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

CASE NO. 8186/2016

In the matter between:

WK CONSTRUCTION (PTY) LIMITED	**PLAINTIFF**
and	
MOORES ROWLAND	**FIRST DEFENDANT**
MAZARS MOORES ROWLAND	**SECOND DEFENDANT**
MAZARS	**THIRD DEFENDANT**

O R D E R

---

1. The defendants' special plea in respect of prescription is upheld with costs.

2. The defendants' special plea in respect of the time bar provisions of clause 53 of the contract between the parties is upheld with costs.

3. The costs referred to above are to include the costs occasioned by the employment of Senior Counsel.

JUDGMENT

PHILLIPS AJ

Introduction

[1] This matter came before me for the determination of a special plea.

[2] The parties had agreed that for the special plea to be determined, the hearing of oral evidence would be necessary.

[3] It had been referred in terms of an Order of this court which read as follows:

> "The issue of prescription is (*sic*) referred to in paragraphs 2 to 5 of the special plea be separated in terms of rule 33(4) and the matter will proceed on this issue only."

[4] At the commencement of the hearing before me, the ambit of the determination was expanded.

[5] the initial referral concerned only the question of statutory extinctive prescription, as contemplated in s 12 of the Prescription Act 68 of 1969 ("the Prescription Act"), however the parties handed in by consent a draft order providing for the separation of issues in terms of Rule 33(4), requiring the determination of not only the statutory prescription special plea but also the determination of a time bar defence raised by the defendants, it being common cause that the contract between the parties provided that the plaintiff was required to institute any action within a two year period

of which the plaintiff became aware of, or ought reasonably to have become aware of circumstances giving rise to a claim or a potential claim against the defendants.

[6] I accordingly made an Order, by consent, in terms of that draft order handed in which read as follows:

> "1. In terms of Rule 33(4), the following issues falls to be determined first:
>
> 1.1 The special plea of prescription pleaded in paragraphs 2, 3, 4 and 5 of the plea as pages 85 and 86.
>
> 1.2 The particular time bar defences pleaded in paragraph 33 (at page 99) paragraph 40 (at pages 101 – 102) regarding the claims arising from the 2008 and 2009 audits respectively.
>
> 2. All other issue falls to be held over for further determination if necessary."

[7] Before the commencement of the matter, I enquired of counsel for the plaintiff as to whether or not the plaintiff intended to proceed without delivering a replication as none had been delivered.

[8] I was informed by Plaintiff's counsel that the plaintiff did not intend to deliver a replication.

[9] The plaintiff's stance in that regard persisted throughout the matter and accordingly the matter proceeded on, and falls to be determined with reference to, the

pleadings as they are, comprising the plaintiff's particulars of claim and the defendant's special plea and time bar plea only. See: *Maswanganyi v RAF* 2019 (5) SA 407 SCA at 411 [11].

The pleadings

[10] The plaintiff's case comprises one main claim with five alternative claims.

[11] In effect, its claim is one for damages arising out of an alleged breach of contract by its auditors (various incarnations thereof from time to time over an extended period and hence the multiple defendants). (The defendants shall hereinafter be referred to interchangeably as "the defendants" and "the auditors".)

[12] The plaintiff discovered at a time, which is the subject matter of the dispute delineated by the special plea of prescription, that its Financial Director had perpetrated an elaborate and extensive fraud. The fraud went undetected by the plaintiff notwithstanding that a series of audits had been, throughout the perpetration of the fraud, conducted by the defendants and reports in respect of each such audit had been signed by the auditors none of which reflected any hint of a fraud having been perpetrated.

[13] The plaintiff provided a "SUMMARY OF FACTS" in its particulars of claim at paragraphs 13 to 16 thereof which reads as follows:

"**SUMMARY OF FACTS**

13.

During the period from 11 January 2006 to 28 August 2013, Mr Maartens systematically perpetrated a series of frauds ("the fraudulent transactions") in which he procured that the Plaintiff made unauthorized payments to the benefit of himself, his family or friends totalling R80 132 548. The fraudulent transactions perpetrated during each financial year ended February are listed in the following schedules which are annexed hereto marked '**A.1**' to '**A.8**':

13.1. 2006 – annexure '**A**' – R116 060,68;

13.2. 2007 – annexure '**A.1**' – R1 693 211,23;

13.3. 2008 – annexure '**A.2**' – R13 152 653,19

13.4. 2009 – annexure '**A.3**' – R12 853 628.30;

13.5. 2010 – annexure '**A.4**' – R13 317 122.84;

13.6. 2011 – annexure '**A.5**' – R12 082 022.58;

13.7. 2012 – annexure '**A.6**' – R16 258 061.96;

13.8. 2013 – annexure '**A.7**' – R10 503 134.01 and

13.9. 2014 – annexure **A.8**' – R156 653,44.

14.

Mr Maartens fraudulently caused the amounts forming the subject-matter of the fraudulent transactions to be included by way of fictitious entries in the financial accounts of the Plaintiff and its annual financial statements purportedly as cost of sales and other items as reflected in annexures **A** to **A.8** hereto.

15.

Mr Maartens' employment with the Plaintiff terminated on 24 August 2013.

16.

16.1 In consequence of Mr Maarten's unlawful conduct, the Plaintiff suffered a loss of R80 132 548 referred to in paragraph 13 above.

16.2 The Plaintiff has recovered R26 million from Mr Maartens, on account of such loss, reducing the Plaintiff's loss to 54 132 548.

CLAIM 1 – AUDIT FOR THE FINANCIAL YEAR ENDED 28 FEBRUARY 2007

Summary of Facts

17.

On 12 December 2007, the Auditor:

17.1. completed it audit; and

17.2. signed its audit report ("the 2007 Audit Report")

for the financial year ended 28 February 2007.

18.

In undertaking its audit for the financial year ended 28 February 2007, the Auditor failed to detect the fraudulent transactions listed in annexure **A.1** hereto.

19.

The 2007 Audit Report states that:

"... We conducted our audit in accordance with International Standards on Auditing. Those standards require that we comply with ethical requirements and plan and perform the audit to obtain reasonable assurance whether the annual financial statements are free from material misstatement ...

