

**IN THE HIGH COURT OF SOUTH AFRICA
KWAZULU-NATAL LOCAL DIVISION, DURBAN**

CASE NO.: D2259/2025

In the matter between:

VUMANI CIVILS CC

Applicant

and

RIDGESIDE P4 RESIDENTIAL ESTATE (PTY) LTD

Respondent

JUDGMENT

Olsen J:

[1] This application concerns the question as to whether the claims made by the applicant, Vumani Civils CC, against the respondent, Ridgeside P4 Residential Estate (Pty) Ltd, have prescribed. The respondent appointed the applicant as civils contractor for the construction of the civil engineering infrastructure required for a development known as the Enigma Private Estate. This was done in August 2018. The contract was written and comprised, insofar as relevant to the present proceedings, a document headed "Contract Data", which is to be read with the General Conditions of Contract for Construction Works, Third Edition (2015), issued by the South African Institution of Civil Engineering.

[2] Practical completion of the works was achieved on 5th July 2019. The defects liability period expired, and, according to the applicant, "factual" contractual completion was achieved, on or about 19th November 2020.

[3] Clause 5.16.1 of the general conditions provided as follows.

"5.16.1 The works shall not be considered as completed in all respects until a final approval certificate has been delivered by the employer's agent to the employer and the contractor stating the date on which the works were completed and defects corrected, all in accordance with the contract.

Such final approval certificate shall be delivered by the employer's agent as soon as practical after the completion of the whole of the works, or the expiration of the defects liability period, if such a period is prescribed, or as soon thereafter as any works ordered during such period pursuant to clauses 5.14.4, 7.7 and 7.8 shall have been completed in accordance with the contract. Full effect shall be given to this clause notwithstanding any previous entry on the permanent works or the taking possession of, working in or using thereof or any part thereof, by the employer;

provided that the issue of the final approval certificate shall not be a condition precedent to the payment to the contractor of the second half of the retention money in accordance with clause 6.10.5.1 and 6.10.5.2."

[4] The final payment certificate is intended to follow the issue of a final approval certificate. The relevant clause is clause 6.10.9, being a replacement clause recorded in the contract data. It reads as follows.

"Within 14 days of the date of final approval as stated in the final approval certificate, the tenderer shall deliver to the engineer a final statement of all monies due to him (save in respect of matters in dispute, in terms of clauses 10.3 to 10.11 and not yet resolved). The engineer shall within 14 days issue to the employer and the tenderer a final payment certificate, the amount of which shall be paid to the tenderer within 30 days of the approval of the final payment certificate by the employer, after which no further payments shall be due to the tenderer (save in respect of matters in dispute, in terms of clauses 10.3 to 10.11 and not yet resolved)."

[5] The respondent's agent in terms of the contract was a firm of consulting engineers, BMK Consulting Engineers. At some stage after practical completion of the works had been achieved the respondent and BMK came to be in dispute with one another, as a result of which BMK refused to do any further work. That left the applicant without a final approval certificate, and consequently without a final payment certificate. This application was launched on or about 26 February 2025. The principal relief sought constituted orders directing the respondent to issue a final approval certificate and a final payment certificate, and to make payment in accordance with the final payment certificate. In the alternative the applicant sought an order for payment of a sum of R11 571 544.57 "in terms of Payment Certificate 4-Rev1 issued by the engineer". The origin of the alternative prayer will be apparent from the brief account I furnish of what transpired between about 2020 and the commencement of the present proceedings.

[6] According to the founding affidavit in about February 2022, despite the fact that it had not received a final approval certificate, the applicant delivered its final statement to "the engineer", indicating the applicant's version of what the final payment certificate would look like. The engineer concerned was DG Naidoo and Associates, a firm of consulting engineers. Correspondence put up with the answering affidavit suggests that exchanges between the applicant and DG Naidoo and Associates must have predated February 2022. Nothing turns on that issue.

[7] DG Naidoo and Associates subsequently made an assessment of what would be owing under a final payment certificate. It was rejected by the applicant. Further exchanges between the applicant and DG Naidoo and Associates produced an assessment at a higher figure, being the one of some R11,5 million which is the subject of the applicant's alternative prayer in these proceedings. Although it is not stated as clearly as one would have thought it would be, as I understand the answering affidavit the respondent does not agree with the figures produced by DG Naidoo and Associates.

