and costs.

ORDER

1. Payment in the amount of R1.8 million.
 2. Interest on the amount of R1.8 million *a tempore morae* from date of service of the summons until date of final payment.
 3. Costs of suit.
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JUDGMENT

Daffue J:

Introduction

[1] In this case a service provider claims an amount of R6 million plus VAT and interest from a public company for services rendered in terms of a written consultancy agreement. The defendant filed three special claims which caused an unnecessary delay in finalisation of the proceedings. Eventually, the only issue that merits adjudication is the alleged prescription of the claim.

The parties

[2] The service provider and plaintiff is Mwelase Korffie (Pty) Ltd, a registered company. It was represented by Adv E Propy, instructed by Jennings Inc, Pretoria. The local correspondent is Peyper and Botha Attorneys, Bloemfontein.

[3] The defendant is the Free State Development Corporation (the FDC), a public company registered and established in terms of the Free State Development Corporation Act 6 of 1995. Adv PT Masihleho appeared for it on behalf of Phatshoane Henney Attorneys, Bloemfontein.

The pleadings

[4] The plaintiff relies on a written consultancy agreement dated 1 December 2013, together with annexures thereto, in claiming payment in the amount of R6 million plus VAT, interest and costs on an attorney and client scale. The R6 million is made up of retainer fees in the total amount of R250 000 per month for a period of 24 months from

August 2014 to July 2016, being R100 000 in respect of liaison support (scope 1) and R150 000 in respect of project management (scope 3) in terms of the costing schedule contained in POC 3 annexed to the particulars of claim.

[5] The FDC raised numerous issues in *inter alia* three special pleas and a plea on the merits. During pre-trial minutes dated 3 October 2023, the parties represented by the same counsel that appeared before me, could not come to an agreement to limit the issues. The FDC insisted as alleged in the pleas that (a) the plaintiff did not comply with the demand requirement contained in the Institution of Legal Proceedings against Certain Organs of State Act 40 of 2002, (b) no authority was provided to institute action, (c) no agreement existed between the parties and even if it did, the plaintiff had not performed in accordance with its obligations and was not entitled to any monies and (d) the plaintiff's claim had become prescribed.

[6] On 6 September 2024, less than a week before the first day of the hearing, a joint supplementary pre-trial minute was filed. The FDC decided not to persist with its special plea relating to Act 40 of 2002 and agreed that the plaintiff had authority to institute action. It also no longer persisted with the defence that the consultancy agreement and annexures thereto were null and void on the basis that the annexures relied upon fell foul of clause 17.4 of the consultancy agreement (the agreement). Finally, the only issues that really had to be adjudicated was whether the plaintiff performed fully in terms of the agreement and whether its claim had prescribed or not. On the second day of the hearing the parties concluded the evidence they intended to lead. Leave was granted to them to file heads of argument. The plaintiff's replying heads had to be filed on/or before 18 October 2024. Judgment was reserved.

[7] In response to the plea of prescription the plaintiff referred in its replication to the email of the Auditor-General dated 24 August 2022 and paragraph 14 of the particulars of claim.¹

¹ The letter of the Auditor-General is attached as annexure POC7 on p 86 of pleadings bundle and states merely the following: 'As part of our audit process we require information from Mwelase Korffie with regards to the amounts owing by FDC.' The plaintiff furthermore relied in its reply to the meetings and discussions from 13 March 2022 and onwards in respect of the debt owing.

The plaintiff's performance in terms of the agreement and annexures thereto

[8] Having heard the evidence of Mr Korff on behalf of the plaintiff and in the absence of any cross-examination to challenge his version that the plaintiff had rendered the required services in a proper and workmanlike manner, as well as a total lack of evidence on behalf of the FDC to counter the version of Mr Korff, there can be no doubt that the plaintiff has proven that it has fully complied with its contractual obligations for the period of 24 months until the end of July 2016 as alleged in the particulars of claim. Consequently, it would be entitled to payment in the amount of R6 million, *ie* R250 000 per month for 24 months, plus VAT, less any payments made by the FDC in partial compliance with its obligations. I will say something later herein about the claim for payment in respect of the period from August to December 2016 testified to by Mr Korff which does not form part of the pleaded claim.

Common cause facts relating to the claim and the defence of prescription

[9] The commencement date of the agreement was 1 December 2013, although the plaintiff rendered similar services for the FDC from 1 April 2013 as is evident from its letter dated 6 May 2013 testified to by its managing director, Mr Shoba.² No fees are claimed for the period till July 2014. In the absence of any evidence in this regard it must be accepted that these fees have been paid.

[10] As mentioned, the plaintiff claims fees for 24 months only, *ie* the period from August 2014 to July 2016. Save for four monthly invoices rendered for August, September, October and December 2014 and three for March, April and May 2016, it failed to issue any invoices for the other months during the aforesaid period.³ The relevant part of the summary has been scanned and inserted below.

