

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

Case Number: 23229/2018

- | | |
|-----|---------------------------------|
| (1) | REPORTABLE: NO |
| (2) | OF INTEREST TO OTHER JUDGES: NO |
| (3) | REVISED: YES |

08 July 2025

DATE

SIGNATURE

In the matter between:

ELLIS STRUCTURAL AND CIVIL ENGINEERS CC

Plaintiff

and

EGAN PROPERTY GROUP (PTY) LTD

Defendant

Delivered: This judgment was prepared and authored by the Judge whose name is reflected and is handed down electronically by circulation to the parties/their legal representatives by e-mail and by uploading it to the electronic file of this matter on Caselines. The date for hand-down is deemed to be 8 July 2025.

JUDGMENT

KUBUSHI, J

Introduction

[1] This matter turns on the interpretation of the Prescription Act.¹ The central issue being whether the plaintiff's claims have prescribed. Underlying that issue is the question of when the plaintiff's debt in respect of its claims became due, and whether the plaintiff's claims were interrupted by prescription.

[2] The plaintiff, Ellis Structural and Civil Engineers CC, a firm of engineers, has issued summons against the defendant, Egan Property Group (Pty) Ltd, a property developer, claiming an amount of R 3 370 166.50 for services rendered in terms of a Storm Water Agreement and a Roads Agreement, and for additional services pertaining to the Storm Water Agreement and the Roads Agreement, rendered *per* the oral instructions of the defendant. The agreements are not disputed by the defendant.

[3] The plaintiff's claim against the defendant consists of five claims which are succinctly set out hereunder.

[4] The matter is defended. The defendant pleaded a special plea of prescription, and a defence on the merits. The plaintiff, in replication, pleaded the interruption of the alleged prescription in terms of section 14 of the Prescription Act during or about June 2015, alternatively, 13 May 2016.

[5] *Per* an order of court granted on 26 July 2021 by Moosa AJ, the defendant's special plea of prescription has, in terms of rule 33(4) of the Uniform Rules of Court, been separated from the remainder of the disputes. Before this court, only the issue of prescription is to be determined and the interruption thereof, if need be.

[6] The defendant accepted that it had the duty to begin in respect of the separated issue. As regards the issue of the *onus*, there were two *onuses* involved in

¹ Act 68 of 1969.

this case. There was the primary *onus* that the defendant had in respect of its plea of prescription. There was, also, the second *onus* the plaintiff had because of its plea in replication of the alleged interruption of prescription.

[7] During trial, the defendant did not lead any evidence and argued the issue of prescription on the basis that the allegations pleaded by the plaintiff and the documents on which the plaintiff relied established that the debt claimed by the plaintiff had prescribed. As such, the defendant did not find it necessary to call witnesses.

[8] The plaintiff, on the other hand, led oral evidence to prove that the claims had not prescribed, alternatively, that the alleged prescription, if any, was interrupted. Here, also, the defendant did not find it necessary to call a witness in rebuttal.

[9] The pleadings are set out hereunder.

Plaintiff's Claim

[10] The plaintiff's particulars of claim are premised on five claims as set out hereunder.

Claim 1 – Storm Water Agreement

[11] The plaintiff's allegation is that on or about 30 September 2013, the plaintiff, duly represented by Francois Ellis as its sole member, and the defendant, duly represented by Russel Egan in his capacity as duly authorised director, entered into a written service agreement ("the Storm Water Agreement").

[12] In terms of the Storm Water Agreement, the plaintiff was to render the services defined as the duties and responsibilities set out in Annexure "B" of the Storm Water Agreement. Annexure "B" is said to be the "Guideline Scope of Services" published in terms of the Engineering Professions Act 46 of 2000, in Government Gazette Number 34875 of 20 December 2011.

[13] In accordance with the terms of the Storm Water Agreement, the defendant agreed to pay the plaintiff such professional fees as stated and apportioned in the Schedule to the Storm Water Agreement for the services to be rendered. The plaintiff alleged further that the parties acknowledged and agreed that the fees and disbursements to which the plaintiff was entitled, was to be based on the following parameters: the scope of the project, scope of services, the project programme, the costs of works, costs of the project, appointment of the consultants and appointment of contractor. Furthermore, in the event of any material variation of the aforementioned parameters, the fees and disbursements would be adjusted.

[14] In terms of the schedule to the Storm Water Agreement, read with Annexure "C" thereof, the plaintiff was to be paid a total amount of R 2 154 739 plus VAT in respect of services, payable in ten monthly instalments of R 195 886, and with a final 11th instalment payable upon final completion in the amount of R 195 886. It was a further term of the agreement that the plaintiff was entitled to render invoices monthly, taking cognisance of the apportionment of the fees in the schedule. Such invoices were to be deemed due and payable by the defendant on receipt thereof. Should the defendant not pay any invoice rendered by the plaintiff within 30 days from receipt thereof, the defendant was to be liable for interest for late payment, calculated at a rate of 2% above the rate of interest applicable from time to time to prime borrowers at the plaintiff's bank from due date of payment.

[15] The plaintiff alleged that it duly rendered the services as set out in the Storm Water Agreement and invoiced the defendant accordingly. Specifically, and without limitation, the plaintiff alleged that it rendered the standard services of a consulting engineer listed in paragraphs 3.1 to 3.2.5, 3.3.7 and 3.3.8 of Annexure "B" to the Storm Water Agreement.

[16] Of the amount the plaintiff alleged it was owed by the defendant, the plaintiff alleged that the defendant paid only an amount of R 301 408.60, exclusive of VAT. In the circumstances, the plaintiff alleged that the defendant was indebted to it in the amount of R 1 853 303.94 (exclusive of VAT), together with interest at the rate of 2% above the prime lending rate of the plaintiff's bankers, a *tempora morae*.

Claim 2 – Roads Agreement

[17] The plaintiff alleged that on 30 September 2013, it, duly represented by Francois Ellis as its sole member, and the defendant, duly represented by Russel Egan in his capacity as duly authorised director, entered into a written services agreement (“the Roads Agreement”). In terms of the Roads Agreement, the plaintiff was to render the services defined as duties and responsibilities set out in Annexure “B” of the Roads Agreement. Annexure “B” is said to be the Guideline Scope of Services published in terms of the Engineering Professions Act 46 of 2000, in Government Gazette Number 34875 of 20 December 2011.

[18] In terms of the Roads Agreement, the defendant agreed to pay the plaintiff such professional fees as stated and apportioned in the schedule to the Roads Agreement, for the services to be rendered. The parties agreed and acknowledged that the fees and disbursements to which the plaintiff was entitled, was to be based on the following parameters: scope of project; scope of services; the project programme; the costs of works; cost of the project; appointment of other consultants; and appointment of contractor. Furthermore, in the event of any material variation of the aforementioned parameters, the fees and disbursements would be adjusted.

[19] In terms of the schedule to the Roads Agreement, read with Annexure “C” of the agreement, the plaintiff was to be paid a total amount of R 385 022 plus VAT in respect of services, payable in ten monthly instalments of R 35 002, and with a final 11th instalment payable upon final completion in the amount of R 35 002. It was a further term of the agreement that the plaintiff would be entitled to render invoices monthly, taking cognisance of the apportionment of the fees in the schedule. Such invoices were to be deemed due and payable by the defendant on receipt thereof. Should the defendant not pay any invoice rendered by the plaintiff within 30 days from receipt thereof, the defendant was to be liable for interest for late payment, calculated at a rate of 2% above the rate of interest applicable from time to time to prime borrowers at the plaintiff's bank from due date of payment.

[20] The plaintiff alleged that it duly rendered the services as set out in the Roads Agreement and invoiced the defendant accordingly. Specifically, and without

limitation, the plaintiff alleged it rendered the standard services of a consulting engineer listed in paragraphs 3.1 to 3.2.5 and 3.3.7 to 3.3.8 of Annexure “B” to the Roads Agreement.

[21] Of the amount the plaintiff alleged it was owed by the defendant, the plaintiff alleged that the defendant paid only an amount of R 159 548.40, exclusive of VAT. In the circumstances, the plaintiff alleged that the defendant was indebted to it in the amount of R 225 473.60 (exclusive of VAT), together with interest at the rate of 2% above the prime lending rate of the plaintiff’s bankers, a *tempora morae*.

Claim 3 – Extension of Term of Appointment

[22] The plaintiff alleged that the defendant appointed Pentacon to assist it with the completion of the construction and related works contemplated in Annexures “POC1”² and “POC2”³. The defendant requested the plaintiff to supervise Pentacon in the completion of the construction and related works. And, on or about 11 September 2013, the parties, duly represented, orally agreed that the supervisory portion of the plaintiff’s services would be remunerated in the amount of R 59 196 *per month*.

[23] The parties agreed and acknowledged that the fees and disbursements to which the plaintiff was entitled, was to be based on the following parameters: scope of project; scope of services; the project programme; the costs of works; cost of the project; appointment of other consultants; and appointment of contractor. Furthermore, in the event of any material variation of the aforementioned parameters, the fees and disbursements would be adjusted.

[24] The project programme in respect of the works determined that the works would be completed within a period of ten months from the date of appointment of Pentacon. Consequently, payment of the fees and disbursements due to the plaintiff pursuant to the services rendered by it to the defendant (including specifically, but

² The Storm Water Agreement.

³ The Roads Agreement.

not limited to, any supervisory services in respect of the works) were payable over a period of ten months.

[25] However, the project programme was not adhered to by Pentacon, resulting in the project programme being extended by an additional ten months. The plaintiff alleged that it duly performed the required supervisory services, but the defendant failed, neglected or refused to pay it the amount due for the services. Consequently, the defendant is indebted to the plaintiff in the amount of R 591 960.

Claim 4 – Additional Services

[26] As a result of the non-performance of Pentacon, the plaintiff alleges that on the instruction of the defendant, it rendered certain other additional services to the defendant, which are set out and quantified in the particulars of claim.

[27] The plaintiff is alleged to have designed an “overlay” solution to address rejected workmanship of Pentacon. By so doing, the plaintiff executed instructions received from the defendant between:

- 27.1 29 October 2014 and 5 March 2015;
- 27.2 04 April 2015 and 12 August 2015;
- 27.3 23 November 2015 and 08 December 2015; and
- 27.4 11 January 2016 and 28 February 2016.

The above instructions were provided under the Storm Water Agreement.

[28] According to the plaintiff, the total remuneration due to it in respect of the additional services amounts to R 642 575.21 (VAT inclusive). Despite demand, alternatively, demand herewith, the defendant is said to have failed, neglected or refused to pay the said amount.

Claim 5 – Additional Services for Roads

[29] The plaintiff's allegation is that between 18 October 2014 and February 2015, he executed instructions from the defendant by designing an additional sewer connection to accommodate incorrect design information received from the local authority. The said instructions were provided under the Roads Agreement.

[30] In respect of the said services rendered, an amount of R 56 825.51 became due and payable. Despite demand, alternatively, demand herewith, the defendant is said to have failed, neglected or refused to pay the said amount.