[8] The position adopted by the respondent was made clear to the applicant as early as February 2020 when a letter was sent to the applicant containing the following paragraphs.

- “6. We are committed to settle the full amount due to Vumani once the work is certified as complete, and once the payment certificates are duly certified.
7. We have instructed Dees Naidoo of DG Naidoo and Associates to conduct an audit of all of the work undertaken by yourselves and that of BMK on the project.
8. Regrettably BMK abandoned the work and refused to attend to any further work on our behalf. We had no alternative but to appoint an independent engineer to assess and audit the work.”

(My underlining.)

[9] The respondent adopted the same stance in its answering affidavit. It pointed out that the applicant was wrong to present its exchanges with DG Naidoo and Associates as if that firm had been appointed as the respondent’s agent in terms of the contract. It had been appointed merely to audit work already done, and, presumably, the claims made by the applicant as to what should be reflected in a final payment certificate. A confirmatory affidavit delivered by Mr Naidoo of that firm confirms that it was not appointed as the agent. It did not replace BMK. In reply the applicant accepted that it may have misunderstood the nature of the relationship between the respondent and DG Naidoo and Associates. Mr Voormolen SC, who argued the case on behalf of the applicant, accordingly directed his submissions at the grant of the principal relief, namely the delivery of the missing certificates. The prayer for relief along those lines was refined during the course of argument, inter alia to include an order directing the respondent to appoint a new agent under the provisions of the contract, who would be empowered to consider the issue of a final approval certificate and a final payment certificate. The respondent’s answer to that claim is that the right to receive such certificates has prescribed. It is indisputable that very much more than three years has elapsed since those certificates were due to have been produced in whatever form they ought properly to have taken.

[10] Clause 3 of the general conditions deals with the subject of the employer’s agent. The appointee must be “a registered professional in a built environment profession that is appropriate to the scope of work”. The function of the employer’s agent is to administer the contract as agent of the employer. Where the agent is to

exercise any discretion, or make or issue any ruling, he is obliged to consult with the contractor and the employer in an attempt to reach agreement, and failing such agreement, to act impartially and make a decision in accordance with the contract.

[11] No dispute has been raised over the proposition that it is the respondent's right to appoint a new employer's agent in the event of the original appointee failing for whatever reason to take any further part in the administration of the contract. It was not disputed in argument before me that the right must be one coupled with a duty to make an appointment. The contrary argument would imply a right on the part of the employer unilaterally to deprive the contractor of its rights, the enforcement of which is dependant upon decisions made impartially through the exercise of the expertise of a professional engineering consultant.

[12] In terms of s 10 of the Prescription Act, 68 of 1969, a "debt shall be extinguished by prescription after the lapse of the period which in terms of the relevant law applies in respect of the prescription of such debt." In terms of s 12 the prescriptive period begins to run when the debt is due. The respondent's argument that the applicant's claim for the production of the certificates has prescribed rests in the first instance upon the proposition that the applicants right to the professional assessment and consequent issue of the certificates constitutes a "debt" as contemplated by section 10 of the Prescription Act. The applicant argues that it does not.

[13] In *Electricity Supply Commission v Stewarts and Lloyds of SA (Pty) Ltd* 1981 (3) SA 340 (A) at 344 the then Appellate Division endorsed the proposition that a debt, for the purposes of the Prescription Act, is "that which is owed or due; anything (as money, goods or services) which one person is under obligation to pay or render to another".

[14] However in *Desai N.O. v Desai and others* 1996 (1) SA 141 (A), the court held, after observing that the term "debt" is not defined in the Prescription Act, that it has a "wide and general meaning, and includes an obligation to do something or refrain from doing something." The confusing aspect of that judgment is that *Electricity Supply Commission* was cited as one of the authorities for the proposition stated in *Desai*.

[15] The issue was taken up by the Constitutional Court in *Makate v Vodacom Ltd* 2016 (4) SA 121 (CC) where the court was concerned with a claim for an order compelling the defendant to negotiate with the plaintiff on the subject of reasonable remuneration. In dealing with the issue of prescription the court held (at paragraph 93) as follows.