² This is also apparent from the summary of invoices and payments prepared by Mr Korff on behalf of the plaintiff: pp 80&81 of part 1 of the discovered documents.

³ See again p 80 of the discovered documents; it is also apparent that the plaintiff does not claim any fees for the period prior to August 2014.

FREE STATE DEVELOPMENT CORPORATION (FDC)

TSHAME DEVELOPMENT PROJECTS

PROJECT TSH FDC APPOINTMENT
 PERIOD 2013 04 09 to 2018 12 31
 SUBJECT Retainer Claim Calculations
 (Rev: 2023 03 27)

TO BE COVERED FOR CLAIMING FOR THE PERIOD 2014.08.01 TO 2016.07.31

PROJECT VOC & FOOD INVOICING
 PERIOD 2013 04 09 to 2013 09 30
 INVOICES #00 - #06 (Refer worksheet "2013.04.09-2013.09.30: #00-#06")

Specific Retainer Invoice No	Date / Period	Month	Scope #01 & #03 Fee per Agreement	Part or no Retainer Pmt Received	Balance for to be covered by Claim	Full Amount for to be covered by Claim
None	N/a	N/a	R 250 000	R -	R -	R -
					R -	R -

PROJECT TSHAME
 PERIOD 2013 10 31 to 2014 08 31
 INVOICES #01 - #13b (Refer worksheet "2013.10.01-2014.08.31: #01-13b")

Specific Retainer Invoice No	Date / Period	Month	Scope #01 & #03 Fee per Agreement	Part or no Retainer Pmt Received	Balance for to be covered by Claim	Full Amount for to be covered by Claim
#13a	2014.08.31	Aug-14	R 250 000	R 52 500	R 197 500	R -
					R 197 500	R -

PROJECT FENCE AND GATEHOUSES / GUARDHOUSES
 PERIOD 2014 10 01 to 2016 11 18
 INVOICES #12 #14a - #46b (Refer worksheet "2014.10.01-2016.11.18: #12, 14-46")

Specific Retainer Invoice No	Date / Period	Month	Scope #01 & #03 Fee per Agreement	Part or no Retainer Pmt Received	Balance for to be covered by Claim	Balance for to be covered by Claim
#14a	2014.10.01	Sep-14	R 250 000	R 50 250	R 199 750	R -
#16a	2014.10.21	Oct-14	R 250 000	R 49 500	R 200 500	R -
None	N/a	Nov-14	R 250 000	R -	R -	R 250 000
#20a	2014.12.31	Dec-14	R 250 000	R 52 250	R 197 750	R -
None	N/a	Jan-15	R 250 000	R -	R -	R 250 000
None	N/a	Feb-15	R 250 000	R -	R -	R 250 000
None	N/a	Mar-15	R 250 000	R -	R -	R 250 000
None	N/a	Apr-15	R 250 000	R -	R -	R 250 000
None	N/a	May-15	R 250 000	R -	R -	R 250 000
None	N/a	Jun-15	R 250 000	R -	R -	R 250 000
None	N/a	Jul-15	R 250 000	R -	R -	R 250 000
None	N/a	Aug-15	R 250 000	R -	R -	R 250 000
None	N/a	Sep-15	R 250 000	R -	R -	R 250 000
None	N/a	Oct-15	R 250 000	R -	R -	R 250 000
None	N/a	Nov-15	R 250 000	R -	R -	R 250 000
None	N/a	Dec-15	R 250 000	R -	R -	R 250 000
None	N/a	Jan-16	R 250 000	R -	R -	R 250 000
None	N/a	Feb-16	R 250 000	R -	R -	R 250 000
#44a	2016.03.18	Mar-16	R 250 000	R 150 000	R 100 000	R -
#45a	2016.04.21	Apr-16	R 250 000	R 192 000	R 58 000	R -
#46a	2016.05.31	May-16	R 250 000	R 150 000	R 100 000	R -
None	N/a	Jun-16	R 250 000	R -	R -	R 250 000
None	N/a	Jul-16	R 250 000	R -	R -	R 250 000
					R 856 000	R 4 250 000

[11] It is apparent from the summary that, unlike as claimed, FDC had indeed made certain payments during the particular period. Furthermore, and although Mr Korff tried to explain it, the figures depicted in the document do not correspond with the particulars of claim. The fees claimed for the period, less payments received, do not add up to R6 million, but to the amount of R5 303 500 only. Also, during the evidence it transpired that the plaintiff sought to claim fees for the period August to December 2016 in the amount of R1 250 000 as reflected on the second page of the summary, despite the evidence that the plaintiff had been substituted by another supplier/contractor – whether lawfully is not the issue at this stage – and was not even invited to monthly meetings to present any further reports. Clearly, the plaintiff was totally ignored during this time. In any event R5 303 500 and R1 250 000 do not add up to R6 million. No attempt was made to seek an amendment during the hearing.