Defendant's amended special plea

[31] The defendant, in its plea, raised a special plea of prescription and a defence on the merits. As indicated, only the special plea is dealt with in this judgment. The defendant, in its special plea, raised the following defence in respect of:

Claim 1

[32] The allegation is that the plain reading of the plaintiff's claim indicates that:

32.1 The latest date at which the plaintiff commenced rendering services in terms of the Storm Water Agreement was 30 September 2013. The latest date at which payment of the amount of R 1 657 451. 40 (one million six hundred and fifty seven thousand, four hundred and fifty one rand, forty cents) — an amount calculated as the difference between the ten monthly instalments of R 195 886. (one hundred and ninety five thousand, eight hundred and eighty six rand) and R 301 408. 60 (three hundred and one thousand, four hundred and eight rand, sixty cents) being the amount already paid by the defendant to the plaintiff — was due and payable to the plaintiff by the defendant was 31 July 2014. The project never reached final completion, and the 11th instalment of R 195 886 (one hundred and ninety five thousand, eight hundred and eighty six rand) never became either due or payable.

32.2 The plaintiff's claim relates to contractual payment for services rendered, due and payable by no later than 31 July 2014, alternatively,

on or before 8 April 2015. Prescription on the above claim would have commenced running, at the latest, on 1 August 2014, alternatively, on 8 April 2015. Summons in respect of the above claim, under case number 23229/2018, was delivered on 9 April 2018.

- 32.3 The defendant accordingly pleads that the plaintiff's Claim 1 against the defendant, before this Honourable Court under case number 23229/2018, had already prescribed at date of institution of proceedings by the plaintiff against the defendant. WHEREFORE, the defendant prays that the plaintiff's claim against the defendant be dismissed with costs.

Claim 2

[33] It is alleged that the plain reading of the plaintiff's claim indicates that:

- 33.1 The latest date at which the plaintiff commenced rendering services in terms of the Roads Agreement was 30 September 2013. The latest date at which payment of the amount of R 225 473. 60 (two hundred and twenty five thousand, four hundred and seventy three rand, sixty cents) was due and payable to the plaintiff by the defendant was 31 July 2014.
- 33.2 The plaintiff's claim relates to contractual payment for services rendered, due and payable by no later than 31 July 2014, alternatively on or before 8 April 2015. Prescription on the above claim would have commenced running, at the latest, on 1 August 2014, alternatively, on 8 April 2015. The above date is a date more than three years after the period of prescription expired.
- 33.3 The defendant accordingly pleads that the plaintiff's Claim 2 against the defendant, before this Honourable Court under case number 23229/2018, had already prescribed at date of institution of proceedings by the plaintiff against the defendant. WHEREFORE, the defendant prays that the plaintiff's Claim 2 against the defendant be dismissed with costs.

Claim 3

[34] The allegation is that the plain reading of the plaintiff's claim indicates that:

- 34.1 The latest date at which Pentacon should have completed the project in accordance with the original project programme was 31 July 2014. Alternatively, to the above, in the event that the plaintiff's claim is for ten (10) monthly payments during an extended project programme commencing July 2014, the latest date at which the Pentacon should have completed the project in accordance with the extended project programme was 31 May 2015. The plaintiff claims a monthly payment of R 59 196 for each of the eight months from August 2014 to March 2015, totalling R 473 568.
- 34.2 On the plaintiff's version, eight payments of R 59 196 - full value of R 473 568 being for the eight month period between August 2014 to March 2015 of the extended programme period - were due and payable to the plaintiff by no later than 31 March 2015. Prescription on the above portion of the claim would have commenced running on or before 8 April 2015. Summons in respect of the above claim, under case number 23229/2018 was delivered on 9 April 2018.
- 34.3 The defendant accordingly pleads that R 473 568 (four hundred and seventy three thousand, five hundred and sixty eight rand) of the plaintiff's Claim 3 against the defendant, before this Honourable Court under case number 23229/2018 - being the eight month period between August 2014 to March 2015 of the extended programme period — had already prescribed at date of institution of proceedings by the plaintiff against the defendant. WHEREFORE, the defendant prays that the portion of the plaintiff's Claim 3 relating to the eight month period between August 2014 to March 2015 of the extended programme period, against the defendant, be dismissed with costs.

Claim 4

[35] The allegation is that prescription on any service rendered by the plaintiff prior to 31 March 2015, would have commenced running, at the latest, on 01 April 2015, and become prescribed three years later on 31 March 2018. Summons in respect of the above claim, under case number 23229/2018, was delivered on 9 April 2018. The above date is a date more than three years after the period of prescription calculated from 31 March 2015.

[36] The defendant accordingly pleads that the portion of the plaintiff's Claim 4 against the defendant, before this Honourable Court under case number 23229/2018 - relating to the services rendered prior to 31 March 2015 - had already prescribed at date of institution of proceedings by the plaintiff against the defendant. WHEREFORE, the defendant prays that the portion of the plaintiff's Claim 4 relating to services rendered prior to 31 March 2015, against the defendant, be dismissed with costs.

Claim 5

[37] It is alleged that prescription on any service rendered by the plaintiff prior to 31 March 2015, would have commenced running, at the latest, on 1 April 2015, and become prescribed three years later on 31 March 2018. Summons in respect of the above claim, under case number 23229/2018, was delivered on 9 April 2018. The above date is a date more than three years after the period of prescription calculated from 31 March 2015.

[38] The defendant accordingly pleads that the plaintiff's Claim 5 against the defendant, before this Honourable Court under case number 23229/2018, had already prescribed at date of institution of proceedings by the plaintiff against the defendant. WHEREFORE, the defendant prays that the plaintiff's Claim 5 against the defendant be dismissed with costs.

Replication by the plaintiff

[39] In replication to the defendant's special plea of prescription, the plaintiff denies that any of its claims has prescribed as alleged by the defendant in its special plea.

[40] In amplification of the aforesaid denials, and without detracting from the general nature thereof, the plaintiff pleads that if it is found that prescription commenced to run on the date pleaded by the defendant, or any other date longer than three years prior to the date of service of the summons herein, the running of prescription was interrupted in terms of the provisions of Section 14 of the Prescription Act during or about June 2015, alternatively, 13 May 2016, as pleaded hereunder.

[41] During or about June 2015, and at or near Pretoria, the plaintiff, represented by Francois Ellis as its sole member, and the defendant, represented by Russel Egan in his capacity as duly authorized director, entered into a further oral agreement, the express, alternatively implied, further alternatively tacit terms and conditions of which were as follows:

- 41.1 The defendant admitted and acknowledged its indebtedness towards the plaintiff and that it was unable to pay the amounts listed in claims 1 to 5 of the particulars of claim to the plaintiff, and would not be able to pay such amounts, irrespective of when they became due, until, at the earliest:
- 41.2 the defendant had secured the release of funds held in trust as guarantee for the defendant's performance of its contractual or legal obligations towards the City of Tshwane, alternatively;
- 41.3 the defendant was able to access funds held in trust pursuant to a sale of business/sale of assets agreement entered into between the defendant and third parties.

[42] The plaintiff agreed to suspend all demands and forego the institution of any legal proceedings in respect of the amounts listed in claims 1 to 5 of its particulars of claim, irrespective of when payment thereof became due, until the date of the occurrence of either of the events in the paragraphs above.

- 42.1 During or about March 2017, the defendant, acting through its director Russel Egan, repudiated the aforesaid oral agreement by communicating and indicating through its conduct to the plaintiff, represented by Francois Ellis, that:
- 42.2 the defendant denies its indebtedness towards the plaintiff, in the amounts as claimed herein or any other amount or amounts;
- 42.3 the defendant denies the existence of the oral agreement.

[43] The plaintiff accepted the defendant's repudiation and cancelled the oral agreement, alternatively, cancelled same with service of the summons herein and claims payment of the amounts reflected in claims 1 to 5 of the particulars of claim.

[44] On or about 13 May 2016, and at or near Pretoria, the defendant, duly represented by Russel Egan, alternatively represented by its attorneys of record, Adams and Adams, further alternatively represented by Pat Ellis SC, further admitted the defendant's liability towards the plaintiff that:

- 44.1 the defendant, in arbitration proceedings between it and Pentacon, claimed damages from Pentacon constituted by amounts due and owing by the defendant to the plaintiff;
- 44.2 the defendant, as part of its statement of defence in the aforementioned arbitration, filed Annexure "R1" hereto, as Annexure "SOD7".

[45] In the premises, the defendant acknowledged its liability to pay the plaintiff during or about June 2015 and, again, on 13 May 2016.

[46] In the premises, and insofar as any of the amounts claimed in Claims 1 to 5 fell due on the dates alleged by the defendant, alternatively, as other date longer than three years prior to date of service of summons herein, the running of prescription was interrupted in terms of the provisions of Section 14 of the Prescription Act, during or about June 2015, alternatively, 13 May 2016. WHEREFORE, the plaintiff persists with its claims.

Defendant's argument

[47] In his oral argument on the issue of when the debts became due, counsel for the defendant strengthened his argument by reliance on the judgment of the Constitutional Court in *Trinity Asset Management (Pty) Limited v Grindstone Investments 132 (Pty) Limited*, (“Trinity”).⁴ Counsel referred to the majority judgment penned by Justice Cameron, where, at paragraph 96, referencing *Deloitte Haskins*,⁵ that court said that “*prescription shall commence to run as soon as the debt is due*”, means that –

‘There has to be a debt immediately claimable by the creditor or, stated in another way, that there has to be a debt in respect of which the debtor is under an obligation to perform immediately. . . . It follows that, prescription cannot begin to run against the creditor before his cause of action is fully accrued, i.e. before he is able to pursue this claim. . . .’ (footnote omitted)

[48] Counsel’s argument in that regard was that that should be the starting point. The question being whether the plaintiff can pursue his claim, and when is he liable to do so. Counsel, also referred to what was said by Justice Cameron,⁶ referencing *Truter*,⁷ that a debt is due –

‘when a creditor acquires a complete cause of action for the recovery of the debt, that is, when the entire set of facts which the creditor must prove in order to succeed with his or her claim against the debtor is in place, or in other words, when everything has happened which would entitle the creditor to institute action and to pursue his claim.’ (footnote omitted)

⁴ 2018 (1) SA 94 (CC) at para 96.

⁵ *Deloitte Haskins & Sells Consultants (Pty) Ltd v Bowthorpe Hellerman Deutsch (Pty) Ltd* 1991 (1) SA 525 (A) at 532F – J.

⁶ Above n 4 at para 97.

⁷ *Truter and Another v Deyssel* 2006 (4) SA 168 (SCA) at para 16.

[49] Therefore, according to counsel, the fundamental question when looking at the plaintiff's claim, is, what were the facts that the plaintiff was required to prove in order to make the claim, and when were the set of facts in place.

[50] Counsel asserted that even though *Trinity* dealt with loans payable on demand, the concept used there is the same, because what the court said in *Trinity* is that, ordinarily, a loan that is made where it is silent as to payment terms, is not payable on demand, but payable immediately. The question that was raised being whether demand forms part of the cause of action. In other words, whether the demand starts the clock running, or whether the clock starts running when the plaintiff is able to make demand. According to counsel, there is a difference between the question whether the loan is immediately payable and therefore, the clock is running, and the plaintiff then makes demand as and when he sees fit, and whether the clock starts running when the plaintiff makes demand and then prescription starts to run.