“To the extent that *Desai* went beyond what was said in *Eskom* it was decided in error. There is nothing in *Eskom* that remotely suggests that ‘debt’ includes every obligation to do something or refrain from doing something, apart from payment or delivery.”

[16] The question here is whether the contractual obligation of the respondent to see to the appointment of an employer’s agent under the contract, and consequently the production of the two certificates in question, constitutes a ‘debt’, in the sense that it should be regarded as an obligation in the nature of money, goods or services to be paid, delivered or rendered by the respondent to or for the applicant. In my view the obligation does not fall into that category. The obligation here is to maintain and observe the structural regime laid down by the contract for its implementation. No delivery of money or service is required of the respondent. The certificates in question are to be produced by an independent third party. What is required of the respondent is that it should play its part in ensuring that such a person is in office, and able to perform the functions required of him or her, including the assessment of the need for and the content of the two certificates the applicant requires before it can pursue a claim for payment against the respondent.

[17] Ms Ploos van Amstel for the respondent sought to counter the conclusion that the principal relief sought by the applicant does not constitute a debt capable of prescribing, by relying on the principle applied in *Uitenhage Municipality v Molloy* 1998 (2) SA 735 (SCA). In that case the court considered a claim by a worker for remuneration for work performed by him on Sundays, and in overtime, which work had been performed considerably in excess of three years before the commencement of the proceedings to recover such payment. The worker resisted the proposition that his claim had prescribed upon the basis that, although the payments making up the claim were due at the end of each month during which such work had been performed, the debts were not “due” for the purposes of the Prescription Act because they were not

then “recoverable”. They were said not to be recoverable unless a certificate had been issued to the worker under s 30(3)(a) of the Basic Conditions of Employment Act, 3 of 1983. Such a certificate had only been issued shortly before the commencement of the proceedings. An analysis by the court of the provisions of the Basic Conditions of Employment Act, 1983 led to the conclusion that the debts were “due” at the time the work had been performed, and that prescription had commenced to run accordingly, despite the fact that the certificate in question had not yet been obtained.

[18] The argument for the respondent, as I understand it, is that the final payment to the applicant was due not later than upon the expiry, or shortly after the expiry, of the defects liability period; that such payment was clearly a debt as contemplated by the Prescription Act; and that the prescriptive period of three years began to run from when the debt was due, whether or not the final approval certificate and the final payment certificate had been issued. In the circumstances the claim for the certificates is futile, as the purpose of their production, (ultimately payment of the balance of the contract price), is the enforcement of a claim which has in the meantime prescribed.

[19] Two judgments cited in *Uitenhage Municipality* as authority for the proposition applied there are instructive. *Benson and another v Walters and Others* 1981 (4) SA 42 (C) concerned the need for an attorney and client bill to be taxed before an attorney could sue its client for payment. It was held that the need for taxation did not delay the commencement of prescription. The principle was put as follows.

“Our courts have consistently held that a creditor is not able by his own conduct to postpone the commencement of prescription”.

The Master v I L Back & Co Ltd 1983 (1) SA 986 (A) concerned the prescription of a claim for Master’s fees in insolvent estates, which had to be “assessed by the Master”. All it took, once the gross value of the estates had been established, was a little arithmetic to establish the amount payable. The principle was stated as follows.

“If all that is required to be done to render the debt payable is a unilateral act by the creditor, the creditor cannot avoid the incidence of prescription by studiously refraining from performing that act.”

[20] The majority judgment in *Trinity Asset Management (Pty) Ltd v Grindstone Investments 132 (Pty) Ltd* 2018 (1) SA 94 (CC) furnishes another example of the principle. It concerned the question as to when an obligation to repay a loan payable within 30 days of demand is regarded as due for the purpose of the Prescription Act. The judgment stressed that 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.”

[21] In my view the soundness of the respondent’s argument must be determined in the light of the provisions of the contract.

[22] The provisions of the contract governing the final payment due to the contractor are set out in clause 6.10.9. The clause contemplates a process. The contractor must deliver to the engineer a final statement of the monies alleged to be due to the contractor. The engineer must assess the correctness of the claim and issue a final payment certificate reflecting the engineer’s determination of what is payable. The next step in the process is approval of the final payment certificate by the employer. Payment follows that. However, in terms of the clause this process for determining the amount payable, and for fixing a time for payment, does not commence until there is final approval reflected in the final approval certificate. Insofar as the final approval certificate is concerned, clause 5.16.1 is clear.

