REPORTABLE/NOT REPORTABLE

IN THE HIGH COURT OF SOUTH AFRICA

EAST LONDON CIRCUIT LOCAL DIVISION

Case No: EL 1221/17

ECD 3221/17

In the matter between:

B[…] G[…] M[…] Plaintiff

and

BATE CHUBB AND DICKSON INC Defendant

JUDGMENT

MAKAULA J:

A. ***Introduction:***

[1] The plaintiff married his ex-wife (the parties) on 12 December 1998 purportedly out of community of property and by Antenuptial Contract (ANC) with the application of the accrual system. I say purportedly because prior to their marriage, the plaintiff approached the defendant in particular Mr N Schultz, to prepare an ANC which provided for no community of property between them and his ex-wife and for

the accrual system to be applicable. The ANC was to exclude the business assets of the plaintiff which were itemised as follows:

1.1	Farm 656 Monte Rosa	R 480 000.00
1.2	Elliot Brothers Loan Account	R 100 000.00
1.3	Elliot Brothers Shares	R 100.00
1.4	Tomlinson & Wootton Loan Account	R 30 000.00
1.5	Tomlinson & Wootton Shares	R 5.00
1.6	Livestock and Implements	R 160 000.00
1.7	Motor Vehicle	R 40 000.00
Total:		R 810 105.00

The ANC was to record the net commencement value of the plaintiff's estate as nil and that of his ex-wife as R20 000.00.

[2] The defendant admits that during or about November 1998, an oral agreement came into existence in terms of which the defendant was to draft an ANC for purposes of regulating the financial affairs of the parties as stated above.

[3] The defendant prepared the ANC and it was executed on 12 December 1998. Pursuant thereof, the marriage between them was consummated on 12 December 1998.

[4] It transpired during the divorce proceedings between the parties that the ANC agreement was contested. That led them to refer the issue of the validity and enforceability of the ANC to trial as a separated issue from the divorce proceedings. A trial was held before Plasket J on 27 and 28 July 2016. Placket J, declared the ANC to be void and in consequence thereof, found that the parties were married in community of property. The plaintiff had to pay his ex-wife half the value of his nett estate which amounted to R4 885 073.00. As a consequence, the plaintiff issued summons on 13 October 2017 suing the defendant for the said amount as damages, taxed legal costs of his ex-wife's attorneys and costs paid by the plaintiff to his attorneys for the determination of the separated issue. The argument by the plaintiff is that he had given the defendant a clear mandate to draft the ANC in terms of his instructions. The defendant had breached that mandate.

[5] The defendant raised several defences to the plaintiff's claim. The defendant pleaded that the claim had prescribed relying on sections 12 (1) and (3) of the Prescription Act, 68 of 1969 (the Act).

[6] The defendant contended that the plaintiff relied on an agreement that was entered into in November 1998. The summons was issued more than three years later. At that time, the claim had already prescribed. In the alternative, the defendant pleaded that the plaintiff consulted with Kretzmann, a Director of the defendant on or about the 9th May 2014, wherein he was informed that he had a

potential claim against the defendant. The plaintiff was further advised by way of a letter dated the 12th May 2014 of the potential claim he had against the defendant. The defendant pleaded as follows in this regard:

> "10. As at the 9th May 2014, alternatively the 12th May 2014 or shortly thereafter the plaintiff was aware of all the material facts upon which the purported claim against the defendant could be formulated, however, failed to institute action within a period of three years from the aforementioned dates as a consequence of which the plaintiff's claim in terms of section 12(1) of the Prescription Act No 68 of 1969 this date had become prescribed. *(Sic)*
>
> 11. The plaintiff consequently had knowledge of the identity of the debtor and the facts from which the debt arises no later than the 12th May 2014"

[7] As a second defence, the defendant pleaded that the plaintiff should have mitigated its damages by pursuing an appeal of the judgment of Plasket J, to the Supreme Court of Appeals.

[8] Lastly, the defendant further pleaded that the plaintiff failed to plead a sustainable case for the rectification of the agreement at the time of divorce. Payment of half of the plaintiff's estate to his ex-wife is a consequence of such failure to adequately plead rectification.