[51] In this regard, counsel referred to paragraph 102 of *Trinity*, where Justice Cameron states the following:

“[102] The practical effect is this. When suing for payment the creditor doesn't need to allege a demand: demand is not part of the plaintiff's cause of action.”
(footnote omitted)

[52] In his submission, counsel argued that his colleague is going to argue that an invoice in the current case needed to be issued, and that, in that event, the court will have to decide whether an invoice forms part of the cause of action. In other words, is it a necessary part of the cause of action for an invoice to have been issued, or was this plaintiff entitled to sue at the same time that he issued the invoice. The answer, counsel submitted, is clear and the principle is established in paragraphs 104 to 105 in *Trinity*, where Justice Cameron remarked thus:

“[104] Here, of course, the loan was not 'payable on demand' but rather payable 30 days after demand. Does the additional 30-day period afforded to the debtor to repay change anything? Does it take the agreement outside the

law applying to loans 'payable on demand'? No. The 30-day period makes no difference. The point of the jurisprudence is that the creditor has the unilateral power to demand performance from the debtor at any time from advance - not that, following demand, the debtor must pay immediately ('on demand') or 30 days later. In both instances, the creditor has the sole power to demand performance at any time.

[105] It is this fact - that the creditor has the exclusive power to demand that performance be made when the creditor so chooses - that has given rise to the general rule applying to loans 'payable on demand', namely the prescription begins to run when the debt arises, unless there is a clear indication to the contrary." (footnote omitted)

[53] The submission by counsel is that the principle here is that when the question, when was the debt due, is asked, it is not what procedure needed to be followed. According to counsel, the question is, did it lie in the sole power of the creditor, in this case the plaintiff, to demand performance? And was there anything else that needed to happen before the plaintiff could demand performance?

[54] The issuing of the invoice, according to counsel, is the procedure that was to be followed in this case. The submission being that in terms of the agreement, the ability to issue the invoice was something that fell solely within the power of the plaintiff. And, where the ability to issue the invoice lies solely within the power of the plaintiff, the plaintiff cannot rely on his own failure to issue the invoice to delay prescription. That is the principle - the creditor cannot unilaterally delay prescription when he has the power to claim. That is the very purpose of prescription, counsel argued.

[55] A further argument raised by counsel was that the plaintiff's reliance on clause 13.1 and 13.2 of the agreement, is misplaced. According to counsel, clause 13.1, which entitles the plaintiff, as consultant, to render invoices, places the power to do so in the hands of the consultant. The defendant's counsel submitted that the plaintiff's suggestion that the use of the word "entitled" should not be read as "obligated" because it is only where the consultant is obligated to issue the invoice, that this principle would apply, is misguided. Counsel submitted, in that regard, that

cannot be correct because the Constitutional Court has told us that the question lies in who has the power to issue it, and the power, in this case, lies in the plaintiff and the entitlement indicates that that power is given to the plaintiff in this agreement. Consequently, it is counsel's argument that clause 13.1 is of no assistance to the plaintiff's case. It certainly does not assist the plaintiff to say that he could withhold invoices and thereby delay prescription.

[56] Counsel argued further that the reliance by the plaintiff on clause 13.2, which stipulates that the client shall be liable for interest for late payment, does not help the plaintiff at all. The fact that interest is payable 30 days later does not assist the plaintiff at all, since the debt is due when the invoice is issued, and the right to issue the invoice lies solely with the plaintiff.

[57] The question, as counsel stated, was answered in paragraph 111 in *Trinity*, when Justice Cameron remarked as follows:

“[111] The first judgment relies on the loan agreement's interest clause to say that the demand required delayed prescription. The suggestion is that, because the parties clearly intended interest to be charged from when the loan was paid over, but that interest was 'due and payable' only when the loan capital was 'due and payable', prescription was delayed. To me, that doesn't wash. 'Charged' in clause 2.4 doesn't entail that the word 'due' in 2.3 should be afforded a heightened significance. It is conceivable that, as with loan capital, interest would be 'due' for purposes of Prescription Act on advance, but would only be repayable along with the loan capital. Indeed, interest usually only starts running from when a is 'due'. On the first judgment's approach, interest would only start running from when demand was made, as this would be the point at which the debt becomes 'due'. That is commercially unsound. And hence improbable.” (footnotes omitted)

[58] Counsel's proposition is that the court in *Trinity* was dealing with a different clause and a different contract, but what it says is that the interest clause cannot be used to change the meaning of the debt and when the debt was due. To reinforce

this proposition, counsel referred to paragraph 122 of *Trinity*, where the court remarked that –

“[122] What prescribes is Trinity’s right to claim payment. And that right is unaffected by when payment must actually be made. This means that Trinity had the right to claim payment immediately, even though Grindstone had 30 days to pay.”

[59] Relying on that passage, counsel pointed out that what prescribed was *Trinity’s* right to claim payment. Counsel submitted that there can be no dispute that even on his own case, the plaintiff had a right to claim payment at the end of every month, and that is the right that has prescribed.

[60] The proposition by the defendant’s counsel is that there can be no dispute that on the plaintiff’s claim, the debt which it claims, arose monthly from September 2013 to July 2014. In each month, the plaintiff was entitled to issue an invoice, which meant it had the power to do so, and so prescription in respect of each of those monthly debts began to run immediately the plaintiff had that right. And, as all of those monthly debts were due, they were due before 31 July 2014: they were due before the prescription date of 8 April 2015, and consequently, are extinguished by prescription. And, that is what prevails in relation to Claim 1, so it was argued.

[61] As regards Claim 2, counsel argued that it follows exactly the same format as Claim 1. The contention was that this is so because the terms of the Roads Agreement are the same as those of the Storm Water Agreement. All of these debts were also due on or before 31 July 2014, and are extinguished by prescription, so the argument went.

[62] A further proposition by counsel was that Claim 3 follows the same principles, as well. The contention being that the claim was alleged to have arisen out of an oral agreement, but it covers similarly a period from 2013 to 2014 and that has prescribed for the same reason.

[63] Claims 4 and 5, as is suggested by counsel, deal with claims for additional services. The claims rely on the terms of the same agreements, and in doing so, they rely on the same payment terms that regulate the payment under the main agreements. This is the entitlement by the consultants to render invoices monthly, taking cognisance of the apportionment of fees. As such, to the extent that there were additional services rendered, the right to charge for those services arose monthly. This is so, as counsel submitted, because the clause that the plaintiff would have to rely on, if it relies on those agreements, is Clause 13, which entitles it to render invoices monthly. No other clause could be found that would allow plaintiff to do so.

[64] With regard to Claim 4, the debt that is relevant for prescription is the claim in paragraph 23.1 of the particulars of claim only, where the plaintiff alleges it designed an overlay solution to address rejected workmanship of Pentacon, and in so doing, executed instructions received from the defendant between 28 October 2014 and 3 May 2015. Mr Ellis confirmed during his testimony that the designed calculations, his strength calculations, and the drawings, had been prepared at this time.

[65] Counsel contended that the argument by the plaintiff's counsel that the referral of Mr Ellis to the two emails which came in April 2015, that because they came on 22 April 2015, they postdate the prescription date, is without merit. This is so, counsel said, because there was no evidence that the plaintiff carried out this work before 3 May 2015, as pleaded.

[66] For this claim, counsel pointed out that the quantum that is claimed by the plaintiff in paragraph 24 of the particulars of claim is for 64 hours by an engineer and 16 hours by a technician, but the plaintiff has not set out when those hours were spent. Consequently, in the heads of argument, counsel formulated a relief asking for an order that the defendant's special plea of prescription against the claim made in paragraph 23.1 related to the design for an overlay solution to address the rejected workmanship, be upheld. Counsel contended further that if it is found that there is a potential for certain hours to have been expended after 31 March 2015, then that can be excluded from the order.

[67] The submission by counsel is that Claim 5 relies on the terms of the Roads Agreement. According to counsel, there was no evidence led on this claim at all, and on its terms alone, the plaintiff claims that all of this work was done before the prescription date. Paragraph 28.1 of the particulars of claim says the plaintiff executed instructions received from the defendant between 18 October 2014 and February 2015. The contention, as such, is that all work done up to February 2015 is before April 2015, and therefore, is extinguished by prescription.

[68] In conclusion, counsel argued that the plaintiff had the right, on his pleaded case, to issue the invoices at the end of every month, and consequently, its failure to have done so does not help its case. Counsel argued that counsel for the plaintiff, in argument in court, did not and could not dispute that the plaintiff was entitled to issue the invoice each month, as contended by the defendant.

Plaintiff's argument

[69] Counsel for the plaintiff argued that the only indication as to the debt being due is to be found in Clause 13.1 of the agreements. He, however, submitted that that clause must be read together with Clause 13.2, which talks about the interest payable. According to counsel, when the payment is due ties in with when the interest starts running. He, in that regard, referred to Schedule "A" of the agreements, which states that *"the professional fees shall be apportioned as follows: equal instalments on a monthly basis over the duration of the project and a payment upon final completion as per Annexure "B"*. Equal portions, according to counsel, should not be based on the indication of project and payment upon completion as per Annexure "B". Annexure "C", which sets out the cashflow, must also be considered, taking into account the basis of how the Schedule was prepared and how the cashflow was calculated with reference to the programme provided by the appointment of Pentacon and how the terms of payment were determined.

[70] Counsel's proposition was that when consideration is to be given to when payment fell due and compared to where there are demands, the creditor has in his hands purely the power to decide when he was going to pull the trigger, and the general principle that applies to debts is that debts are payable on demand. In

support of this proposition, counsel referred to paragraph 106 of *Trinity*, where it is said that:

“[106] So the question is whether this loan agreement gives us enough signs to justify dumping the general principle that in loans ‘payable on demand’ prescription begins to run as soon as the money is paid. And our starting premise is that the parties’ contract fixes when a contractual debt becomes due.” (footnote omitted)

[71] Counsel conceded that the principle enunciated therein applies to loans payable on demand. He, however, submitted that the principle remains the same as far as the contractual position is concerned, where the creditor unilaterally decides when to pull the trigger, and what the effect is of what the parties agree upon, and how it is dealt with.

[72] Furthermore, Counsel contended that the problem in *Trinity* was that the agreement in itself was ambiguous as to when payment became due, which is distinct from the current agreement which has a telling sign of when payment is due. According to counsel, when an agreement provides when a debt is due, that needs to be followed, and the parties may, for various reasons, agree on certain terms and those terms will then apply.

[73] The submission by counsel was that in the present instance, the undisputed evidence is that there was no invoice rendered in time. The first invoice rendered by the plaintiff was rendered on 20 October 2013, the invoice was dated 30 September 2013. There were two further invoices rendered on 22 November 2013. Then there was a request from Mr Egan in an email of 29 November 2013, requesting Mr Ellis to split those invoices into the portion that the Council would be liable for. Importantly, counsel argued, payment was made of two invoices.