[12] On 12 November 2018 the Chief Financial Officer of the FDC issued a letter annexed as annexure POC4 to the particulars of claim on behalf of the FDC's Supply Chain Management 'to whom it may concern.' The plaintiff alleged in its particulars of claim that this letter confirmed the plaintiff's appointment. I do not agree that it referred to an ongoing appointment at that stage. Mr Korff made it clear in his evidence that it was a letter of recommendation to assist the plaintiff to obtain new business from third parties. In my view the letter does not assist the plaintiff insofar as the defence of prescription is concerned. The letter refers to the appointment and deployment of the FDC in the past and carries on to state that 'it is understood that **Mwelase Korffie (Pty) Ltd is interested and available** for appointment and deployment by other Organs of State ...' and 'the FDC **formally supports** the leveraging by any other organ of state off the said appointment and deployment of Mwelase Korffie (Pty) Ltd by FDC.'⁴

[13] On 13 March 2022, nearly six years after the plaintiff had been replaced by a new service provider, the managing director of the plaintiff, Mr Shoba and the new Chief Executive Officer of the FDC, Mr Lebelo met in person. Much may be said about the meeting, their different versions and the minutes presented by the plaintiff. It is apposite to state that at that time Mr Lebelo was not presented with any documentation relating to the claim, although he was by then aware that the plaintiff was one of the

⁴ Annexure POC4 to the particulars of claim on pp 69-72.

FDC's creditors. He testified in court that prior to the meeting with Mr Shoba he made a representation to the FDC's new Board of Directors wherein he pointed out that an amount of R1.8 million was reflected in the FDC's books as an outstanding debt in favour of the plaintiff. In my view this recordal in FDC's books constitutes an express acknowledgement by FDC of a debt owing to the plaintiff in the amount of R1.8 million.

[14] On 15 March 2022 the plaintiff issued a letter, *inter alia* claiming payment from FDC.⁵ This came three years and four months after the letter of 12 November 2018 and nearly six years after July 2016. It is apparent from the letter that the plaintiff believed that it was still appointed and deployed by formal agreement with the FDC and that it sought consideration from FDC of possible further leveraging of the said appointment and deployment. Furthermore, it requested FDC's consideration of the '**proposed back-dated remuneration** ... from the period of formal appointment of [the plaintiff] to when an alternative service provider was appointed (first half of 2016) ...'. It is common cause that the plaintiff did not obtain an interdict to stop FDC from appointing a new contractor/supplier to substitute it and also to prevent the hand-over of all relevant documents to the new supplier as instructed by FDC.

[15] The letter of 15 March 2022 clearly indicates that the plaintiff believed that it was entitled to payment for the aforesaid period of 24 months only. The plaintiff alleged that no fees had been paid by the FDC which is clearly wrong, bearing in mind the summary above. It was then suggested that instead of insisting on payment of R6 million and 'given the possibility of further leveraging off the original appointment and deployment [of the plaintiff] and its Consortium', the plaintiff would be satisfied with a once-off payment of R4.5 million 'after the required invoice was submitted to the FDC'.⁶ In the letter the plaintiff acknowledged that during the first half of 2016 the FDC 'procured and appointed another Project Management Service Provider (Messrs LTE Consulting) despite the contractual arrangement with [the plaintiff] (and its Consortium Members)....'

[16] On 18 August 2022 the FDC wrote a letter to the plaintiff following upon the undertaking of an audit by the Auditor-General, seeking information about the plaintiff's claim. On 24 August 2022 Mr Korff confirmed in writing that R4 million plus VAT was

⁵ Annexure POC6 to the particulars of claim: pp 76 – 83.

⁶ Paragraph 2c on p 82.

owing.⁷ The plaintiff also caused a pro forma invoice to be issued on 11 June 2022 in the amount of R4.6 million.⁸ It is obviously in respect of the 24 months from August 2014 to July 2016. The plaintiff claimed R6 million, but was prepared to grant a 33.3% discount of R2 million and when 15% VAT was added, the amount claimed came to R4.6 million. The FDC did not respond and the plaintiff eventually instituted action procedure.

Prescription: applicable legal principles

[17] The only real issue to be considered is the FDC's reliance on prescription. The normal prescription period of three years is applicable *in casu*. For the moment it is apposite to state the legal principles. Before doing so, it is recorded that the following issues raised by the parties will be considered during the evaluation of the evidence:

- a. when did the debt become due, *ie* when did it become claimable by the plaintiff and payable by the FDC;
- b. did interruption of prescription occur;
- c. could the debt, once prescribed, be revived thereafter by an admission of liability.