“The works shall not be considered as completed in all respects until a final approval certificate has been delivered by the employer’s agent to the employer...”

The condition for the commencement of the process for the determination of the final payment due to the contractor is not completion of the works, but the expression of an opinion by the engineer that the works are complete. They cannot be “considered as completed” unless that expression of opinion is reflected in the engineer’s final approval certificate. If it is withheld, because the engineer does not support the view that the works are complete, there will be no final payment certificate.

[23] In those circumstances can it be said that the facts of the present matter fall into the same category as those considered in the judgments referred to above? Is there a unilateral act (or rather, a unilateral omission) on the part of the applicant (ie the failure to enforce the production of the certificates earlier) which cannot be allowed to delay the running of prescription in respect of the final payment? I answer these questions in the negative. The first point to be made is that there is only one unilateral act (or rather omission) which has obstructed the determination of the amount which is payable by the respondent to the applicant, and the rendering of the payment of it due. It is the omission on the part of the respondent to appoint a consulting engineer to the office of employer's agent. Even if the respondent corrected that omission, a series of determinations, two on the part of the appointed agent and one on the part of the respondent itself, would be necessary in order to reach a determination as to what is payable by the respondent to the applicant for completion of the works. It is not actual completion, but certified completion which would set in motion the further assessments by each of the engineer and the respondent as to what is payable. The determination of the right to a final payment certificate, and the quantum of it, can hardly be classified as mere "procedural conditions" (see *Uitenhage Municipality* at 741); or as the equivalent of the submission of a bill for taxation (see *Benson*); or as the simple arithmetic exercise to be performed by the creditor in *The Master v I L Back and Co Ltd*.

[24] The institution of the present proceedings, the delay in which the respondent argues is a unilateral act which should not be recognised as a legitimate obstruction to the commencement of the running of prescription on the ultimate claim for payment, only opens the way to implementation of the contractual provisions which would ultimately determine whether the applicant is entitled to a final approval certificate because the works are complete; and what the amount of that payment should be.

[25] I accordingly conclude that prescription is not an obstacle to the grant of the principal relief sought by the applicant. I make the following order.

1. The respondent is directed to appoint an "Employer's Agent" as contemplated in clause 1.1.1.16 of the General Conditions of Contract for Construction Works published by the South African Institution of Civil Engineering (2015, Third Edition) (the "GCC") within 30 days of the date of this order and shall notify the applicant as contemplated in that clause.
2. The respondent shall do all things necessary on its part to enable the Employer's Agent thus appointed to
 - (a) deliver the final approval certificate in terms of clause 5.16.1 of the GCC;
 - (b) issue the final payment certificate in terms of clause 6.10.9 of the contract data in the GCC.
3. The respondent shall thereafter make a decision whether or not to approve the final payment certificate as contemplated in clause 6.10.9 of the GCC contract data, within 30 days of the final payment certificate being issued, and notify the applicant of its decision forthwith.
4. If the respondent approves the final certificate it shall pay the amount thereof to the applicant within 30 days of such approval.
5. The respondent shall pay the costs of this application, and counsel's fees may be taxed on scale C.


Olsen J

Case Information:

Date of hearing:

3 November 2025

Date of Judgment:

12 December 2025

Counsel for the Applicant:

Instructed by:

A V Voormolen SC

Cox Yeats Attorneys

Ncondo Chambers

Vuna Close

Umhlanga Ridge, Durban

Ref: 069V00800000008

Tel: 031 536 8500

Email: sjames@coxyeats.co.za ;

tgovender@coxyeats.co.za ;

cpretorius@coxyeats.co.za

Counsel for the Respondent:

Instructed by:

Z Ploos van Amstel

NCA Attorneys

8 Sinembe Park

La Lucia Ridge Office Estate

REF: T Naidoo/DRamuther/R174L

Tel: 031 566 5271

Email: theveena@nca-attorneys.co.za;

litigation1@nca-attorneys.co.za