In our opinion, the annual financial statements present fairly, in all material respects, the financial position of company as of 28 February 2007, and of its financial performance and its cash flows for the year then ended in accordance with the South African Statements of Generally Accepted Accounting Practice, and in the manner required by the Companies Act of South Africa".

A copy of the 2007 Audit Report is annexed hereto marked '**B.1**'.

Breach

20.

In breach of the tacit term of the agreement appointing the Auditor for the financial year ending 28 February 2007 referred to in paragraph 12 above, the Auditor, in conducting its audit procedures before 31 August 2007, alternatively before and in signing its 2007 Audit Report, failed to exercise due care and skill and was negligent in that, in exercising the judgement of an auditor in public practice at that time, the Auditor:

20.1. failed to:

(a) properly verify the costs of sales in the financial statements to establish that the costs were validly incurred for actual construction contracts of the Plaintiff;

(b) detect one or more of the fraudulent transactions listed in annexure **A.1** hereto; and

(c) react to the detection of such fraudulent transactions and immediately report such fraudulent transactions to the Plaintiff; and

20.2 should not have issue the unqualified 2007 Audit Report because of the misstatement of the fraudulent transactions as costs of sales in the manner referred to in paragraph 14 above.

Consequences

21.

Had the Auditor not breached its aforesaid obligations:

21.1. the Auditor would have detected by 31 August 2007, alternatively by 12 December 2007 one or more of the fraudulent transactions listed in annexure **A.1** hereto;

21.2. the Auditor would have reacted thereto and immediately reported the fraudulent transactions to the Plaintiff; and

21.3. the Plaintiff would have prevented the further fraudulent transactions perpetrated by Mr Maartens after 31 August 2007, alternatively after 12

December 2007, as listed in annexures **A.2** to **A.8** hereto.

22.

The loss to the Plaintiff of the fraudulent transactions after 31 August 2007 is R54 132 548 being:

22.1. R74 491 217 misappropriated after 31 August 2007;

less

22.2. R20 358 669 being recoveries of R26m less R5 641 331 appropriated to the fraudulent transactions perpetrated prior to 31 August 2007.

23.

The loss to the Plaintiff of the fraudulent transactions after 12 December 2007 is R54 132 548 being:

23.1. R72 962 531 misappropriated after 12 December 2007:

less

23.2. R18 829 983 being recoveries of R26m less R7 170 017 appropriated to the fraudulent transactions perpetrated prior to 12 December 2007.

Damages

24.

In the premises, the Plaintiff has suffered damages of R54 132 548.

25.

The said damages:

25.1. flow naturally and generally from the Auditor's failure to perform its obligation as aforesaid, alternatively

25.2. were actually and presumptively contemplated by the parties at the time the Auditors was appointed as auditor of the Plaintiff of the financial year ended 28 February 2007.

26.

In as much as:

26.1. the claim of R54 132 548 referred to in paragraph 22 above arose when the First Defendant was the Auditor, the First Defendant is liable to compensate the Plaintiff in respect thereof; and

26.2. the claim of R54 132 548 referred to in paragraph 23 above arose when the Second Defendant was the Auditor, the Second Defendant is liable to compensate the Plaintiff in respect thereof;

alternatively

26.3. the claims of R54 132 548 referred to in paragraphs 22 and 23 above arose when the Third Defendant was the Auditor, the Third Defendant is liable to compensate the Plaintiff for R54 132 548."

[14] The defendant's special plea reads as follows:

"**Special plea**

2. The Plaintiff's claim advanced in the action against the Defendants are:

2.1 claims for damages flowing from alleged breaches of contract between the Plaintiff and the Defendants, alleged to have occurred during the period 2007 and 12 September 2012; and

2.2 claims in respect of "debts" of the nature envisages in section 11(d) of the Prescription Act No. 68 of 1969.

3. The summons in this action was served on Mazars on 23 August 2016 and (assuming that such service amounted to proper service on any of the Defendants or former partners in the Defendant partnerships) could not have operated to interrupt extinctive prescription before that date.

4. On the assumption that the Plaintiff can establish the elements of its alleged claims, the Defendants aver that prior to 23 August 2013 :

4.1 The Plaintiff had knowledge:

4.1.1 that the Defendants had performed the audits of the Plaintiff company for the financial years in question;

4.1.2 that the former financial director of the Plaintiff, Mr Maartens had perpetrated fraud on the Plaintiff, causing the Plaintiff to suffer losses (assumed that the Plaintiff proves the commission of the fraudulent transactions alleged); and

4.1.3 that the Defendants had not reported on any fraudulent activity of Mr Maartens identified in the course of performing the audits;

4.2 the Plaintiff accordingly had knowledge of the identity of the Auditors (as the debtor in respect of the claims) and of the facts from which the debts arose;

4.3 Alternatively, and if the Plaintiff did not have all of the knowledge referred to in paragraph 4.2 above, the Plaintiff could have acquired such knowledge by exercising reasonable care.

5. In the premises:

5.1 the Plaintiff's claim as sought to be enforced in the action became due, and the three-year period of extinctive prescription commenced to run in terms of section 12 of the Prescription Act, 68 of 1969, prior to 23 August 2013; and

5.2 the Plaintiff's claims were extinguished by prescription in terms of section 10(1) as read with section 11(b) and section 12 of the Prescription Act, No. 68 of 1969 prior to 23 August 2016.

In the premises, the Defendants pray for an order: (a) that the special plea of

prescription is upheld and (b) judgment is granted in favour of the Defendants with costs."

[15] The defendants' plea in respect of time barring appears in the body of its main plea as an alternative and reads as follows:

"33. Alternatively, and in the event that the Plaintiff is held to have been vested with a claim against the Auditors arising out of the performance of the audit for the 2009 financial year as alleged, the Auditor pleads as follows:

33.1 In terms of the provisions of clause 53 of the Standard Terms and Conditions of Business (annexure "D2") it was provided that:

"*Any claim by you or other beneficiaries must be made (for these purposes a claim shall be made when court or other dispute-resolution proceedings are commenced) within two years of the date on which you or they became aware, or ought reasonably to have become aware, or circumstances giving rise to a claim or potential claim against us*". ("you" being the Plaintiff and "us" being the Auditor).