[18] A debt must be immediately enforceable before a claim in respect of it can arise. In *Standard Bank of South Africa Ltd v Miracle Mile Investments 67 (Pty) Ltd and Another (Miracle Mile)*⁹ the court confirmed the principle that a debt is due in the normal course of events when it is claimable by the creditor and as a corollary thereto is payable by the debtor. It relied on a *dictum* in *Deloitte Haskins & Sells Consultants (Pty) Ltd v Bowthorpe Hellerman Deutsch (Pty) Ltd*¹⁰ 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'. In the context of the *Miracle Mile* judgment this could only occur when the bank elected to give the requisite notice to the debtor, in terms of an agreed acceleration clause in the contract, to claim the full outstanding balance of the claim at once upon breach by the debtor. In that case the court held

⁷ Discovered documents p 95.

⁸ Pleadings bundle, p 95.

⁹ (187/2015) [2016] ZASCA 91; [2016] 3 All SA 487 (SCA); 2017 (1) SA 185 (SCA) (1 June 2016) at para 24.

¹⁰ [1990] ZASCA 136; 1991 (1) SA 525 (A) at 532G-H.

that the creditor could not be said to be in default and guilty of dilatoriness until it has made an election which must be communicated in the form of the requisite notice.

[19] Creditors cannot be allowed to enforce their claims without regard to the time limits imposed by the Prescription Act 68 of 1969. If they fail to enforce their claims timeously, they may not enforce them at all. Subject to exceptions, s 12(1) of the Prescription Act provides that prescription begins to run 'as soon as the debt is due'. It is trite that creditors may not by their own conduct postpone the commencement of prescription.¹¹ In *Gunase v Anirudh*¹² the Supreme Court of Appeal held that s 12(3) imposes a duty on a creditor to exercise reasonable care to obtain knowledge of the identity of the debtor and the facts from which the debt arises. Creditors are not allowed to postpone the commencement of the running of prescription by their failure to take necessary steps, or put otherwise, they may not sit back, do nothing and arbitrarily or at will postpone the commencement of prescription. They must be vigilant in enforcing their rights. The Prescription Act has promoted certainty by imposing the various time limits.

[20] The first issue to be determined as mentioned above is when did the debt arise *in casu*. In order to interpret the parties' agreement in this regard, it is required to consider the unitary approach to interpretation of contracts. The parties' contentions pertaining to the interpretation of clause 6 of the agreement quoted hereunder as well as their conduct during implementation thereof will be dealt with later herein. Before then it is apposite to refer to the approach of our courts to the conduct of parties in the interpretation of contracts. In doing so I decided to quote extensively from *Capitec Bank Holdings Ltd and Another v Coral Lagoon Investments 194 (Pty) Ltd and Others (Capitec)*.¹³ In its reasoning the Supreme Court of Appeal *inter alia* considered whether the conduct of Capitec Holdings after conclusion of the particular contract was significant in interpretation of clause 8.3 thereof as the other parties maintained. The

¹¹ Christie's *The Law of Contract in South Africa* 8th ed p 596; *Uitenhage Municipality v Molloy* 1998 (2) SA 735 (SCA) at 742A – C, relying on *The Master v IL Back & Co Ltd and Others* 1983 (1) SA 986 (A) at 1005G where the court held as follows: 'If all that is required to be done to render the debt payable is a unilateral act by the creditor, the creditor cannot avoid the incidence of prescription by studiously refraining from performing that act.'

¹² (826/2010) [2011] ZASCA 231; 2012 (2) SA 398 (SCA) (30 November 2011) para 14.

¹³ [2021] ZASCA 99 (9 July 2022); 2022 (1) SA 100 (SCA) paras 36 – 56; the SCA referred to the following judgments: *Comwezi, Security Services (Pty) Ltd v Cape Empowerment Trust Ltd* [2012] ZASCA 126 para 15, *Johannesburg v Auckland Park Theological Seminary and Another* [2021] ZACC 13; 2021 (6) SA 1 (CC) paras 68 and 92, and *Natal Joint Municipal Pension Fund v Endumeni Municipality* [2012] ZASCA 13; [2012] 2 All SA 262 SCA; 2012 (4) SA 593 (SCA) para 18.

court did in fact accept that the evidence in this regard was admissible, but ultimately found that Capitec Holdings' conduct was equivocal, bearing in mind it initially acted on its understanding of the clause, merely to change its mind thereafter. I quote the relevant parts of the judgment:

'[36] In *Comwezi*, this court explained that, even in the absence of ambiguity, the conduct of the parties in implementing the agreement may provide clear evidence as to how reasonable persons of business construed a disputed provision in a contract. Capitec Holdings acknowledged that in two transactions, one in 2012 and the other in 2017, Capitec Holdings had consented to the sale by Coral of its Capitec Holdings shares.

[37]

[38] ... Under the expansive approach to interpretation laid down in *Endumeni*, extrinsic evidence is admissible to understand the meaning of the words used in a written contract. Such evidence may be relevant to the context within which the contract was concluded and its purpose, and this is so whether or not the text of the contract is ambiguous, either patently or latently....