[74] According to counsel, the invoicing was clearly an important aspect in the payment and how the parties implemented the agreement. Not only that, but the format of the invoices was also of utmost importance to Mr Egan. He insisted on the invoices being split. No payments were made unilaterally by the defendant prior to

invoices being submitted. That, counsel argued, is the question that was not answered and that he did not have the benefit of cross-examining Mr Egan on.

[75] When arguing, counsel raised the question why the defendant effected payment at the end of October and not at any other time, because the defendant says the money became due immediately. Why insist on the invoices being split for the purposes of the defendant. A further important aspect in Mr Ellis' evidence, as counsel sought to argue, is that the invoices would have been accompanied by payment certificates, and, as such, there was a whole process that was applied.

[76] In reinforcement of his argument, counsel referred to the matter of *Capitec Bank Holdings Limited & Another v Coral Lagoon Investments 194 (Pty) Limited & Others* ("*Coral Lagoon investments*"),⁸ from paragraphs 51 and 54, where the following is stated:

"[51] Most contracts, and particularly commercial contracts, are constructed with the 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 gravitational pull that is important. The proposition is that context is everything is not a license to contend for meanings unmoored in the text and its structure. Rather, context and purpose may be used to elucidate the text."

[77] That court, further, referred to the matter of *University of Johannesburg*⁹ as to how parties implement the agreement. The court there concludes in paragraph 54:

"[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."

⁸ 2022 (1) SA 100 (SCA).

⁹ *University of Johannesburg v Auckland Park Theological Seminary and Another* 2021 (6) SA 1 (CC).

[78] The submission was, therefore, that the same applies in respect of Clauses 13.1 and 13.2, specifically 13.1 of the current agreements. This, as counsel argued, is the manner in which the parties conducted themselves. No payments were made automatically by the defendant on a month to month basis and there were very specific requirements as to how the invoice had to be done.

[79] In conclusion, counsel argued, furthermore, that in addition to the fact that the initial programme was determined based on Pentacon's projections, and the fact that it was anticipated that the City of Tshwane would contribute a portion of the fees to be paid by the defendant to the plaintiff, which necessitated a request to split the invoices, clearly the parties intended that payment would be due on invoicing occurring.

Legal framework

[80] The law regulating prescription is the Prescription Act.¹⁰ Section 11 thereof provides for the periods of prescription of debts, the periods range from three to thirty years, and depend on the type of debt. The debts under review in this matter are governed by section 11(d) of the Act, which stipulates the period of prescription as three years.

[81] Section 12(1) of the Act provides that:

"(1) Subject to the provisions of subsection (2), (3), and (4), prescription shall commence to run as soon as the debt is due."

[82] The following is said in *Trinity* about when a debt becomes due:

"[96] **Section 12(1)** of the **Prescription Act** provides that prescription '*shall commence to run as soon as the debt is due*'. The **Prescription Act** doesn't define 'due', but long-standing SCA decisions have given it

¹⁰ Above n 1.

content. In *Deloitte Haskins* the court said that ‘prescription shall commence to run as soon as the debt is due’ means that—

‘there has to be a debt immediately claimable by the creditor or, stated in another way, that there has to be a debt in respect of which the debtor is under an obligation to perform immediately. . . . It follows that prescription cannot begin to run against a creditor before his cause of action is fully accrued, i.e. before he is able to pursue his claim. . . .’

[97] *Truter* said a debt is ‘due’—

‘when the creditor acquires a complete cause of action for the recovery of the debt, that is, when the entire set of facts which the creditor must prove in order to succeed with his or her claim against the debtor is in place or, in other words, when everything has happened which would entitle the creditor to institute action and to pursue his or her claim.’

[98] In *Miracle Mile* the SCA reaffirmed the existing doctrine applied in *Deloitte Haskins* and *Truter*. Under the statute, it said—

‘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.’” (footnotes omitted).

[83] Furthermore, *Trinity*, dealing with the concept of loans payable on demand, reaffirmed the general rule that the debt is due immediately upon conclusion of a contract, unless the context states otherwise. In that regard, that court remarked as follows:

“[101] When a contract doesn’t say when precisely a debtor must perform or repay, the general rule is that the debt is ‘due immediately upon conclusion of the contract’. But what about a creditor whom the contract gives power unilaterally to determine when the debtor must perform – by making demand? Loubser points out that ‘opinions are divided’ on

whether prescription begins to run as soon as the creditor has the right to demand that performance be made, or when actual demand is made. Saner suggests that a contractual term that performance is due 'on demand' simply reinforces the implicit term that performance is due as soon as the deal is made.

[102] *Oneanate* is instructive. The first-instance court had to determine when prescription began to run on a bank's claim for repayment of four separate amounts debited to a current account. When were the separate debts in the overdrawn account 'due and repayable'? The court invoked the long-standing common law rule that a loan without stipulation as to a time for repayment is 'repayable on demand'. But what does 'repayable on demand' mean? The court said that '[a]lthough by no means linguistically clear', the phrase means that 'no specific demand for repayment is necessary and the debt is repayable as soon as it is incurred'. The practical effect is this. When suing for repayment the creditor doesn't need to allege a demand: demand is not part of the plaintiff's cause of action. After considering English, Canadian, Australian and New Zealand law, the court held that, unless the parties agree otherwise, a loan 'repayable on demand' is repayable from the moment the advance is made and that no specific demand for repayment need be made for the loan to be immediately due and repayable." (footnotes omitted)

[84] And, further on, that court stated the following:

"[104] Here, of course, the loan was not 'payable on demand' but rather repayable 30 days after demand. Does the additional 30-day period afforded to the debtor to repay change anything? Does it take this agreement outside the law applying to loans 'payable on demand'? No. The 30-day period makes no difference. The point of the jurisprudence is that the creditor has the unilateral power to demand performance from the debtor at any time from advance – not that, following demand, the debtor must pay immediately ('on demand') or 30 days later. In both

instances, the creditor has the sole power to demand performance at any time.

[105] It is this fact – that the creditor has the exclusive power to demand that performance be made when the creditor so chooses – that has given rise to the general rule applying to loans ‘payable on demand’, namely that prescription begins to run when the debt arises, unless there is a clear indication to the contrary.

[106] So the question is whether this loan agreement gives us enough signs to justify dumping the general principle that in loans ‘payable on demand’ prescription begins to run as soon as the money is paid. And our starting premise is that the parties’ contract fixes when a contractual debt becomes due.”(footnotes omitted)

Analysis

[85] This case revolves around two agreements, namely, the Storm Water Agreement and the Roads Agreement. The agreements are drafted in exactly the same terms, save for the fact that they relate to different work, and the professional fees payable by the defendant to the plaintiff are different. The agreements form the basis of the five claims.

[86] Claim 1 pertains to the Storm Water Agreement, and in claim 4, reference is made to the Storm Water Agreement. The terms of that agreement are incorporated as a basis for claim 4. Thus, the plaintiff’s claims 1 and 4 are founded on the Storm Water Agreement. Claim 2 relates to the Roads Agreement and reference is made to the Roads Agreement in claim 5. The terms of that agreement are incorporated as a basis for claim 5. Thus, the plaintiff’s claims 2 and 5 are founded on the Roads Agreement. And, claim 3 refers to both agreements – the Storm Water Agreement and the Roads Agreement.

[87] All the claims are based on contractual debts. Claims 1 and 2 are premised on a written agreement, whilst claims 3, 4 and 5 are based on oral agreements. It is alleged in the particulars of claim that the written agreements were signed by the parties on 30 September 2013; and the oral agreements were, in terms of the

instructions given by the defendant to the plaintiff, as follows: claim 3 on 11 September 2013; claim 4 on 29 October 2014 and claim 5 on 18 October 2014.

[88] The question that arises is when the debts were due.

[89] The defendant's contention was that the debts in respect of these agreements became due immediately on the date the agreements were concluded, and that, according to the defendant, was when prescription started to run.

[90] To the contrary, the plaintiff's contention was that the debts were not immediately due because their "dueness", was fixed in terms of the agreements. Relying specifically on clause 13.1 of the agreements, the plaintiff submitted that that clause fixed the time when the debts would become due. The debts, according to the plaintiff, became due upon the rendering of an invoice by the plaintiff to the defendant.

[91] Both parties referred the court to the judgment in *Trinity*. The court, in that judgment, dealt with a loan that was "repayable on demand". The question that arose was whether the debt was "due" only when the lender made demand or it was repayable immediately after it had been extended because the right to make demand lay solely within the discretion of the lender.

[92] At paragraph 101 of that judgement, it is stated that:

"[101] When a contract doesn't say when precisely a debtor must perform or repay, the general rule is that the debt is 'due immediately upon conclusion of the contract'." (footnote omitted)

[93] And, at paragraph 105, that court states that:

"[105] It is this fact — that the creditor has the exclusive power to demand that performance be made when the creditor so chooses —that has given rise to the general rule applying to loans 'payable on demand', namely

that prescription begins to run when the debt arises, unless there is a clear indication to the contrary." (footnote omitted)

[94] Even though *Trinity* dealt with a loan "payable on demand", the principles enunciated therein do apply in this instance. The general rule, therefore, is that when an agreement does not say when precisely a debtor must repay, the debt is due immediately upon conclusion of the agreement, unless there is an indication to the contrary.

[95] The only indication in the agreements, in this instance, as to the debt being due, is to be found in Clause 13.1, which, as has already been stated, provides that:

"13.1 The consultant [the plaintiff] shall be entitled to render invoices monthly, taking cognisance of the apportionment of fees in the schedule. Such invoices shall be due and payable by the client [the defendant] on receipt thereof."

[96] The clause entitled the plaintiff to render invoices on a monthly basis, and the schedule of payments provided by Pentacon is for a period of ten months, with the final invoice upon completion of the work. The final payment is not considered for purposes of this judgment because the agreements were never completed.

[97] On that basis, it seems that the agreements fixed the time when the debt became due, by the issuance of an invoice by the plaintiff, in order to demand payment from the defendant.

[98] The defendant's counsel argued that in terms of the agreements, payment was due and payable immediately, without the need to issue an invoice. The contention was that the invoice is not a necessary part of the cause of action but a mechanism that was to be followed to demand payment. The plaintiff's counsel, on the other hand, submitted that the issuance of an invoice was a precondition for the payment of the debt that was due each month, and thus formed a necessary part of the cause of action.

[99] It is trite that the parties' contract fixes when a contractual debt becomes due.¹¹ The court in *Trinity*, dealing with loans 'payable on demand' remarked as follows:

"[106] So the question is whether this loan agreement gives us enough signs to justify dumping the general principle that in loans 'payable on demand' prescription begins to run as soon as the money is paid. And our starting premise is that the parties' contract fixes when a contractual debt becomes due." (footnote omitted)

[100] The same question can be asked, in this instance. The question is whether the agreements give enough signs to justify dumping the general principle that prescription started to run as soon as the agreements were concluded. However, as *Trinity* states, the starting premise is that the parties' contract fixes when a contractual debt becomes due.