33.2 The Plaintiff became aware, or ought reasonably to have become aware, as envisaged in clause 53, well in excess of two years before the commencement of proceedings as envisaged in the said clause.

33.3 In the premises, the plaintiff's claims, insofar as they are alleged to arise out of the audit for the 2008 financial year, are time-barred and no longer enforceable."

[16] Although it was indicated by the parties that a combined total of four or five witnesses was to be anticipated, in the event, only one witness was called to testify.

[17] That witness was Mrs Gina de Coster (previously Gina van der Mescht) ("Mrs de Coster").

[18] She was called to testify by the defendant upon whom, it was common cause, rested the onus to prove that the plaintiff's claim had been extinguished by statutory prescription, alternatively, by the time barring provisions of the contract, and upon whom was the concomitant duty to begin leading evidence in the proceedings before me.

[19] Mrs de Coster testified that:

(a) She was a Chartered Accountant.

(b) At the material time, and specifically from May 2006 to May 2018, she had been employed by the plaintiff as its Financial Manager.

(c) She reported directly to the plaintiff's Financial Director, namely, Mr Shaun Maartens ("Mr Maartens") [as is evident from the pleadings, Mr Maartens was not only Mrs de Coster's immediate superior, but he was, more importantly, the perpetrator of the fraud from which the plaintiff's cause of action arose.]

(d) Mrs de Coster described how the plaintiff operated its financial system and gave evidence as to the utilisation by the plaintiff of a system of codes which were allocated to contracts being undertaken by the plaintiff from time to time, each contract having its own code thereby enabling the identification of payments which had been made as being in respect of a specific contract.

(e) In addition to the main code allocated to specific contracts, the plaintiff also used a system of "small codes" to identify the type or nature of service or goods which had been provided or purchased, thereby enabling an identification of the reason why a payment was made in respect of any particular contract.

(f) In accordance with usual accounting practices, each payment or transaction identified would have its corresponding record, entries and remittances in the plaintiff's financial system.

(g) In addition to the aforementioned codes, the plaintiff also utilised what is described as "bonus codes" and "closed codes".

(h) A closed code was a code which had previously been allocated to a contract but which was no longer utilised that contract having come to an end.

(i) As such, in the normal course of events a closed code would not be utilised and no transaction would, or should, be channelled with reference to such closed code.

(j) A bonus code was a code allocated for each of the plaintiff's directors and, although not entirely clear, due to objections by the plaintiff's counsel to defendants' counsel's characterisation thereof, seems were utilised for personal expenses by the directors which were then supposedly duly accounted for, or at least was supposed to have been duly accounted for, at an appropriate stage elsewhere in the plaintiff's financial and accounting system with reference to a specifically allocated ledger number.

(k) During or about February 2013 Mrs de Coster noticed a particular entry which reflected that a transaction / payment had been dealt with or made with it being recorded by reference to a closed code.

(l) Mrs de Coster described thinking that this was "weird" and that it occurred to her that someone was attempting to conceal the transaction, or as she put it, to make it "disappear".

(m) It reflected that the plaintiff had paid an amount of R543 022.76 to a close corporation, namely, Leigh Ebben Services CC.

(n) As a result thereof, Mrs de Coster sent an email to one "Vanessa" on 6 February 2013 at 12h21 in which she stated:

"Subject: A gremlin?

Hi Vanessa this is super weird for me, I hope you can help me.

Document was processed as attached (2-3), now appears as per report (page 1) and when looking up transaction as below * seriously confused . . .

Please please help."

(o) On the same date and at 14h04 Mrs de Coster sent an email to one Sonja Halse wherein she stated:

"Hi Sonja

I haven't processed the jnl yet, I am awaiting a reply from Vanessa first. Please can I ask you to hang on until then."

[20] What is significant about the aforesaid evidence is that it seems to pinpoint the beginning of the first encounters by a functionary of the plaintiff with the misdeeds of Mr Maartens.

[21] However at that stage there was no suspect in Mrs de Coster's sights and indeed, it was not even clear to her that anything other than a "gremlin" was to blame for the apparent discrepancy.

[22] Indeed, as per the chain of command and reporting within the plaintiff required of her, Mrs de Coster sent an email to Mr Maartens on 12 February 2013 at 1:57pm stating:

> "Thus, I have noticed some funnies in the ledger to an account 69990.
> I have asked Vanessa to investigate.
> Do you know something about something in December?"

[23] Extensive evidence was thereafter led as to how matters progressed including evidence of Mrs de Coster being, albeit momentarily, being thrown off the scent by Mr Maartens himself.

[24] On 12 February 2013, the same day as the aforementioned email, and in response to the aforementioned email, Mrs de Coster received an email from Mr Maartens purporting to explain the discrepancy upon which she had stumbled.

[25] In that email he stated:

> "Hi there
> We were doing a clean out of old bonus transactions so we could run 13th cheque costs in this code. We merged 67997 and 69990 so that we could use a clean 67997. There should have been a 0 movement to date in the year to date on contract 69990. I will double check and advise.
> Regards

Shaun Maartens"

[26] It was quite understandable how Mrs de Coster could have been thrown off the trail. Mr Maartens was the plaintiff's Financial Director, her boss, and the man to whom she reported as her immediate superior.

[27] Furthermore, there also seemed initially to be a lack of alarm on the part of the CEO of the plaintiff, namely, Mr Karl Kusel when first approached by Mrs de Coster with her concerns.

[28] However, Mrs de Coster's suspicions were re-ignited when she chanced upon a further entry which led her to conclude that coincidence was not an adequate explanation.

[29] Mrs de Coster then began, in earnest, to investigate the discrepancies upon which she had stumbled.

[30] It is common cause that this led to her preparing multiple page, extensive spreadsheets which ultimately revealed a series of fraudulent transactions perpetrated by Mr Maartens eventually calculated to be in the tens of millions.