[39] In the recent decision of *University of Johannesburg v Auckland Park Theological Seminary and Another (University of Johannesburg)*, the Constitutional Court affirmed that an expansive approach should be taken to the admissibility of extrinsic evidence of context and purpose, whether or not the words used in the contract are ambiguous, so as to determine what the parties to the contract intended....

[40] This seeks to give a very wide remit to the admissibility of extrinsic evidence of context and purpose. Even if there is a reasonable disagreement as to whether the evidence is relevant to context, courts should incline to admit such evidence, not least because context is everything. The courts may then weigh this evidence when they undertake the interpretative exercise of considering text, context and purpose.'

The court continued in *Capitec*:

'[51] Most contracts, and particularly commercial contracts, are constructed with a design in mind, and their architects choose words and concepts to give effect to that design. For this reason, interpretation begins with the text and its structure. They have a gravitational pull that is important. The proposition that context is everything is not a licence to contend for meanings unmoored in the text and its structure. Rather, context and purpose may be used to elucidate the text.

[52] ...

[53] ...

[54] In conformity with *University of Johannesburg*, I do think the evidence must be judged relevant and considered. How the parties to the subscription agreement conducted themselves after the conclusion of the agreement may have some relevance for the purpose

of deciding upon the meaning of clause 8.3. Capitec Holdings certainly conducted itself after the conclusion of the subscription agreement, notwithstanding its later change of heart, on the basis that its consent was required. That is evidence of some relevance to an objective interpretation of clause 8.3 because it may be probative, as suggested in *Comwezi*, as to how reasonable businesspeople, situated as they were, and knowing what they did, construed clause 8.3. This finding is made in conformity with the dicta in *University of Johannesburg*, to which I have referred, that the test of relevance is deferential to reasonable differences as to admissibility and that weighing such evidence is to be preferred to excluding the evidence. In addition, since the evidence is claimed to be relevant to context and hence to the meaning of clause 8.3, contrary indications as to the meaning of the clause do not oust the consideration of this evidence.

[55] ...

[56] Weighing this evidence, as I do, I cannot find that the conduct of Coral and Capitec Holdings after the conclusion of the subscription agreement lends context to clause 8.3 that displaces the clear meaning of the clause derived from the text of the clause, understood in the context of the structure of the agreement as a whole, and its proclaimed purpose — the desire of Capitec Holdings to increase its black shareholding in conformity with the BBE Act and its codes. The conduct is equivocal... This ultimately matters little because the weight of the evidence of its understanding of clause 8.3 does not displace the outcome of the interpretative exercise, set out above, which shows that the meaning of clause 8.3 imports no requirement that Capitec Holdings' consent is necessary for Coral to conclude a demarcated sale.' (footnotes omitted and emphasis added)

[21] Section 14 of the Prescription Act allows for the interruption of prescription. It provides:

'(1) The running of prescription shall be interrupted by an express or tacit acknowledgment of liability by the debtor.

(2) If the running of prescription is interrupted as contemplated in subsection (1), prescription shall commence to run afresh from the day on which the interruption takes place or, if at the time of the interruption or at any time thereafter the parties postpone the due date of the debt from the date upon which the debt again becomes due.'

[22] In *Investec Bank Ltd v Erf 436 Elandspoort (Pty) Ltd and Others (Elandspoort)*¹⁴ the Supreme Court of Appeal had to determine whether the bank's claim had prescribed. The issue was whether or not the debtor admitted liability. I quote the relevant paragraphs:

¹⁴ (410/2019) [2020] ZASCA 104; 2021 (1) SA 28 (SCA) (16 September 2020).

[32] In determining whether Erf 436 [the debtor] acknowledged liability either expressly or tacitly, and when, it is necessary to consider not only what Joubert said but also what he did. His words and conduct must be viewed holistically and in their proper context. That, it seems to me, is particularly so in respect of the monthly payments of the rental of subtenants towards the loan and the payment of the purchase price for Investec's rights by Johnny Prop. Viewed in isolation they tell one nothing, but viewed in their broader context, with particular reference to the two agreements between Investec and Erf 436, a picture emerges.

[33] When Erf 436 was responsible for the collection of the subtenants' rental, its payments of those amounts towards the repayment of its loan constituted a series of tacit acknowledgments of liability. This period ended with a payment on 30 September 2003. Furthermore, during this period, Joubert, on behalf of Erf 436, wrote two letters, dated 7 May 2003 and 13 June 2003, in which he expressly acknowledged liability. The effect of the payments and the letters was that prescription was interrupted on the date of each payment and the date of each letter and commenced running again from those dates. As the last payment during this first period was made on 30 September 2003, the running of prescription was extended to 30 September 2006, with the last day for serving the summons being 29 September 2006.' (emphasis added)

[23] A debt is extinguished by prescription after the lapse of the applicable prescription period. A prescribed debt cannot be revived by an acknowledgement of liability, unless the acknowledgment amounts to a new undertaking.¹⁵ This must be clear from an interpretation of s 10 of the Prescription Act if it is interpreted holistically by simultaneously considering the wording, context and purpose.¹⁶ The section reads as follows:

'(1) Subject to the provisions of this Chapter and of Chapter IV, a debt shall be extinguished by prescription after the lapse of the period which in terms of the relevant law applies in respect of the prescription of such debt.