[101] In my view, a holistic reading of the written agreements and an understanding of the oral agreements, in this instance, illustrates that the agreements fixed when the debts became due. This was done in terms of Clause 13.1, which requires the rendering of an invoice before the debt became due. Clause 13.1 is the only clause in the agreements that the plaintiff could rely on for its proposition that the debt in the claims became due upon the rendering of an invoice. On a simple reading of the clause,¹² the parties had fixed the due date of the debt as, when the plaintiff had rendered an invoice which became payable on receipt by the defendant. Such an invoice had to be rendered on a monthly basis. The rendering of an invoice was, as a result, a necessary part of the cause of action. It is not in dispute that that part (the rendering of invoices) has been pleaded. That clause shows that the parties

¹¹ See para 106 in *Trinity* above n 4.

¹² See *Coral Lagoon investments* at para 50, where the following is stated:

"[50] *Endumeni* simply gives expression to the view that the words and concepts used in a contract and their relationship to the external world are not self-defining. The case and its progeny emphasise that the meaning of a contested term of a contract (or provision in a statute) is properly understood not simply by selecting standard definitions of particular words, often taken from dictionaries, but by understanding the words and sentences that comprise the contested term as they fit into the larger structure of the agreement, its context and purpose. Meaning is ultimately the most compelling and coherent account the interpreter can provide, making use of these sources of interpretation. It is not a partial selection of interpretational materials directed at a predetermined result."

intended to delay when the claim becomes due, and consequently, the commencement of prescription.

[102] Dependent on the finding made here above, the defendant's counsel had argued that should it be found that payment was due upon the issuance of the invoice, that in that event, the defendant would argue that in terms of the agreements, the ability to issue invoices lay solely within the power of the plaintiff, and that the plaintiff could not rely on its own failure to issue invoices to delay the running of prescription.

[103] Counsel submitted that the plaintiff exercised that power on the same day that it signed the agreements, by issuing an invoice. He sought reliance for his argument on an invoice issued by the plaintiff to the defendant which was dated 30 September 2013. The contention being that the plaintiff knew that as soon as it had an agreement, it could issue an invoice, and it did. Counsel asserted that if the plaintiff had the exercise of the power on day one, it had that exercise of power each month after that, it just did not exercise it.

[104] Conversely, the plaintiff's counsel referred to the judgment in *Standard Bank of South Africa Ltd v Miracle Mile Investments 67 (Pty) Ltd and Another*,¹³ and argued that according to that judgment, a creditor has the right to elect when to accelerate payment. Counsel contended that it meant that a creditor has in his hands purely the unilateral power to decide when he is going to pull the trigger to demand payment. The contention was that since the agreements called for the rendering of an invoice, which was payable on receipt by the defendant, the various debts arose at the time of issuance of an invoice. Accordingly, as no invoices were issued from December 2013 until summons was issued, the claims in respect of all those months had not become due, and, as such, were not extinguished by prescription.

[105] The principle is that a creditor cannot unilaterally delay prescription when it has the power to claim. *Trinity* is instructive in this regard. That court held as follows:

¹³ [2016] 3 All SA 487 (SCA).

“[105] It is this fact – that the creditor has the exclusive power to demand that performance be made when the creditor so chooses – that has given rise to the general rule applying to loans ‘payable on demand’, namely that prescription begins to run when the debt arises, unless there is a clear indication to the contrary.” (footnote omitted)

[106] In my understanding of this passage, the creditor has the exclusive power to demand that performance be made when the creditor chooses, in circumstances where the due date is not fixed, hence the sentence that ‘unless there is a clear indication to the contrary’.

[107] I have to hold, as such, that, the entitlement in the agreements, gave the plaintiff the ability to issue invoices. That ability, as was argued by the defendant, lay solely within the power of the plaintiff. The plaintiff had the power, and that power was to be exercised every month, as was called upon by the agreements. And, if it failed to exercise that power, it could not rely on such failure to delay the running of prescription.

[108] Counsel for the plaintiff’s argument that it lay in the hands of the plaintiff to decide when to issue an invoice, is, to me, absurd. The absurdity is brought about by the fact that if the plaintiff’s suggestion is right, it would mean that a creditor in the position of the plaintiff can just sit back for years before issuing an invoice and be able to maintain that the debt had not become prescribed,¹⁴ as the plaintiff seeks to do in this instance.

[109] It was, furthermore, argued on behalf of the plaintiff that Schedule “C” does not cater for the additional work that was done post the signing of the agreements. The contention was that Schedule “C” only provided for the amounts to be paid in terms of the written agreements, that is, the fees provided for in Annexure “A”. Schedule “C”, as was argued, did not contain the fees that were payable in respect of claims 3, 4 and 5. The concession, however, was that the payments were to be made in monthly instalments following the terms of the agreement.

¹⁴ *Benson and Another v Walters and Others* 1984 (1) SA 73 (A).

[110] This argument by the plaintiff's counsel does not wash. This is so because of the following:

110.1 in paragraph 18 of the particulars of claim, which relates to Claim 3, it is alleged that:

“ . . . payment of the fees and disbursements due to the plaintiff pursuant to the services rendered by it to the defendant . . . were payable over a period of ten months, as recorded in the respective **Annexures “C”** to the Storm Water Agreement and the Roads Agreement.”

110.2 paragraph 22 of the particulars of claim, pertaining to Claim 4, states that:

“The plaintiff repeats the content of paragraphs 4 to 6.4, above, and pray that same be read in here as if specifically pleaded as such by the plaintiff.”

And, in paragraph 5.10 of the particulars of claim, Annexure “C” is referred to.

110.3 paragraph 27 relating to Claim 5 states that:

“The plaintiff repeats paragraphs 9 to 11.4 above, and prays that same be read in here as if specifically pleaded as such.”

And, in paragraph 10.11 of the particulars of claim, reference is made to Annexure “C”.

On the face of the plaintiff's pleaded case, it is apparent that Annexure “C” plays a part in determining the fees that were due to the plaintiff in respect of claims 3, 4 and 5.

[111] The question that follows is whether the claims have prescribed.

[112] The sum total of the defendant's argument is that prescription, on the plaintiff's claims, the debts which it claims are premised on the agreements, arose monthly from September 2013 to July 2014. In each month, the plaintiff was entitled to issue an invoice, which meant it had the power to do so, and so prescription in

respect of each of those monthly debts began to run immediately the plaintiff had that right. And, as all of those monthly debts were due, they were due before 31 July 2014, they were due before the prescription date of 8 April 2015, and consequently, were extinguished by prescription.

[113] It was argued on behalf of the plaintiff that the debts could not have been due by 30 September 2013, as suggested by the defendant. The contention was that the commencement of the project was delayed, because Pentacon only commenced work on 19 May 2014. Moreover, so counsel for the plaintiff submitted, the services that the plaintiff had to render, endured for the duration of the project which ended in September 2015, when the agreements were cancelled due to the non-performance of Pentacon. Therefore, it could not be said that prescription started to run on 30 September 2013 when there was no work done by then, so it was argued.

[114] It is common cause that three invoices were issued, being for September, October and November. Out of the three invoices, only two were paid, which means that the invoice for November was not paid. It is also not in dispute that that invoice was received by the defendant.

[115] Thus, relying on the interpretation afforded to clause 13.1 of the agreement, it is obvious that prescription in respect of the debt accrued in the month of November, started running when the invoice was issued on 30 November 2013 (as testified by Mr Ellis), and three years later on 29 November 2016, the debt prescribed. The summons was delivered on 9 April 2018, about one year and four months after the debt had already prescribed.

[116] It is not in dispute that the invoices for the debt that accrued for the seven remaining months were never issued. The plaintiff's defence in this regard is that prescription never commenced running in respect of the debt in those months because invoices were never issued.

[117] As I have already found, the ability to issue the invoice was something that fell solely within the power of the plaintiff. And, where the ability to issue the invoice lies

solely within the power of the plaintiff, the plaintiff cannot rely on its own failure to issue the invoice to delay prescription.

[118] The allegations by Mr Ellis, in his testimony, that the plaintiff stopped issuing invoices because the defendant had indicated that it does not have the funds to settle the debt that was due and requested the plaintiff to await the availability of funds, is unmeritorious.

[119] Sight should not be lost of the fact that Mr Ellis testified that at the time of the conclusion of the agreements, that is, the Storm Water Agreement and the Roads Agreement, he had already completed work up to stage 4. At stage 4, most of the services that the plaintiff had to render for the defendant were completed because Mr Ellis' testimony was that Pentacon was to start at stage 5. Mr Ellis testified, further, that the plaintiff had been rendering its services on risk and that at that time, the plaintiff was desperate for cash. Rendering services at risk, to me, means, that the plaintiff was not paid for the services he had rendered since 2010. Therefore, the plaintiff had completed the work and was entitled to payment. What it needed to do was to issue an invoice for that work.

[120] According to Mr Ellis' testimony, the invoice was not rendered because of the cashflow challenges of the defendant. Mr Egan requested Mr Ellis to claim the amount due in terms of the cashflow schedule that was provided by Pentacon. That is, to claim payment of the amount that was already due and payable in ten monthly instalments.

[121] As *per* Mr Ellis' evidence, the plaintiff did issue three invoices, two of which were paid by the defendant. The third one was not paid because the defendant had cashflow challenges and asked the plaintiff to wait until funds were available.

[122] The plaintiff, also, relied on Clause 13.2 of the agreements to prove that the claims had not prescribed. The clause provides that should the defendant not pay any invoice rendered by the plaintiff within 30 days from receipt thereof, the defendant would be liable for interest for late payment calculated at a rate of 2%

above the rate of interest applicable from time to time to prime borrowers at the plaintiff's bank from due date of payment.

[123] The plaintiff's reliance on Clause 13.2 was dealt a fatal blow in *Trinity*, where it was held that the fact that interest is payable 30 days later does not delay the running of prescription.¹⁵ This is so, as that court stated, because interest would only start running from when demand is made, and, in this case, when an invoice is rendered. The right to issue the invoice, as it has been said, lies solely with the plaintiff and that power cannot be used to delay prescription.

[124] As Justice Cameron remarked in *Trinity*,¹⁶ what prescribes is the right to claim payment and that right is unaffected by when payment must actually be made. This, according to that court, means that the creditor had the right to claim payment immediately even though the debtor had 30 days to pay. The principle applies similarly in this case. What prescribed was the plaintiff's right to claim payment when it became due, and that right was unaffected by when payment of the interest must actually be made. It means that the plaintiff had the right to claim payment immediately it became due, even though the defendant had 30 days to pay the interest.

[125] I deal hereunder with the plaintiff's claims in turn:

Claims 1 and 2

[126] The parties concluded the agreements on 30 September 2013. It was a term of the said agreements that the plaintiff was to render services for the defendant in accordance with Annexure "B" of the agreements. The defendant undertook, in terms of the agreement, to pay the plaintiff services rendered in terms of the agreement in ten monthly instalments.

¹⁵ *Trinity* above n 4 at para 111.

¹⁶ *Trinity* above n 4 at para 122.

[127] The fundamental question, as correctly put by the defendant's counsel, when looking at the plaintiff's claims, is what were the facts that the plaintiff was required to prove in order to make a claim, and when were the set of facts in place.