[31] None of the evidence, which was extensive, and which revealed in clear terms the reasons for Mrs de Coster's concerns, was challenged. Accordingly, I do not intend to canvass the minutia or even the contents of those spreadsheets in this judgment. Indeed, the contents of those spreadsheets, and the conclusions arising

therefrom, underpin the plaintiff's case against the defendants in respect of the merits thereof.

[32] However, what is of moment for the determination of the issue of prescription, is what, or how much, about the fraud perpetrated by Mr Maartens, the plaintiff knew by no later than midnight on 22 August 2013 [summons was served on 23 August 2016].

[33] Mrs de Coster testified that, as a result of a series of communications between her and Mr Karl Kusel, he invited her to his home on the long weekend of 9/10/11 August 2013 for the specific purpose of investigating what, at the very least, *prime facie*, appeared to be a large scale fraud.

[34] During the course of that long weekend investigation at Mr Karl Kusel's home, it became abundantly clear that a large scale fraud had indeed been perpetrated and that the perpetrator thereof was Mr Maartens. Once again, vast amounts of paperwork were generated evidencing these discoveries and none of that evidence was challenged by the plaintiff.

[35] Mrs de Coster was cross examined by counsel for the plaintiff on this aspect.

[36] The gist of that cross examination was that, at best for Mrs de Coster, and/or the plaintiff, at that stage, there was no more than a mere suspicion of a fraud by Mr Maartens and not sufficient to conclude that the plaintiff was in a position to institute action against the defendants.

[37] That assertion is, in my view, undone by the extent and detail of the spreadsheets which had been prepared.

[38] In my view, the cross examination of Mrs de Coster did not, in any way, affect or undermine the overall creditability of her testimony.

[39] It was in some ways ironic that Mrs de Coster who, by all accounts, had been the initial "whistle blower", was subjected to criticism under cross examination about the somewhat apparently casual manner in which she had addressed her email correspondence on the subject of the fraud to the various role players within the plaintiff.

[40] The cross examination of Mrs de Coster, at times, did not fall far short of being derisive of Mrs de Coster in circumstances where the plaintiff's gratitude would have been a far more appropriate sentiment to have conveyed.

[41] It would seem that what initially was uncovered by Mrs de Coster, although welcomed by the plaintiff at the time of the uncovering thereof, for the purposes of the issue of prescription, certainly in respect of the timing of such discoveries, had become an inconvenient truth.

[42] Mrs de Coster struck the Court as being a reliable and credible witness and most importantly, did not demonstrate any ill will or hostile disposition towards the

plaintiff nor was any reason demonstrated to exist for her to fabricate her evidence or to have any 'axe to grind' with the plaintiff.

[43] Indeed, as stated above, the very evidence adduced by Mrs de Coster would be central to the plaintiff's case against the defendant on the merits.

[44] Accordingly, it is hardly surprising that the plaintiff's approach in these proceedings, in dealing with Mrs de Coster's "inconvenient" evidence, was to attempt to subvert its reliability or cast doubt on Mrs de Coster yet, at the same time, cautiously avoid challenging the substance of her evidence. The plaintiff seemed intent on having its proverbial cake and eating it.

[45] In the event, none of Mrs de Coster's evidence was actually cogently challenged, nor was any countervailing version put to her or any countervailing evidence led to contradict anything stated by her in her testimony.

[46] There is an aspect of Mrs de Coster's evidence which needs to be focused on specifically as it was the cause of some controversy during the hearing and it was, in my view, critical evidence.

[47] Following the conclusion of the cross examination of Mrs de Coster by plaintiff's counsel, counsel for the defendants indicated that there was evidence which he had intended to canvass with Mrs de Coster but had omitted to do so by virtue of an oversight on his part.

[48] As such, he indicated that he wished to lead further evidence the subject matter of which was not within the purview of re-examination.

[49] Having tendered an appropriate explanation and apology for such oversight, and in the absence of any objection from, or prejudice to, the plaintiff, the Court permitted that evidence to be led.

[50] That evidence concerned a conversation which was alleged to have taken place on the long weekend of 9/10/11 August 2013, when Mrs de Coster and Mr Karl Kusel had concluded their investigation at Mr Karl Kusel's house.

[51] Mrs de Coster testified that Mr Willie Kusel (the "WK" in the plaintiff's name), the plaintiff's founder, the main shareholder of the plaintiff, and Mr Karl Kusel's father, had been present at Mr Karl Kusel's house on that weekend.

[52] Mrs de Coster testified that, in a conversation between Mr Willie Kusel and her, which conversation she stated took place after the investigations conducted that weekend had been completed, Mr Willie Kusel asked Mrs de Coster if she (Mrs de Coster) thought "Shaun" (Mr Maartens) "... could have done something like this".

[53] Mrs de Coster replied saying "... don't know what else it could be".

[54] In the context of that weekend, dedicated as it was to investigating and uncovering the fraud, and in light of the actual discoveries and the clarification achieved as to the modalities, scale and the identity of the perpetrator of the fraud, as

evidenced by the vast amount of material compiled in the form of spreadsheets, the only reasonable inference, if not conclusion, to draw from that conversation is that it was a direct reference to what Mrs de Coster and Mr Karl Kusel had been investigating and what they had uncovered as a result of such investigation.

[55] In other words, Mr Willie Kusel was asking Mrs de Coster if she believed that Mr Maartens could actually be the thief which the investigation had revealed him to be.

[56] Mrs de Coster's answer in the circumstances was unequivocal. She, in my view, confirmed that there was, and could be, no other explanation for what had been uncovered.

[57] Although there was an attempt to cast doubt upon the actual occurrence of that conversation, no counter narrative was put to Mrs de Coster under cross examination and, as stated above, neither Mr Willie Kusel nor Mr Karl Kusel was called to testify.

[58] That conversation is wholly consistent with the unchallenged evidence placed before the Court about what Mrs de Coster had uncovered and recorded in the vast amounts of paperwork in the form of the spreadsheets.

[59] That conversation, in my view, reveals unequivocally that Mr Willie Kusel was struck with disappointment, some amazement and a sense of grudging realisation that the plaintiff's own financial director, namely, Mr Maartens, had perpetrated a major fraud against the plaintiff.