(2) By the prescription of a principal debt a subsidiary debt which arose from such principal debt shall also be extinguished by prescription.

(3) Notwithstanding the provisions of subsections (1) and (2), payment by the debtor of a debt after it has been extinguished by prescription in terms of either of the said subsections, shall be regarded as payment of a debt.' (emphasis added)

¹⁵ *Lipschitz v Dechamps Textiles GmbH* 1978 (4) SA 427 (C) at 430, approved in *Standard General Insurance Co Ltd v Verdun Estates (Pty) Ltd and Another* 1990 (2) SA 693 (AD) at 699C-H.

¹⁶ The 'unitary' exercise mentioned in *Chisuse v Director-General of Home Affairs* [2020] ZACC 20; 2020 (6) SA 14 (CC) at para 52; *University of Johannesburg v Auckland Park Theological Seminary and Another* [2021] ZACC 13; 2021 (6) SA 1 (CC) paras 65 & 66.

Consideration of the evidence in conjunction with the legal principles

[24] I referred earlier to what I believe to be common cause facts. Before I evaluate the relevant evidence in some detail, it is appropriate to consider the agreement between the parties. Clause 5.6 thereof reads as follows:

'FDC will make payments at the successful completion of each phase in line with the table under paragraph 3 in Annexure "A".'

Paragraph 3 of the initial annexure A dealt with CAPEX costing which is not applicable. Clause 4 thereof dealt with retainer costs. The substituted annexure A, attached as annexure POC3, merely refers to the respective retainer fees of R100 000 and R150 000 per month. There is no indication that these would only be payable at the final completion of one or more or all the phases of the agreement as is the case with CAPEX costing. It would in any case not be businesslike to agree on such basis in respect of the retainer fees. If the parties agreed otherwise, one would have expected them to agree on the calculation of a once-off lump sum to be paid at the successful completion of one or more phases or after final completion of all the works.

[25] Clause 6 of the agreement deals with payments and tax. It reads as follows:

'6. PAYMENTS AND TAX

6.1 Payments shall be made by FDC by way of direct transfer into the Consultant's bank account within fourteen (14) days from the date of receipt of the Consultant's invoice and/or report detailing the phase progress and ultimate final completion achieved in performing the Contracted Service, provided that such progress or final report is submitted as set out in Annexure "A", "B" and "C" hereto, and provided furthermore that such services have been rendered in a proper and workmanlike manner and to the reasonable satisfaction of the client.

6.2 The Consultant shall be responsible for accounting to the appropriate authorities for income tax, VAT, or any other monies required to be paid by it or the Member in terms of income tax legislation, or any other law.' (emphasis added)

[26] Plaintiff's counsel submitted that any reasonable person would construe the payment clause to mean that once the plaintiff provides an invoice, it shall be paid 14 days from date of receipt of the invoice. Therefore, *in casu* payment was only due from the date of receipt of the plaintiff's invoice of 11 June 2022. Plaintiff's counsel submitted that insofar as the project has not reached ultimate final completion, the alternative provision for payment in clause 6.1, to wit 'report detailing the phase progress and ultimate final completion achieved in performing the Contracted Service' was not possible. I do not agree with this submission. I refer to the conduct of the

plaintiff and what was said in *Capitec*. The plaintiff accepted that it was entitled to issue monthly invoices in order to claim payment. They issued at least seven invoices during the relevant period as indicated herein. But more importantly, the clause must be read in proper context. Plaintiff's counsel failed to consider the proviso in the paragraph which I have underlined with specific reference to the word 'or'. The agreement makes a clear distinction between progress and final reports and if this is appreciated, the clause makes proper business sense. The plaintiff did not need to wait for payment until after ultimate final completion as suggested by it. In this case it would never happen as the plaintiff was substituted.

[27] It is confirmed by both the plaintiff's witnesses that the plaintiff rendered monthly, quarterly and half-yearly reports. It is also clear from the summary provided by Mr Korff referred to earlier that the plaintiff did indeed render four monthly invoices in 2014 and another three in 2016. Although no monthly invoices were issued for more than a year, the plaintiff decided not to issue these as it did not 'want to give the client [FDC] payment fatigue' as testified by Mr Korff. Mr Korff continued to testify that due to longevity of the appointment they decided not to send an email to claim payment. Even if Mr Korff's evidence could be understood that there was an agreement not to issue invoices during the relevant time prior to July 2016, there can in my mind be no doubt that FDC repudiated the agreement with the plaintiff when it appointed a new contractor/supplier to substitute it. The plaintiff left the scene at the end of July 2016, or at best for it, at the end of December 2016 and never returned. Since then, according to Mr Korff, the plaintiff received no feedback whatsoever in respect of the project from FDC until the start of the hearing.