[128] In order to make a case for the two claims, the plaintiff had to show that the work it had to perform in terms of the agreements, had been completed for a particular month that it was claiming for. And, in terms of the agreements, the plaintiff was to render the standard services of a consulting engineer listed in paragraphs 3.1 to 3.2.5, 3.3.7 and 3.3.8 of Annexure "B". The plaintiff alleged in the particulars of claim and confirmed in its oral evidence, that it rendered the said services. This is not in dispute. In addition to those services, clause 13.1 of the agreements entitled the plaintiff to issue invoices.

[129] In amplification of what was pleaded in the particulars of claim, in his oral evidence, Mr Ellis testified that most of the services that it had to render for the defendant were completed before the agreements were signed, and that in terms of the normal excel rules of invoicing, the plaintiff was entitled to claim about 70% of its fees in the first invoice, and that the construction phase was only 25%. This, the plaintiff did not do because the defendant requested it to spread out the debt over ten months as *per* the schedule of cashflow provided by Pentacon. When the agreements were concluded, it was required that invoices be issued on a monthly basis as a precondition for payment.

[130] On the basis of this evidence, counsel for the plaintiff argued that the timeframes submitted by the defendant, that the claims would have been due by 31 July 2014, are problematic as *per* the evidence of Mr Ellis, the plaintiff continued rendering services to the defendant beyond 31 July 2014. The evidence on record, according to counsel, stated that the agreements were cancelled in September 2015, which was a date that would fall within the period of prescription.

[131] This evidence does not assist the plaintiff's case, instead, it confirms that the debt was due at the time the agreements were signed. The least that can be said in this regard is that 30% of the work had to be done over the duration of the agreements. In terms of the agreements, the standard services of a consulting

engineer listed in paragraphs 3.2.5, 3.3.7 and 3.3.8 of Annexure “B” could not have been completed before the agreements were signed.

[132] In terms of paragraph 3.2.5, the plaintiff was to be involved in stage 5 of the project, which required it to manage, administer and monitor the construction works, contracts and processes, including preparation and coordination of procedures and documentation to facilitate the practical completion of the construction works. Paragraph 3.3.7 required the plaintiff to assist the defendant in mediation, arbitration and litigation proceedings and similar services. In terms of paragraph 3.3.8, the plaintiff is appointed as a principal agent on the construction of the project. Such services could only be done during the duration of the agreements. Under those circumstances, it could be said that the claims in respect of the said services had not prescribed at the time the summons was delivered because the agreements endured until in September 2015.

[133] The challenge with this evidence is that it was not pleaded, and the defendant was not afforded an opportunity to plead thereto in its special plea. The evidence is, as a result, irrelevant and inadmissible for the purposes of determining whether the claim had prescribed or not.

[134] On the defendant’s pleaded case, these claims have prescribed. A claim for each of the payments in these claims would be extinguished by prescription after three years. The last of those payments was, as the defendant argued, due and payable on 31 July 2014. Prescription on the claims for that payment commenced running on 1 August 2014. A period of three years for that claim would have expired on 30 July 2017.

[135] Summons was delivered on 9 April 2018, which was nine months after the period of prescription had expired. Thus, at date of institution of the proceedings, the claims had prescribed. And, if the claims for the tenth payment (which was the last

one),¹⁷ had prescribed, it means that all of the claims for the payments prior to it had also been hit by prescription.

[136] The debt that arose on 30 November 2013, is classic. An invoice had been issued and received by the defendant. The debt was, for all intends and purposes, due, and prescription started to run immediately. For that debt, the three year period of prescription expired on 29 November 2016. Summons was delivered on 9 April 2018, which was a year and four months after the claim was extinguished by prescription.

[137] In respect of the debt for the remaining seven months, there were no invoices issued. But as it has been said, the power to issue the invoices laid with the plaintiff, and the plaintiff having failed to issue the invoices, such debt arose monthly from December 2013 until July 2014, and prescription for those debts commenced running.

Claim 3

[138] In this claim, the parties are alleged to have, on 11 September 2013, entered into an oral agreement for supervisory services to be rendered by the plaintiff. In terms of this agreement, the plaintiff was employed to supervise the work of Pentacon.

[139] It was expected that the project programme of Pentacon would be completed within ten months from the date of appointment of Pentacon. The project programme did not start as was expected and had to be extended by an additional ten months.

[140] To prove the supervisory nature of the agreement, Mr Ellis gave evidence that in the service agreement that was signed between the Tshwane Council and the defendant, it was agreed that Mr Egan appoint the plaintiff as the consulting engineer during the construction of the external works. The contractor in this instance was Pentacon. The service agreement was signed by the council on 13 September 2013,

¹⁷ The 11th payment, which ought to have been the last one as *per* the agreement, had not become due and payable because the agreement was not completed.

and by the defendant on 30 September 2013. Mr Ellis, in his testimony, also, stated that the plaintiff was appointed as a principal agent to manage the contract between the defendant and Pentacon.

[141] Mr Ellis testified that, although the agreements were signed in September 2013, Pentacon did not go on site immediately because, what Mr Ellis referred as the 'Wayleaf' agreements, were outstanding. Therefore, Pentacon could only take possession of the site on 13 January 2014. And, due to the Telkom fibre that was to be removed on the site, Pentacon could only start working on the site on 18 May 2014. Mr Ellis testified that in terms of the programme that it was said would take ten months and start in September 2013, the actual start date thereof, was 18 May 2014. There is also evidence to the effect that the contract between the defendant and Pentacon was stopped somewhere in 2015.

[142] Furthermore, in the request for further particulars, the defendant enquired from the plaintiff what was the month that the plaintiff is alleged to have delivered services pursuant to the agreement pleaded in Claim 3. The answer given by the plaintiff in its reply to the request for further particulars, is October 2014.

[143] It is on that basis that it was argued on behalf of the plaintiff that, because the plaintiff continued to render services beyond the date suggested by the defendant of 31 July 2014, or the date stated in the reply to the request for further particulars, or until the agreement was cancelled in September 2015, the debt in respect of this claim had not become due because the plaintiff had not acquired a complete cause of action.

[144] On the plaintiff's pleaded case, the ten month period was to be from 11 September 2013 to 13 July 2014. The date would therefore expire three years later on 12 July 2017. On Mr Ellis' testimony, the ten months extension was to be from 18 May 2014 to 18 March 2015. The claim would, as a result, expire three years later on 17 March 2018. Summons was delivered on 8 April 2018, and at that time, on both scenarios, the claim had already prescribed.

[145] The extension from 18 May 2014 to 18 March 2015, as well as the extension of the services until the cancellation of the agreements in September 2015, is not pleaded. Evidence tendered by the plaintiff in that regard, is therefore, irrelevant and cannot be considered for the purposes of determining the prescription of this claim. There is, also, no evidence on record to prove the date provided in the reply to the request for further particulars.

Claim 4

[146] There were a number of instructions allegedly received by the plaintiff to render additional services for the defendant. The plaintiff claimed payment for each of those instructions, however, the defendant raised a plea of prescription against only one. The debt that is, therefore, relevant for prescription in this claim is that referred to in paragraph 23.1 of the particulars of claim. This is where the plaintiff alleged it designed an overlay solution to address the rejected workmanship of Pentacon, and in so doing, executed instructions received from the defendant between 28 October 2014 and 5 March 2015.

[147] The plaintiff's counsel is of the opinion that even though the instructions for the construction of the overlay were received between 28 October 2014 and 5 March 2015, the work that had to be done was completed after that time. The result was that, as counsel argued, the plaintiff could not claim for those services before such completion.

[148] In this regard, counsel sought support in the unchallenged evidence of Mr Ellis, in which he referred to a string of emails between Mr Jan G McCabe, a representative of the Tshwane Council, Mr Egan and himself. The emails show that in order to finalise the said instructions or the services that were rendered, the approval of the Tshwane Council was required. The emails also indicated that the negotiations for such approval went far beyond 5 March 2015, the last of which was on 23 April 2015.

[149] Relying on the principle that the plaintiff had the power to issue an invoice, the view of the defendant's counsel is that the claim had prescribed because the three year period of prescription fell on 4 March 2018.

[150] It is trite that a debt is due when the creditor acquires a complete cause of action for the recovery of the debt, that is, when an entire set of facts which the creditor must prove in order to succeed with his/her claim against the debtor is in place. The situation in this claim was that the entire set of facts were not in place until the approval of Tshwane Council was obtained. There is an email that indicates that even by 23 April 2015, the approval of the Tshwane Council was still under negotiation.

[151] The challenge for the plaintiff with this evidence is that it was not pleaded, and as such, the defendant was not afforded an opportunity to respond thereto in the special plea. The evidence is, as a result, irrelevant and inadmissible and cannot be considered in determining whether the claim had prescribed or not.

[152] And, on the defendant's pleaded case, the claim has prescribed. The plaintiff claims a globular amount of R 112 000, calculated at 64hrs at the rate of R 1 600 *per* hour for the engineer, plus 16hrs at the rate of R 600 *per* hour for the technician. This, without specifically stating how the amount was accumulated over the period in question. However, prescription on that claim commenced running on 6 March 2015. A period of three years for that claim expired on 5 March 2018. Summons was delivered on 9 April 2018, which was about one month after the period of prescription had expired. Thus, at date of institution of the proceedings, the claim had prescribed.

Claim 5

[153] The claim pertains to additional road services done by the plaintiff at the instruction of the defendant, between 18 October 2014 and February 2015 by designing an additional sewer connection to accommodate incorrect design information received from the local authority.

[154] The plaintiff claims a globular amount of R 56 825.51 without specifically stating how that amount was accumulated over that period. In any way, prescription on the claim commenced running on 6 March 2015. A period of three years for that claim expired on 5 March 2018. Summons was delivered on 9 April 2018, which was about one month after the period of prescription had expired. Thus, at date of institution of the proceedings, the claim had prescribed.

Was the running of prescription interrupted?

[155] As earlier stated, section 12(1) of the Prescription Act provides that, subject to certain exceptions, prescription starts running as soon as a debt is due. Section 12 is supplemented by section 13 which identifies circumstances which may delay the running of prescription.

[156] Section 14 of the Prescription Act, which is relevant for the purposes of this judgment, provides as follows:

“14. Interruption of prescription by acknowledgement of liability. -

- (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.”

[157] In *Investec Bank Limited v Erf 436 Elandspoort (Pty) Ltd and Others* (“*Erf 436*”),¹⁸ whereat the Supreme Court of Appeal dealt with the question of whether a series of payments in terms of agreement between creditor and debtor were acknowledgements of liability that interrupted prescription, the court stated the reason for the rule relating to prescription and interruption thereof, as follows:

¹⁸ (410/2019) [2020] ZASCA 104 (16 September 2020).