[60] If that was indeed so, then it seems that the inevitable conclusion to reach is that, as of the long weekend of 9/10/11 August 2013, the plaintiff's guiding minds were well aware of the fraud and the fact that Mr Maartens was the perpetrator thereof.

[61] It is inconceivable that Mr Willie Kusel could have had the knowledge and concerns reflected by Mrs de Coster's testimony and yet somehow Mr Karl Kusel did not.

[62] After all, the actual investigation on that weekend had been conducted by Mrs de Coster and Mr Karl Kusel and Mr Willie Kusel was, by all accounts, merely an observer.

[63] Mr Karl Kusel's knowledge of the misdeeds of Mr Maartens must have been exponentially more detailed than those of his father Mr Willie Kusel.

[64] Accordingly, the evidence of Mrs de Coster in respect of the conservation with Mr Willie Kusel became central and, not surprisingly, thereafter controversial.

[65] Plaintiff's counsel's cross examination of Mrs de Coster on this further evidence very quickly descended into another attack on Mrs de Coster, *inter alia*, for failing to set the law in motion immediately by reporting the fraud to the police or some other authority.

[66] In short, without actually accusing Mrs de Coster of being untruthful, the sub-text and innuendo, (no more than that), of the cross examination was that she, Mrs de Coster, could not be expected to be taken seriously when nothing about her subsequent conduct reflected the urgency or seriousness of the conversation which she alleged she had had with Mr Willie Kusel.

[67] Also, at some stage in argument, it was to be suggested by plaintiff's counsel that the failure to have led that evidence initially smacked of it being a stratagem and somehow deliberate and that accordingly on that basis doubt should be cast upon the veracity or reliability thereof.

[68] I can see no reason why that should be. That evidence was not enhanced in any way by the sequence in which it was adduced. In any event, the plaintiff had the opportunity to test that evidence by cross examination or by leading evidence to contradict it.

[69] Furthermore, if any of the aforesaid criticisms of the contents of that further evidence, or even the timing or sequence of the testimony was ever to have achieved any traction, it would or could only possibly have done so if it had been put to Mrs de Coster that she was not telling the truth or was somehow confused or mistaken. That was never done.

[70] Moreover, the criticism of Mrs de Coster's evidence would not have rang as hollow as it ultimately did if Mr Willie Kusel had been called to testify and had done so

contradicting or, at the very least, clarifying Mrs de Coster's evidence. That too never happened.

[71] As stated above, argument was addressed by plaintiff's counsel to the effect that Mrs de Coster's conduct, after her alleged conversation with Mr Willie Kusel, was so inconsistent with that alleged conversation so as to negate any authenticity with which her evidence may be clothed.

[72] Counsel for the plaintiff referred the Court to the case of *Stellenbosch Farmers' Winery Group Ltd & another v Martell et cie & others 2003 (1) SA 11* as authority for the proposition that Mrs de Coster should be disbelieved, *inter alia*, because her conduct subsequent to her alleged discoveries about Mr Maartens and his fraudulent conduct, cast doubt on the evidence which she had given in that respect.

[73] In my view that matter offers no such support for that argument.

[74] The *Stellenbosch Farmers' Winery* matter dealt with a situation where there were two irreconcilable versions.

[75] In this matter there was only one version before the Court. The plaintiff, in its wisdom, elected not to call any witnesses to testify.

[76] Accordingly, after considering the favourable impression that Mrs de Coster left on the Court and the fact that there was nothing to contradict or gainsay her testimony,

the Court ultimately finds that the conversation between Mrs de Coster and Mr Willie Kusel took place as described by Mrs de Coster.

[77] In my view, that evidence, in and of itself, demonstrated that the plaintiff, as of the long weekend of 9/10/11 August 2013 had knowledge of Mr Maartens' misdeeds albeit, at that stage, not the full extent thereof.

[78] There is further unchallenged and undisputed evidence which in my view places it beyond doubt that, as of 22 August 2013, the plaintiff was well aware of the fact that Mr Maartens had perpetrated a substantial fraud in an amount of tens of millions of rand.

[79] This evidence comprises the following:

(a) At some stage soon after the weekend of 9/10/11 August 2013, Mrs de Coster was instructed to arrange for the locks on Mr Maartens' office to be changed and she duly attended to carrying out that instruction;

(b) On 22 August 2013 at 13h50, Mrs de Coster informed Mr Karl Kusel that, as per his instructions, she had caused Mr Maartens' "user certificate" on the plaintiff's Nedbank system to be revoked thereby precluding Mr Maartens from operating or accessing the plaintiff's bank accounts; and

(c) On 22 August 2013, the plaintiff's attorney of record wrote to the conveyancing attorneys, Morris Fuller Walden Williams, stating the following:

> "Thank you for your assistance today and providing me with the deeds office search in KZN. We found two additional properties in the Pretoria deeds registry.
>
> I confirm that I act on instructions of Mr Willie Kusel, the chairman of WK Construction (Pty) Ltd and WK Construction South Africa (Pty) Ltd and his son, Karl Kusel, the CEO of the company who you met today.
>
> As discussed at our meeting I confirm that we are undertaking an investigation into the properties that have been transferred into the name of Shaun Maartens from funds provided by WK Construction without the knowledge and authority of Willie Kusel.
>
> I would appreciate it if you could draw conveyancing files. A meeting is being arranged with Shaun Maartens and his attorney on Saturday morning in Sandton and I will let you know the outcome of that meeting early next week."

[80] Each of these events, taken in isolation, and more so, having regard to the cumulative effect of them, reveals that the 'game was up' for Mr Maartens and that the plaintiff was well aware of the fraud which had been perpetrated by him.

[81] Finally what needs to be determined is whether or not, as of 22 August 2013, the Plaintiff was aware of, or was in a position to be aware of the identity of the 'debtor', namely, the defendants *in casu*.

[82] That is to say, was the plaintiff, through its guiding minds, cognisant of the fact that the defendants had conducted audits and prepared unqualified reports and had failed to detect or to expose Mr Maartens' fraudulent conduct thereby leaving Mr Maartens employed by the plaintiff and being able to wreak the havoc which he ultimately did.