[28] The parties' agreement needs to be interpreted to establish when did the plaintiff become entitled to payment, *ie* when did the debt arise. As mentioned in *Capitec*, the court is also entitled to consider the parties' conduct after conclusion of the agreement as a valuable tool to provide guidance as to the context and purpose of the agreement. I am satisfied that the parties agreed on retainer fees calculated on a monthly basis and if clause 6 is interpreted by using the language, context and purpose – the unitary approach – supported by the conduct of the plaintiff in issuing monthly invoices, the only logical conclusion to be arrived at, is that the fees for each month became due 14 days after receipt of an invoice, or after submission of each of the monthly progress reports. This makes proper business sense indeed.

[29] The FDC's last payment was received in May 2016. Following this approach, the claim for the balance of the retainer fees for August 2014 prescribed in September 2017 and the same approach is to be adopted in respect of the following months. Alternatively, the total claim prescribed either in August 2019, allowing for the July 2016 invoice or July 2016 progress report, or at best for the plaintiff in January 2020, allowing for the final December 2016 invoice or December 2016 progress report. The last alternative is based on the version of Mr Korff that they still had to file reports although they were not invited to meetings anymore and clearly side-lined. No doubt, the evidence is overwhelming that the plaintiff had been substituted by a new service provider.

[30] Important issues emanate from the facts and submissions. The plaintiff cannot be allowed to enforce its claim without regard to the time limits imposed by the Prescription Act. If it fails to enforce its claim timeously, it may not enforce it at all. A creditor such as the plaintiff *in casu* is not allowed to postpone the commencement of the running of prescription by its failure to take necessary steps as clearly held in *Uitenhage Municipality v Molloy*.¹⁷ It could not sit back, do nothing and arbitrarily or at will postpone the commencement of prescription. Mr Korff's allegation that the plaintiff did not want to cause payment fatigue and therefore decided not to issue invoices does not hold water. The plaintiff should have been vigilant in enforcing its rights, at least when it became clear that it had been side-lined. The facts in *Miracle Mile* are distinguishable from the facts *in casu*.

[31] I shall now consider whether the FDC expressly or tacitly admitted liability, and if so, when. Plaintiff's counsel submitted that, insofar as the court might not be prepared to accept his interpretation argument of the agreement and find that the claim had prescribed in August 2019, Mr Lebelo on behalf of the FDC expressly admitted that the FDC owed the plaintiff an amount of money although he was uncertain of the amount during the meeting of 13 March 2022. Consequently, this should be found to be an express acknowledgement of liability by FDC, alternatively a tacit acknowledgment. He relied on *Cape Town Municipality v Allie NO (Allie)*¹⁸ dealing with tacit acknowledgement of liability and the objective test to be applied, *ie* what did the debtor's conduct convey outwardly. I accept that a debtor's silence may be important

¹⁷ 1998 (2) SA 735 (SCA) at 742A – C.

¹⁸ 1981 (2) SA 1 (C) at 5 G-H.

when a duty to speak is expected. Tacit acknowledgement of liability may be found in such cases. However as set out in *Allie*, the acknowledgement must not be of a liability which existed in the past, but of a liability which still exists.

[32] I refer to s 14 of the Prescription Act and the relevant authority quoted above. Plaintiff's counsel relied on *Elandspoort* in submitting that the claim had not prescribed. I dealt with the relevant facts in *Elandspoort* above. The reliance on *Elandspoort* does not assist the plaintiff's case. Those facts are totally distinguishable from the facts *in casu*. No payments were made in respect of the retainer fees since May 2016. The FDC did not admit liability prior to prescription – expressly or tacitly – for payment of the debt, save for the amount of R1.8 million with which I dealt earlier. Even if it can be found that FDC admitted liability, it needs to be established when it took place. I accept the recordal in the FDC's books about the R1.8 million debt. It was incumbent upon the FDC to present evidence as to when it admitted the debt and recorded it as such in its books. If it was recoded after the claim had become prescribed, it could have avoided liability. It failed to deal with the issue at all in evidence. The plaintiff is entitled to judgment in respect of this amount.