[9] The plea in this regard reads:

> "18.3 The defendant mentions that options open to the plaintiff included pursuing an appeal against the judgment *inter-alia* on the basis that:

18.3.1 the learned judge held that the plaintiff and his former wife had not agreed about excluding his current business assets when in fact the evidence was to the contrary;

18.3.2 the learned Judge failed to consider the late application to amend the claim for rectification introduced by the plaintiff's counsel during the course of argument, namely for deletion of the words '<u>or to be acquired in the future</u>' in the rectification sought, or to rule thereon, notwithstanding there being no objection thereto; and

18.3.3 the learned Judge failed to grant the rectification sought (including as amended) notwithstanding evidence which established consensus between the plaintiff and his erstwhile wife with regard to the terms of the ANC.

18.4 The defendant pleads further that the plaintiff failed to plead timeously, alternatively at all, a sustainable claim for rectification, which claim on the evidence available would have been sustained, alternatively failed to testify honestly and coherently with regard to the rectification sought".

[10] The defendant contended in paragraph 15 of its plea that the ANC as presented, was in accordance with the plaintiff's wishes and instructions. It further put the plaintiff to proof that had the ANC been prepared on the basis he contended, then the defendant puts the plaintiff to proof that there would have been consensus between the plaintiff and his ex-wife and that the latter would have signed the ANC reflecting such consensus.

[11] In affirming that it did not breach its mandate, the defendant pleaded that it executed the mandate according to the standards of a reasonable attorney of average ability. Defendant further averred that at the time of drafting the ANC it did

not anticipate nor could it reasonably have been anticipated by any attorney, that the manner in which the ANC had been drafted could or would result in it being declared null and void some years into the future.

[12] In replication, the plaintiff disputed that his claim against the defendant had become prescribed. The plaintiff disputed further that he would have acquired knowledge that the debt was due to him by the defendant at any time before the judgment of Plasket J had been handed down. Furthermore, the plaintiff pleaded, that in the absence of any concession by the defendant that there had been a breach of the mandate given or that the defendant was liable to the plaintiff for the consequences of such a breach, he would not have issued summons against the defendant. It was only after the judgment pertinently pronounced on the issue, that he commenced action against the defendant.

[13] The plaintiff denied that he instructed the defendant to draw up a document that is void *ab initio.* In furtherance of his denial, the plaintiff pleaded that Mr Schultz confirmed in the trial on the separated issue, under oath that the plaintiff's oral mandate given to the defendant was in terms contended for by the plaintiff in its particulars of claim. The plaintiff pleaded that since the ANC was declared to be void *ab initio,* it was not executed either in accordance with the standards of a reasonable attorney, nor in accordance with the standards of average ability.

[14] The plaintiff averred that, Mr Schultz, confirmed under oath that he had instructions to exclude the plaintiff's listed assets; that there was consensus between the plaintiff and his ex-wife regarding the basis upon which the parties instructed Mr Schultz to draw up the ANC. The plaintiff disputed that he failed to mitigate his damages. The order of Plasket J, that he was married in community of property gave rise to an immutable obligation to pay fifty percent of his estate to his former wife which obligation was not open to realistic commercial challenge on appeal, so argued the plaintiff.

B. ***The Antenuptial Contract:***

[15] The clauses of the ANC, apart from the particulars of the parties, read thus:

"1. That there shall be no community of property between them.

2. That there shall be no community of profit or loss between them.

3. That the marriage shall be subject to the accrual system in terms of the provisions of Chapter 1 of the Matrimonial Property Act, 1984 (Act No 88 of 1984).

4. That for the purpose of proof of the net value of their respective estates at the commencement of the intended marriage the intended spouses declared the net value of their respective estates to be as follows:-

4.1 that of the said **B[…] G[…] M[…]** is R810 105.00 consisting of:-

4.1.1	Farm 656 Monte Rosa	480 000.00
4.1.2	Elliot Brothers Loan Account	100 000.00
4.1.3	Elliot Brothers Shares	100.00
4.1.4	Tomlinson & Wootton Loan Account	30 000.00

4.1.5	Tomlin & Wootton Shares	5.00
4.1.6	Livestock and Implements	160 000.00
4.1.7	Motor Vehicle	40 000.00
		R810 105.00

4.2 that of the said Rosemary Lois Jannaway is R20 000.00 in respect of cash on hand.

[16] Plasket J heard and determined the issues before him and made the following order:

> "(a) The ante-nuptial contract signed by the plaintiff and the defendant and dated 12 December 1998 is declared to be void and in consequence, the parties were married in community of property.
>
> (b) The defendant's counter-claim for the rectification of the ante-nuptial contract is dismissed.
>
> (c) The defendant is directed to pay to the plaintiff's costs in respect of the determination of the separated issues".