[83] It seems to be self-evident that the plaintiff, having received the various reports from the defendants, from time to time, during the periods referred to in its particulars of claim and during which Mr Maartens perpetrated his fraud, can be assumed to have had knowledge of the fact that such audits had been conducted, the reports had been delivered and significantly, that the audits and the reports had failed to detect or record Mr Maartens' fraudulent conduct.

[84] In my view, the fact that the guiding minds of the plaintiff might not immediately, upon the uncovering of the fraud, have been cognisant of or recalled the fact of the audits and the report and specifically that the auditing process had failed to detect Mr Maartens' conduct, does not eliminate that knowledge which the guiding minds of the plaintiff must have had upon the delivery of each report by the defendants, from time to time, to the plaintiff.

[85] Indeed, it is the plaintiff's very case that it received unqualified audit reports from time to time from the defendants and that, had such reports, or the process underpinning each such report, detected and reflected Mr Maartens' fraudulent conduct, the plaintiff could have and would have been in a position to have rooted Mr Maartens' out of the system and thereby avoid damages going forward.

[86] In my view therefore, the plaintiff, upon becoming aware of Mr Maartens' misdeeds, and certainly by no later than midnight on 22 August 2013, was aware of the unqualified audit reports.

[87] The question then arises as to whether or not the plaintiff, beyond being merely aware of the fact of the reports, unqualified as they were in the face of what was an extensive fraud, was required to be aware of its right to sue the defendants in order for prescription to commence running.

[88] In *Truter v Deysel* 2006 (4) SA 168 (SCA), to which the court was referred by defendants' counsel, it was stated that:

> "In a delictual claim, the requirements of fault and unlawfulness do not constitute *factual* ingredients of the cause of action; but are *legal* conclusions to be drawn from facts ..."

and further that:

> "'cause of action' for the purposes of prescription thus means –
>
> ... every fact which it would be necessary for the plaintiff to prove, if traversed, in order to support his right to the judgment of this court. It does not comprise

every piece of evidence which is necessary to prove each fact, that every fact which is necessary to be proved.'"

[89] In *Mtokonya v Minister of Police* 2018 (5) SA 22 (CC), the court concluded:

"Section 12(3) does not require the creditor to have knowledge of any right to sue the debtor nor does it require him or her to have knowledge of legal conclusions that may be drawn from the 'the facts from which the debt arises'. Case law is to the effect that the facts from which the debt arises are the facts which a creditor would need to prove in order to establish the liability of the debtor. In his founding affidavit in support of his application for leave to appeal to this Court, the applicant in effect criticises the fact that section 12(3) refers only to knowledge of 'the facts from which the debt arises' and does not also refer to knowledge of legal conclusions that must be drawn from those facts. He says in the affidavit that this creates a lacuna in s 12(3) and that that is the question he is asking this Court to decide, namely, whether s 12(3) requires a creditor to also know that the conduct of the debtor is wrongful and actionable before a debt may be deemed to be due or before prescription may begin to run ... The question that arises is whether knowledge that the conduct of the debtor is wrongful and actionable is knowledge of a fact. This is important because the knowledge that s 12(3) requires a creditor to have is 'knowledge ... of facts from which the debt arises'. It refers to the 'facts from which the debt arises'. It does not require knowledge of legal opinions or legal conclusions or the availability in law of a remedy ... The reference to 'knowledge ... of the facts' in s 12(3) raises the question of what a question of fact is as distinct from, for example, a question of law or a value judgment. The distinction between a question of fact and a question of law is not always easy to make. How difficult it is will vary from case to case ..."

[90] The court further concluded that:

> "Knowledge that the conduct of the debtor is wrongful and actionable is knowledge of a legal conclusion and is not knowledge of a fact ... Therefore, such knowledge falls outside the phrase 'knowledge ... of facts from which the debt arises' in s 12(3). The facts from which a debt arises are the facts of the incident or transaction in question which, if proved, would mean that in law the debtor is liable to the creditor."

[91] And ultimately the court stated:

> "We decline the invitation by Counsel for the applicant to hold that the meaning of the provision in s 12(3) that a debt shall not be deemed to be due until the creditor has 'knowledge ... of the facts from which the debt arises' includes that the creditor must have knowledge of legal conclusions, ie that the conduct of the debtor was wrongful and actionable. We decline it for a variety of reasons. I mention a few. The text of s 12(3) does not support the contention, especially as s 12(3) makes it clear that it refers to knowledge 'of the facts from which the debt arises'. That is apart from knowledge of the identity of the debtor ... Furthermore, to say that the meaning of the phrase '*knowledge ... of the facts from which the debt arises*' includes knowledge that the conduct of the debtor giving rise to the debt is wrongful and actionable in law would render our law of prescription so ineffective that it may as well be abolished. I say this because prescription would, for all intents and purposes, not run against people who have no legal training at all. That includes not only people who are not formally educated but also those who are professionals in non-legal professions. However, it would also not run against trained lawyers if the field concerned happens to be a branch of law with which they are not familiar. The percentage

> of people in the South African population against whom prescription would not run when they have claims to pursue in the courts would be unacceptably high. In this regard, it needs to be emphasised that the meaning that we are urged to say is included in s 12(3) is not that a creditor must have a suspicion (even a reasonable suspicion, at that) that the conduct of the debtor giving rise to the debt is wrongful and actionable but we are urged to say that a creditor must have knowledge that such conduct is wrongful and actionable in law. If we were asked to say a creditor needs to have a reasonable suspicion that the conduct is or may be wrongful and actionable in law, that would have required something less than knowledge that it is so and would not exclude too significant a percentage of society."

[92] Accordingly, *in casu*, the fact that, as of 22 August 2013, the plaintiff might not have had specific expert evidence establishing that the defendants had failed to carry out their contractual obligations in a manner which was befitting and appropriate for an auditor, or may not otherwise have been aware of the legal effect of the defendants' conduct, does not detract from the knowledge which the plaintiff had, namely, that it had received unqualified audit reports from the defendants and the knowledge that Mr Maartens had perpetrated his frauds during the periods covered by the aforesaid audit reports.