[33] Mr Shoba tried to suggest in his evidence that Mr Lebelo had admitted liability on behalf of the FDC on 13 March 2022. If that was so, I would have expected this crucial aspect to be inserted in the minutes drafted by the plaintiff. There is no indication of an admission of liability. No amounts have been discussed and no documents were perused or considered during this initial meeting. However, I am prepared to accept that Mr Lebelo was at that stage aware of the book entry of R1.8 million, indicating the amount owing to the plaintiff as one of FDC's creditors, but neither he, nor Mr Shoba testified that any amounts were discussed. It is common cause that Mr Lebelo was not at that stage in possession of any documentation in respect of the claim and Mr Shoba also did not present him with any documents. He could not admit liability for payment of any amount, save perhaps for referring to the R1.8 million book entry. At best for the plaintiff, Mr Lebelo insisted on documents to be sent to FDC's Chief Financial Officer in order to substantiate the claim.

[34] In so far as there is a conflict between the versions of Mr Shoba and Mr Lebelo, the plaintiff's counsel submitted that Mr Lebelo's evidence was not reliable and/or credible, whilst Mr Shoba's version contained no internal or external contradictions.

Therefore, so he submitted, Mr Shoba's version should be accepted as to what occurred during the meeting. In my view, the probabilities favour the FDC's case. If there was an admission of liability, this would have been recorded in the minutes produced by the plaintiff and a letter of demand would have been sent immediately, claiming the amount due and payable in accordance with the admission. This did not happen as the objective evidence indicates.

[35] Mr Korff's version that the plaintiff did not claim the retainer fees due to good faith and longevity of the agreement does not assist the plaintiff at all. He tried to suggest that the uncertainty pertaining to the relationship of the parties in respect of scope 1 and 3 continued until 2020 and even to the date of the hearing. As mentioned earlier, he testified that no feed-back at all was received. As indicated, the plaintiff was not even invited to any meetings after July 2016, had to hand over documents to the new contractor/supplier and was effectively banned from the project, if not from the end of July 2016, then at least from the end of December 2016. Its claim for retainer fees became due and prescription started to run from either August 2016 or January 2017. Any tacit or express acknowledgement of liability in March 2022, nearly six years later, could not interrupt prescription or revive the prescribed debt.

[36] In conclusion on the issue mentioned in the previous paragraph, the following is recorded. Even if it could be found, which I am not prepared to do on the facts before me, that Mr Lebelo admitted liability to pay whatever was proved due to the plaintiff, that would not assist the plaintiff. This conversation of 13 March 2022 took place years after the claim had prescribed. Whatever occurred on 13 March 2022 is in my view irrelevant. Clearly, no interruption of prescription was possible by then. I quoted s 10 of the Prescription Act and referred to relevant authority above. Goldstone AJA, writing for a unanimous court, pointed out in *Standard General Insurance Co Ltd v Verdun Estates (Pty) Ltd*¹⁹ that s 10(1) thereof 'appears to have introduced throughout the concept of "strong" prescription' and after the lapse of the prescription period 'such debt "shall be extinguished".' Therefore, once a claim has prescribed, it cannot revive by an acknowledgement thereafter. Consequently, any acknowledgement by the FDC, either tacitly or expressly, after the debt had prescribed could not revive the debt.

¹⁹ 1990 (2) SA 693 (AD) at 699 C - H.

[37] The plaintiff's counsel referred to Mr Korff's testimony pertaining to the further period from August to December 2016. He submitted that although the plaintiff did not claim for this period, it should not be kept to its pleadings as no prejudice would be caused. Yet, notwithstanding argument, plaintiff's counsel at no stage formally moved for an amendment. Mr Korff indicated in his summary and his oral evidence that the inclusion of the further fees would increase the amount of the claim. In any event, and even if an amendment was to be allowed, it would not change my conclusion and nothing more needs to be considered in this regard.

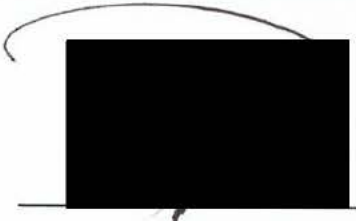
Conclusion

[38] I conclude that although the plaintiff failed to prove its case *in toto*, it is partially successful based on what transpired in the evidence presented on behalf of the FDC. Having achieved substantial success, it is entitled to its costs. I am not prepared to grant a punitive costs order as submitted by the plaintiff although I have some reservations about the FDC's approach to the litigation. I did indeed give much thought about this aspect, but eventually decided in the exercise of my discretion not to penalise the FDC. The plaintiff must also take much blame for waiting six years to institute action.

Order

[39] The following order is made:

1. Payment in the amount of R1.8 million.
2. Interest on the amount of R1.8 million *a tempore morae* from date of service of the summons until date of final payment.
3. Costs of suit.



JP DAFFUE J

Appearances

For plaintiff: Adv E Propy

Instructed by: Jennings Inc, Pretoria
c/o Peyper & Botha Attorneys Inc
Bloemfontein

For defendant: Adv PT Masihleho

Instructed by: Phatshoane Henney Inc
Bloemfontein