[27] The reason for rules relating to prescription was discussed by Marais AJ in *Cape Town Municipality v Allie NO*. He said:

‘Over the years the Courts and the writers on the law have sought to provide a rationale for the doctrine of prescription or the limitation of actions. It is unnecessary to burden this judgment with a discussion of the plausibility of the explanations which have been suggested. Whatever the true rationale may be, it cannot be denied that society is intolerant of stale claims. The consequence is that a creditor is required to be vigilant in enforcing his rights. If he fails to enforce them timeously, he may not enforce them at all. But that does not mean that the law positively encourages precipitate and needless law suits. It is quite plain that both at common law, and in terms of the Prescription Acts of 1943 and 1969, a creditor may safely forebear to institute action against his debtor if the debtor has acknowledged liability for the debt. *Lubbers and Canisius v Lazarus* **1907 TS 901**; *De Beer v Gedye and Gedye* **1916 WLD 133**. And it seems right that it should be so. Why should the law compel a creditor to sue a debtor who does not dispute, but acknowledges, his liability?’

[28] The policy underlying prescription in general, as well as the exception that is created by **s 14**, were explained in *Murray & Roberts Construction (Cape) (Pty) Ltd v Upington Municipality*:

‘Although many philosophical explanations have been suggested for the principles of extinctive prescription . . . its main practical purpose is to promote certainty in the ordinary affairs of people. Where a creditor lays claim to a debt which has been due for a long period, doubts may exist as to whether a valid debt ever arose, or, if it did, whether it has been discharged . . . The alleged debtor may have come to assume that no claim would be made, witnesses may have died, memories would have faded, documents or receipts may have been lost, etc. These sources of uncertainty are reduced by imposing a time limit on the existence of a debt, and the relevant time limits reflect, to some extent, the degree of uncertainty to which a particular type of debt is ordinarily subject (**s 11** of the Act).

The same considerations which provide a justification for extinctive prescription also suggest that the time limits should not be immutable. Where the creditor takes judicial steps to recover the debt, and thereby to remove all uncertainty about its existence, prescription should obviously not continue running while the law takes its course (**s 15** of the Act). Moreover, **s 14** of the Act provides that the running of prescription is interrupted by an express or tacit acknowledgement of liability by the debtor. The reason is clear – if the debtor acknowledges liability there is no uncertainty about the debt. No purpose would accordingly be served by requiring the creditor to interrupt prescription by instituting legal proceedings for the recovery of the debt.” (footnotes omitted)

Defendant’s argument

[158] In argument against the plaintiff’s suggestion that the running of prescription against the plaintiff’s claims was interrupted, the defendant’s counsel placed reliance on the judgment of the Supreme Court of Appeal in *Road Accident Fund v Mothupi* (“*Mothupi*”),¹⁹ which sets out the various elements a court should look for in determining whether prescription has been interrupted. As a point of departure, counsel referred to paragraph 37 of that judgment that reads as follows:

“[37] For a variety of reasons the question posed must in my opinion be answered in the negative. In the first place an acknowledgment of liability for the purpose of **s 14** of the **Prescription Act** is a matter of fact, not a matter of law. Thus it was stated in *Agnew v Union and South West Africa Insurance Co Ltd* [“*Agnew*”] **1977 (1) SA 617** (A) at 623A-B:

“Of daar in ’n bepaalde geval ’n erkenning van aanspreeklikheid was, is ’n feitlike vraag wat betrekking het op die bedoeling van die persoon wat as skuldenaar aangespreek is. In dié verband

¹⁹ 2000 (4) SA 38 (SCA).

het BROOME, R.P., die volgende gesê in *Petzer v. Radford (Pty.) Ltd.*, **1953 (4) S.A. 314** (N) op bl. 317 en 318:

‘To interrupt prescription an acknowledgment by the debtor must amount to an admission that the debt is in existence and that he is liable therefor.’ ”

[159] Based on this passage, counsel argued that Mr Ellis in his evidence complained that Mr Egan had said there would be a potential liability if the plaintiff finished the project, based on payment to be made by Pentacon, or the issue of the guarantees by City Council. That evidence, according to counsel, fell short of what the Supreme Court of Appeal in *Mothupi*, says is required.

[160] In support of this argument, counsel emphasised the remarks of that court when it said:

“In Benson’s case, the majority of the court put it on the footing that the Act required an acknowledgement of liability “aanspreeklikheid” and not merely an acknowledgement of indebtedness.” ²⁰

[161] Counsel juxtaposed what the court said in *Mothupi* with what is pleaded in the plaintiff’s replication. And, what is pleaded in paragraph 39.1.1 of the replication is that

“The defendant admitted and acknowledged that (sic!) its indebtedness towards the plaintiff . . .”

[162] Counsel argued, therefore, that on the plaintiff’s own case, it was alleged that the defendant admitted and acknowledged its indebtedness, which is against what the Supreme Court of Appeal said when it stated that an admission of indebtedness is not enough. According to counsel, an acknowledgment of indebtedness is different from an acknowledgment of liability, and only an acknowledgment of liability interrupts prescription.

²⁰ Para 38.

[163] In addition, counsel referred, also, to the following quote in *Mothupi*:

“And in the minority judgment, in that case, it is further stated at 90G:

‘For an acknowledgment of debt to be effective as an interruption of prescription it is not necessary that it should be quantified in figures. It is sufficient if it is capable of ascertainment by calculation or extrinsic evidence without the further agreement of the parties.’

In this case, there is not even common ground on a minimum amount which is acknowledged by the Fund. The admission, in short, must cover at least every element of the debt and exclude defence, as to its existence. An admission relating solely to the negligence of the insured driver does not comply with that requirement.”²¹

[164] According to counsel, the above remark meant that the admission must cover every element of the debt and exclude the defence, as to its existence. The contention was that the plaintiff’s evidence did not prove that the admission by the defendant covered every element of the debt and excluded the defence, as to its existence.

[165] In support of this proposition, counsel referred to the evidence of Mr Ellis where he acknowledged that Mr Egan had always relied on Item D.²² According to counsel, when Item D is always an obstacle seen by Mr Egan to his obligation to pay, it can never be assumed or inferred that Mr Egan made an acknowledgement of liability which excludes the defence, as to its existence.

[166] Finally, counsel referred to paragraph 39 in *Mothupi*, where the court mentioned a point raised in *Cape Town Municipality v Allie NO (“Allie”)*,²³ where the following is said:

²¹ Para 38.

²² Item D relates to a suspensive condition that was a term of the agreement between the plaintiff and the defendant.

²³ 1981 (2) SA 1.

[39] And finally there is the point raised in *Cape Town Municipality v Allie* NO **1981 (2) SA 1** (C) 7F-G:

“In the end, of course, one must be able to say when the acknowledgment of liability was made, or otherwise it would not be possible to say from what day prescription commenced to run afresh.”

This links up with what was earlier stated in *Benson’s* case, *supra*, at 86E:

“No doubt an alleged, but ambiguous, ‘acknowledgment’ may fall to be interpreted in the light of preceding conduct of the debtor, but, since interruption takes place at a specific point in time, I have some difficulty in understanding how various factors can cumulatively amount to a single act of interruption.”

On the facts of this case, where the alleged concession as to negligence does not consist of a single act but of an impression due to inaction over a prolonged period, it is even more difficult to conceive how the requirement of s 14 can be said to have been fulfilled.”

[167] This paragraph, counsel contended, was important because the plaintiff does not plead a specific date in June 2015, for the interruption. Counsel referred to the plaintiff’s pleading in paragraph 39.1 of the replication, where the plaintiff alleges, during or about June 2015, without alleging a particular date when the interruption occurred. The defendant’s submitted, in this regard, that prescription cannot commence to run during or about June 2015. Counsel argued, similarly, that an oral agreement cannot be concluded during or about June 2015, simply because, an oral agreement is where two people talk to each other, and exchange specific words on a particular day.

[168] In addition, so counsel argued, the testimony of Mr Ellis does not inform the court whether the oral agreement was concluded before the letter of 12 June 2015,²⁴ or after that letter. The evidence referred to general office discussions. Counsel submitted, further, that it was clear that there was no agreement before the letter of

²⁴ The letter of 12 June 2015 was written by Mr Ellis to Mr Egan, wherein he requested Mr Egan to remove Item D from the agreement.

12 June 2015, because if there had been an agreement before 12 June 2015, that letter would not have been written.

[169] Furthermore, counsel pointed out that Mr Ellis' testimony did not indicate that there was an oral agreement concluded after 14 June 2015. The evidence referred to a letter by Mr Egan in response to the letter from Mr Ellis of 12 June 2015 wherein Mr Egan undertook to give Mr Ellis a call on Monday. The evidence, according to counsel, does not indicate that that call was ever made.

[170] On the second occurrence of the interruption, pleaded in paragraph 42 of the replication, counsel argued that for this interruption, the plaintiff relied on a statement of defence in the arbitration proceedings that ensued after the agreement between the defendant and Pentacon was cancelled. The contention is that Mr Ellis confirmed, in his evidence, that claims 1, 2 and 3 do not appear in the statement of defence. And, counsel argued that the statement of defence could not be relied on for claims 1, 2 and 3.

[171] With regard to claims 4 and 5, counsel's proposition is that the reliance by the plaintiff on the arbitration proceedings, has no chance of success. Counsel submitted that in respect of the overlay claim, Mr Ellis sought to count on the eighth item on the statement of defence which refers to interest lost. According to counsel, Mr Ellis seemed to suggest that with regard to the interest that was lost due to non-payment by the defendant, that the defendant was relying on him as a witness to give evidence, amounted to an admission by the defendant that the amount was due. This, according to counsel, does not follow because all that the defendant wanted was that Pentacon should pay.

[172] Counsel argued that the authorities are clear that if an acknowledgment of liability is to be made by an agent, that agent must be authorised to make that admission. The plaintiff, so it was argued, has not come close to establishing the authority of the lawyers who signed the statement of defence to admit liability on behalf of the defendant in a different matter.

Analysis

[173] In its replication to the defendant's special plea of prescription, the plaintiff pleaded two events during which the running of prescription was interrupted, namely, the events that occurred during or about June 2015 and, the events that happened on 13 May 2016.

[174] I agree with the reasoning provided by the defendant as to why it cannot be said that the running of prescription was interrupted in accordance with section 14 of the Prescription Act. I deal with the two occurrences hereunder, in turn.

June 2015 interruption

[175] On the first alleged interruption that occurred during June 2015, the plaintiff's case is pleaded as follows:

“39.1 During or about June 2015 and at or near Pretoria, the Plaintiff, represented by Francois Ellis as its sole member, and the Defendant, represented by Russel Egan in his capacity as duly authorized director, entered into a further oral agreement, the express, alternatively implied, further alternatively tacit terms and conditions of which were as follows:

39.1.1 the Defendant admitted and acknowledged that (sic!) its indebtedness towards the Plaintiff and that it was unable to pay the amounts listed in claims 1 to 5 of the particulars of claim to the Plaintiff and would not be able to pay such amounts, irrespective of when they became due, until, at the earliest:

39.1.1.1 the Defendant had secured the release of funds held in trust as guarantee for the Defendant's performance of its contractual or legal obligations towards the City of Tshwane; alternatively

39.1.1.2 the Defendant was able to access funds held in trust pursuant to a sale of business/sale of assets agreement entered into between the Defendant and third parties.”