[93] In *Truter v Deysel* the court stated:

> "As contended by counsel for Drs Truter and Venter, an expert opinion that a conclusion of negligence can be drawn from a particular set of facts is not itself a *fact*, but rather *evidence*. As indicated above, the presence or absence of negligence is not a fact; it is a conclusion of law to be drawn by the court in all

the circumstances of the specific case. Section 12(3) of the Act requires knowledge only of the material facts from which the debt arises for prescriptive period to begin to running – it does not require knowledge of the relevant legal conclusions (ie that the known facts constitute negligence) or of the existence of an expert opinion which supports such conclusions."

[94] Accordingly I find that, as a matter of fact, prior to midnight on 22 August 2013, the plaintiff was well aware of the following:

(a) Mr Maartens had perpetrated an extensive fraud upon it which fraud had been perpetrated over a number of years;

(b) That fraud had caused the plaintiff to suffer damages in an amount of at least R45 million;

(c) That the aforesaid amount was only part of the damages suffered by the plaintiff as a result of Mr Maartens' deeds;

(d) At the termination of each financial year in which Mr Maartens had carried out his fraud, the auditors had signed off on unqualified audit reports not reflecting nor detecting any of Mr Maartens' misdeeds or any loss occasioned thereby;

(e) 'The debtor and the facts from which the debt arises'.

[95] In my view then, on the face of it, the plaintiff was in a position to have instituted action against the defendants by midnight on 22 August 2013 and accordingly it is from that date and time when prescription began to run.

[96] I state above "on the face of it" as the plaintiff had a further 'arrow in its quiver'.

[97] The plaintiff contended that, unlike its claim against Mr Maartens, its claim against the defendants could only, and did in fact only, crystallise and accrue when it, the plaintiff, was able to conclude definitively that vis-à-vis the defendants it had suffered a loss.

[98] The plaintiff's argument essentially was that, unless and until the plaintiff was able to, and did, conclude that Mr Maartens would or could reimburse it for the loss suffered by it as a result of his misdeeds, it, the plaintiff, had no way of knowing whether, or if, it had a claim against the auditors. Its claim against the defendants was accordingly, until that stage was reached, no more than a contingent claim.

[99] In my view, there is simply no basis in law or in fact, or for that matter in common sense, to rank Mr Maartens as a primary debtor and to rank the claim against the auditors as secondary or contingent.

[100] The plaintiff's claim against Mr Maartens, based on a delict, is a separate and distinct claim from that against the auditors which is founded in contract.

[101] As at the moment Mr Maartens stole his first cent, subsequent to the first audit report by the defendants being rendered, the plaintiff suffered a loss and, if a breach of contract or other unlawful conduct established, the defendants became liable for that loss, and in my view, unconditionally so.

[102] The fact that Mr Maartens made good on repayment, or part repayment as it turns out, does not affect the fact that, as of the aforementioned date, the plaintiff had suffered the loss and was entitled to have sued both Mr Maartens and the defendants.

[103] In the circumstances, Mr Maartens' subsequent conduct in confessing to his misdeeds and agreeing to pay back, and in fact paying back, a portion of the money stolen by him, is wholly irrelevant other than for the purposes of the issue of quantum of the plaintiff's claim against the defendants.

[104] On the plaintiff's hypothesis, prescription may never commence running if the plaintiff was unable subjectively and definitively to conclude that it had 'excussed' Mr Maartens. That simply cannot be so. The plaintiff's argument fails to identify a cut-off point at which it would be able to determine definitively that Mr Maartens' ability to repay had been exhausted.

[105] On this aspect, in the matter of *ATB Chartered Accountants (SA) v Edna Bonfiglio* [2011] 2 All SA 132 (SCA), a case referred to by the plaintiff, the court had the following to say:

> "[14] In *Truter & another v Deysel* at para 16 the following was said:

'For the purposes of the Act, the term 'debt due' means a debt including a delictual debt, which is owing and payable. A debt is due in this sense 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.'

[15] It was submitted on behalf of the appellant that the respondent's debt became due when ATB breached the contract with the respondent when the latter concluded the sale agreement on the alleged negligent advice of ATB. It was submitted further that it was then that the wrong occurred and that the respondent sustained the loss although it was not yet apparent.

[16] There is support for that submission in various cases cited in R H Christie: *The Law of Contract in South Africa.* Thus in *Burger v Gouws & Gouws (Pty) Ltd,* for example, in which the defendant breached a contract by delivering to the plaintiff the wrong variety of onion seed, Franklin J said the following at 588 A:

'The plaintiff has claimed damages as a result of the defendant's breach of contract in failing to deliver the "Caledon Globe:" variety of seed. That was the single completed wrongful act by the defendant; and the fact that the nature and extent of the damages ultimately sustained by the plaintiff may only manifest themselves after the seed has been planted is in my view irrelevant, provided that it is proved at the trial that the plaintiff suffered damages as a result of that single completed wrongful act.'

[17] The respondent's counsel, on the other hand, submitted that the right of action was complete only when the writ of execution resulted in a nulla bona return. It was

not before that event, so it was submitted, that it could be said that Raath was unable to pay the purchase price. I do not think that can be correct. On that approach it might just as well be said it would not be known that Raath was unable to discharge his debt to the respondent until the judgment debt had expired after the period of thirty years because at any time before then he may have acquired the necessary funds to do so.

[18] But I do not think it is necessary to decide in this case precisely when the right of action arose. I have pointed out that s 12(3) of the Act delays the running of prescription until the creditor has knowledge of the identity of the debtor and the facts from which the debt arises (a creditor is deemed to have such knowledge if he or she could have acquired it by exercising reasonable care). The purchase price of the corporation (company) was to be paid from the profits that it made but on 3 April 2003, the respondent was advised not only that Raath had been unable to make payment, but also that the company had been placed in liquidation. There can be no doubt that at least by that time the prospect of receiving the purchase price was minimal, if it existed at all. Had a court been called upon to determine at that date, as a matter of probability, whether the respondent had suffered loss, it is plain what its finding would have been. I think it must follow that by no later than that date the respondent's right of action had indeed accrued, and that she had knowledge of all the facts which gave rise to that right of action.

[19] Thus in my view prescription had commenced to run from no later than 3 April 2003 and the claim prescribed no later than three years thereafter ie on 2 April 2006. The summons was issued only thereafter – on 30 June 2006 – and the special plea ought to have been upheld."

(underlining added)

[106] None of the authorities to which I was referred by the plaintiff on this aspect, in my view, offers assistance to the plaintiff.

[107] The court was also referred by the plaintiff to the House of Lords matter "*Law Society v Sephton & Co* [2006] All UKHL 22" as support for its contentions on the issue of 'contingency'.

[108] The plaintiff's case against the defendants in this matter, in my view, is one which stands on its own in respect of both liability and quantum and no part of it is or was dependent on the outcome of the claim the plaintiff had against Mr Maartens. I say this notwithstanding that the plaintiff's claim against the defendants is dependent on the plaintiff proving that Mr Maartens perpetrated his fraud during the relevant period of the contractual relationship between the parties *in casu*. That connection between the plaintiff's case against the defendants and the plaintiff's case against Mr Maartens should not be confused or conflated for the purposes of determining the issue at hand and do not lead to the conclusion that the plaintiff's case against the defendants was a 'contingent' claim.

[109] Sephton's case, as all of the others referred to by the plaintiff on this aspect, concerned what are correctly described in those cases as contingent claims. I see no correlation between the facts and principles in those cases and the facts and principles of this case in respect of the issue of 'contingency'. Accordingly, I conclude that the plaintiff's claim against the defendants was not contingent.

[110] In respect of the contractual time barring provisions of clause 53 of the contracts between the plaintiff and the various incarnations of the defendants from time to time, the plaintiff argued that, whilst it was common cause that the time bar provisions had formed part of the contracts between it and the auditors from time to time, such provisions were impermissible or unenforceable as a result of the provisions of section 46(8) of the Auditing Profession Act No. 26 of 2005 ("the APA") which provides that:

> "A registered auditor may not through an agreement or in any other way limit or reduce the liability that such auditor may incur in terms of this section."

[111] The "section" to which 46(8) refers is section 46(2) of the Act which provides as follows:

> "In respect of any opinion expressed or report or statement made by a registered auditor in the ordinary course of duties the registered auditor does not incur any liability to a client or any third party, unless it is proved that the opinion was expressed, or the report or statement made, maliciously, fraudulently or pursuant to a negligent performance of the registered auditor's duties."

[112] It was argued on behalf of the plaintiff that the provisions of clause 53, which required any action by the plaintiff to be pursued within two years, failing which the plaintiff would be barred, was "a limitation" of "liability" as contemplated by section 46(8) of the APA and accordingly thereby was excluded from enforcement.

[113] Time barring provisions are common in contracts and particularly in insurance policies. When put to plaintiff's counsel that this was the case, it was argued that the

provisions of the APA are distinguishable. It remains unclear to me how they are distinguishable. [See: *Barkhuizen v Napier* 2007 (5) SA 323 (CC)].

[114] It is, in my view, clear that the provisions of the APA relied upon by the plaintiff were intended to ensure that no auditor could stipulate contractual provisions the effect of which would be to exempt them, whether partially or entirely, from liability for damages arising from, *inter alia*, fraud or negligence in the performance of their duties.

[115] Clause 53, in my view, does no such thing. It compelled the plaintiff to exercise its right to claim redress, undiminished and unlimited, but to do so within a two year period.

[116] It is the right to delay seeking the enforcement of redress which can be said to be "limited" by the time bar provisions of clause 53 and not the actual redress itself which is "limited".

[117] As such, I conclude that the provisions of clause 53, which requires that action be instituted within a specific time period, namely, two years, cannot be read as an attempt to "limit" or reduce "liability".

[118] I am unable to find any cogent authority for the proposition that compelling a party, by way of agreement, to institute action for any claim which it may have against another party, within a specific period of time, as in this case, within two years, constitutes an inroad into its right to claim redress against the other party and as such, is a restriction of "liability" in any way whatsoever.

[119] Other than refer the court to a dictionary definition from 'Black's Law Dictionary' (Seventh Edition), nothing further was advanced by the plaintiff in support of its contentions.

[120] It should be borne in mind that the plaintiff, in challenging the provisions of clause 53 of the agreement, did not do so on public policy grounds or any issues relating to the Constitutionality or otherwise thereof. It relied exclusively on a direct interpretation of section 46(8) of the APA.

[121] For the reasons stated above by me, I find that the provisions of clause 53 of the contract are operational and of full force and effect and are not precluded from enforceability by the APA.

[122] As I have already determined that the plaintiff was out of time in respect of the issue of statutory prescription, it having been obliged to sue the defendants within three years of 22 August 2013, it follows that the plaintiff was out of time in terms of the contractual obligation upon it in terms of clause 53 to enforce its claim by way of action within a two year period.

Conclusion

[123] In the premises I make the following Order:

1. The defendants' special plea in respect of prescription is upheld with costs.

1. The defendants' special plea in respect of prescription is upheld with costs.

2. The defendants' special plea in respect of the time bar provisions of clause 53 of the contract between the parties is upheld with costs.

3. The costs referred to above are to include the costs occasioned by the employment of Senior Counsel.

PHILLIPS AJ

CASE INFORMATION

APPEARANCES

Advocate for the Plaintiff	:	Adv Broster SC
Attorneys for the Plaintiff	:	Alexander Cox Suite 1, 6 Inkonka Road Kloof Durban Ref: JC Alexander/pc/W002.037 c/o Thorpe & hands 4th Floor No. 6 Durban Club Place Durban Ref: Mr R Pearton
Advocate for the Defendants	:	Adv Mullins SC
Attorneys for the Defendants	:	Norton Rose Fulbright South Africa Inc 3 Pencarrow Crescent Pencarrow Park Umhlanga Rocks Tel: 031 582 5620 Email: craig.woolley@nortonrosefulbright.com Ref: Craig Wooley:CAP310
Dates of Hearing	:	2 December 2019; 3 December 2019, 4 December 2019; 5 December 2019; 6 December 2019
Date of Judgment	:	