[176] In opposition to the plaintiff's pleaded case, the defendant raised three grounds, that it alleged prove that the running of prescription in respect of the claims was not interrupted. These grounds are valid.

[177] Firstly, it is not in dispute that the plaintiff in paragraph 39.1.1 of the replication alleged that the defendant admitted and acknowledged its indebtedness, instead of acknowledging its liability. As was decided in *Benson*, which was cited with approval by the court in *Mothupi*, 'the Act (the Prescription Act), requires an acknowledgement of liability ('aanspreeklikheid') and not merely an acknowledgement of indebtedness.'

[178] The argument by the plaintiff's counsel that the plaintiff has, in paragraph 43 of the replication, pleaded that the defendant acknowledged its liability to pay the plaintiff, does not assist the plaintiff's case, at all. The occurrence upon which the plaintiff depends for the interruption of the prescription in June 2015, is as stated in paragraph 39 of the replication, as quoted above. The allegations therein are that the plaintiff entered into an oral agreement with the defendant, the terms and conditions of which are that 'the defendant admitted and acknowledged its indebtedness towards the plaintiff'. This is the case that the defendant had to meet, on this ground.

[179] Secondly, if it were to be accepted that the defendant admitted and acknowledged its liability to the plaintiff, the evidence of Mr Ellis that Mr Egan refused to remove Item D from the appointment agreement, proves otherwise. It was Mr Ellis' testimony that he had on several occasions requested an amendment to the appointment agreement that would remove the suspensive clause in Item D, of the contract, without success. This evidence, therefore, indicates that Mr Egan, on behalf of the defendant, placed reliance on Item D as a defence to the defendant's obligation to pay the plaintiff. Consequently, as was argued by counsel for the defendant, it could never be assumed or inferred that Mr Egan made an acknowledgement of liability which excludes the defence, as to its existence.

[180] Lastly, even if it were to be accepted that the admission alleged to be made by the defendant, covers all the elements of the debt and does not exclude the defence, as to its existence, the fact that no specific date in June has been pleaded,

puts to bed the plaintiff's case. It is common cause that in paragraph 39.1 of the replication, the allegation made by the plaintiff is that 'during or about June 2015', without a specific date being alleged, when such interruption took place.

[181] It is a general principle of our law that when a plea of interruption of prescription is made, a particular date of such occurrence should be alleged. As is the case, interruption takes place at a specific point in time. It must, therefore, be stated when the acknowledgement of liability was made in order to be able to determine what day prescription would commence to run afresh.

[182] There are only two dates in June 2015 that are mentioned in Mr Ellis' testimony, that is, 12 June 2015 and 14 June 2015. The two dates are mentioned specifically in relation to the emails that were exchanged between Mr Ellis and Mr Egan. None of the two emails make mention of when the oral agreement between the parties was concluded or put differently, when the running of prescription was interrupted.

[183] The plaintiff's counsel conceded in argument that the exact date upon which the oral agreement is alleged to have been entered into, is not provided by the plaintiff. Neither in its pleading nor in its oral evidence. Counsel explained such failure to be because of the passage of time – the interaction between the parties having occurred nine years ago. Counsel argued that it would have been highly suspect if Mr Ellis could have been able to provide an exact date upon which the discussions, when Mr Egan put him at ease that he would pay the plaintiff's fees, occurred. According to counsel, it was impossible for Mr Ellis to provide those details, but he (Mr Ellis) gave an honest response to the question that was put to him, and his version is not in dispute. The explanation does, however, not take the plaintiff's case any further.

[184] The further argument by the plaintiff's counsel, which was based on the judgment in *Erf 436*, that the outward conduct of Mr Egan, of continually asking Mr Ellis to provide services to the defendant, and undertaking to pay the plaintiff's fees, should be regarded as a tacit acknowledgment of liability, does not assist the plaintiff's case. The tendered evidence of the general conduct by the defendant

which, when taken together, is alleged to be consistent with an acknowledgement of liability, does not, in my view, meet the threshold for interruption under section 14(1).

[185] Similarly as in *Mothupi*, on the facts of this case, where the alleged admission and acknowledgement does not consist of a single act, but of an impression due to inaction over a prolonged period, it is even more difficult to conceive how the requirement of section 14 can be said to have been fulfilled. It is, therefore, my finding that without a specific date as to when the prescription was interrupted, the plaintiff's plea of interruption cannot see the light of day.

March 2016 interruption

[186] In its second occurrence, the plaintiff pleaded its case as follows:

“42. On or about 13 May 2016 the defendant duly represented by Russel Egan alternatively represented by its attorneys of record, Adams and Adams, further alternatively represented by Pat Ellis SC, further admitted the defendant's liability towards the plaintiff that:

42.1 the Defendant, in arbitration proceedings between it and Pentacon, claimed damages from Pentacon constituted by amounts due and owing by the Defendant to the Plaintiff;

42.2 the Defendant, as part of its statement of defence in the aforementioned arbitration, filed Annexure "R1a hereto, as Annexure "SOD7".”

[187] In order to prove the acknowledgement of liability that occurred on 13 May 2016, the plaintiff relied on the statement of defence that was used to support the counterclaim that was brought by the defendant in the arbitration proceedings that ensued after the defendant cancelled Pentacon's agreement. Attached to the statement of defence was Annexure “SOD7” which was used as the basis for the counterclaim. In Annexure “SOD7” which was said to be Annexure “FE6”, the plaintiff set out a detailed breakdown of the estimates of additional fees that were due to it as a result of the cancellation of Pentacon's agreement. According to Mr Ellis' evidence, the statement of defence contained, amongst others, amounts that were due by the

defendant to the plaintiff that the defendant was claiming from Pentacon. The amounts, also, included the interest lost by the plaintiff due to the non-payment of its debt by the defendant. The evidence indicates that the defendant's legal representatives signed that statement of defence. The plaintiff now seeks to use that statement of defence as prove that the defendant acknowledged its liability by allowing the fees and/or interest owed to the plaintiff in its claim against Pentacon.

[188] It is common cause that the amounts alleged to be due in respect of claims 1, 2 and 3 do not appear in the statement of defence. It is, also, not in dispute that the amounts stated in the statement of defence are damages claimed by the defendant from Pentacon. The damages, as such, could only include expenses for which Pentacon was liable, or would become liable to pay in the future.

[189] It is counsel for the defendant's argument that the statement of defence could not be relied on for claims 1, 2 and 3. However, the contention by the plaintiff's counsel is that the damages includes the payment of interest in respect of the plaintiff's unpaid fees, as claimed in claims 1, 2, 3 and 5, and Annexure "SOD7", attached to the statement of defence, includes the additional work performed by the plaintiff, as pleaded in Claim 4. The contention is that firstly, the inclusion of the interest component in the damages, is an acknowledgment by the defendant that it was indebted to the plaintiff in the amount claimed in claims 1, 2 and 3. Secondly, as regards claims 4 and 5, the contention is that the amounts claimed, amounted to a clear acceptance and acknowledgement that the amounts are due by the defendant to the plaintiff. This being so because the statement of defence was prepared and submitted by Mr Ellis and accepted by the defendant and hence it was included in the counterclaim, so it was argued.

[190] It is my view that there is nothing in Annexure "FE6" or "SO7" that shows that the interest that is included in the damages claim mean that the defendant acknowledged liability for the debts in claims 1, 2 and 3. It is quite clear that claims 1, 2 and 3 are not covered in the statement of defence. Mr Ellis' evidence confirms it, as well. Therefore, the statement of defence cannot be relied upon for the alleged interruption of prescription in respect of the said claims.

[191] The contention that the defendant accepted and acknowledged liability simply because it accepted the statement of defence that was prepared by Mr Ellis, holds no water. It is trite that for an acknowledgement of liability to pass master, acknowledgment by the debtor must amount to an admission that the debt is in existence and that he is liable therefor.²⁵ In this instance, although it can be said that Mr Ellis' evidence proved the existence of the debt, the evidence, however, fell short of indicating that the defendant admitted that it is liable for such debt.

[192] The plaintiff also sought to rely on the admission of liability being made by the defendant's legal representatives. It is a principle of our law that for an acknowledgement of liability, to effectively interrupt prescription, it can be made by either the debtor or his or her agent.²⁶ In this instance, the plaintiff sought to rely on the legal representative as its agent. However, the law is that if an acknowledgment of liability is to be made by an agent, that agent must be authorised to make that admission. The plaintiff's evidence, in this instance, failed to establish the authority of the defendant's legal representatives who signed the statement of defence to admit liability on behalf of the defendant in a different matter. Mr Ellis was unable to do so, nor could he do so because he would not have been privy to the defendant's instructions to its legal representatives.

[193] Consequently, I have to agree with the defendant's argument that the statement of defence which is used by the defendant to claim costs from Pentacon, does not constitute an acknowledgement of liability by the defendant to the plaintiff. Certainly, the plaintiff failed, as well, to establish that Adams & Adams and/or Adv P Ellis SC, who were briefed to defend the arbitration proceedings, were authorised by Mr Egan to represent him in admitting liability for any historical claims. Thus, even on this ground, the plaintiff has failed to prove that the alleged occurrence of 13 May 2016, interrupted the running of prescription

Conclusion

²⁵ Agnew at 623A-B.

²⁶ Erf 436 para 31.

[194] When trying to explain to the court how prescription works, counsel for the defendant stated the following:

“ . . . you are pleading a case. Your case cannot get better than your pleadings. Your pleading says, you had a contract, you did the work, you are entitled to payment. The Court asked, well, when were you entitled to payment. When was your debt due, it was the month after you did the work. Is that more than three years before you issued the summons? Yes. Your claim is prescribed.”

All that can be said is that there was a debt, now there is no debt. That is the effect of prescription.

[195] This judgment is delivered terribly late. I apologise profusely for this lateness, which was occasioned by circumstances beyond my control. I have, for the better part of this year, been afflicted by illness.

Costs

[196] The defendant, as the successful party, is entitled to its costs of suit. It is my view that the issue of prescription, in this instance, with multiple claims and complex facts, justifies the granting of an order for costs on the highest scale — Scale C.

Order

[197] The following order is granted:

1. The defendant's special plea of prescription against claim 1 is upheld.
2. The defendant's special plea of prescription against claim 2 is upheld.
3. The defendant's special plea of prescription against claim 3 is upheld.
4. The defendant's special plea of prescription against the claim made in paragraph 23.1 of the particulars of claim relating to the design of an overlay solution to address rejected workmanship of Pentacon, is upheld.

5. The defendant's plea of prescription against claim 5 is upheld.
6. The plaintiff is ordered to pay the defendant's costs in accordance with Scale C.

E M KUBUSHI
JUDGE OF THE HIGH COURT
GAUTENG DIVISION, PRETORIA

APPEARANCES:

For the Plaintiff:

Adv Daniel Prisloo

Instructed by:

Jacobs Roos Fouche Inc.

For the Defendant:

D.A Turner SC & Adv T.G Ngobeni

Instructed by:

Lawtons Africa

Date of the hearing:

4 – 6 September 2024

Date of judgment:

8 July 2025