C. ***The Trial*:**

[17] The plaintiff is the only witness who testified. The defendant did not call witnesses.

[18] The plaintiff is a farmer and a production manager at the East London Abattoirs. He was introduced to Mr Schultz, who at the time, was a director of the defendant. At their first meeting, a broad concept of the ANC was discussed and Mr Schultz indicated what the plaintiff needed to bring at their subsequent meeting. Mr

Schultz needed the parties' identity books, list of assets and values. He also needed a list of the assets plaintiff wanted to exclude. He and his ex-wife agreed and furnished Mr Schultz with the list as reflected on the ANC and paragraph 15 above.

[19] On the appointed day, the parties met with Mr Schultz, at the office of the defendant. Mr Schultz explained the import of the new Matrimonial Property Act, the types of marriage agreements which they could enter into. Mr Schultz suggested to them that an "Antenuptial Contract with accrual was the way to go". The parties agreed with the suggestion and elected to be married out of community of property with accrual. They furnished Mr Schultz with the list of assets, in particular his business assets which he wanted to exclude and the R20 000.00 which his ex-wife recorded as her cash on hand. The business assets and the amount of R20 000.00 were not going to form part of their marriage regime, neither would they form part of the joint estate in future especially in the event of death or divorce, Mr Schultz explained to them.

[20] The parties were subsequently telephoned some days later to come and sign the ANC. At the offices of the defendant, they met with Mr Kay, a Notary Public, and Mr Schultz. They all went through the ANC. Mr Schultz confirmed he had executed their mandate. He and his ex-wife signed the ANC in the presence of Mr Kay. The plaintiff at the time, was also satisfied that all his wishes were met.

[21] The plaintiff testified that it became apparent to him eighteen years later, when he was divorcing his ex-wife that Mr Schultz did not carry out his mandate. He learnt that, when the judgment of Plasket J was delivered. Neither Mr Schultz nor a member of the defendant ever advised him that they made a mistake about the ANC and that the plaintiff had a claim for damages against them. In fact, Mr Schultz denied before Plasket J, that he made a mistake in drafting the ANC.

[22] Under cross-examination, the plaintiff testified that he was asked by Mr Schultz to bring a list of assets and not their values. The evidence of his ex-wife, about her understanding of the instruction to Mr Schultz, before Plasket J was put to the plaintiff and he accepted it. Before Plasket J, his ex-wife testified that her understanding of the agreement was that the business assets, as listed in the ANC, would be excluded from their shared assets. However, all assets that were acquired after the consummation of their marriage would form part of the "cake" i.e. "they were to share equally in the event of a divorce". That was the agreement according to his ex-wife.

[23] The defendant, in an effort to establish that the plaintiff should have appealed the judgment of Plasket J, referred to various excerpts of Plasket J's judgment at which it was demonstrated that Plasket J's judgment was based on incorrect facts. The following are such instances. The plaintiff was referred to the judgment where it was found that the plaintiff was told by Mr Schultz to bring amongst other things/documents a list of assets and their values. The plaintiff disputed this finding because it was not based on the evidence tendered by Mr Schultz. The plaintiff further disputed the finding that the ANC was "drafted in more or less standard form

on the basis of fairly minimal instructions" as not correct because on the second consultation, he and his wife had an extensive consultation with Mr Schultz.

[24] Mr *Ford*, for the defendant, brought to the attention of the plaintiff that Plasket J was incorrect in finding as follows:

> "It is clear from the evidence of both parties that prior to the signing of the ANC there had been no agreement as to its content apart from an acceptance that they were to marry in terms of the accrual system. No further terms were agreed upon".

The plaintiff confirmed that.

[25] The plaintiff accepted that the ensuing factual findings were not based on his evidence and that of his ex-wife before Plasket J.

> "To the extent that Mr M[…] attempted to establish that he and Ms M[…] had agreed about excluding his current business assets, his evidence is unconvincing and improbable. He never gave evidence of this in chief and only sought to introduce it in cross-examination. Mr M[…]'s intention, it would appear was to exclude his current business asset interests from the accrual. There was however no discussion in either of the consultations with Mr Schultz of the exclusion of his future business interests".

The plaintiff denied that he instructed Mr Schultz to exclude all his current and future assets as found by Plasket J. All the plaintiff sought was to exclude his business assets and all that "permeated from one to the other".

[26] Mr *Ford*, in regard to the application for the rectification of the ANC, informed the plaintiff that what was sought to be rectified throughout was the wording which excluded all current and future business assets until the last day of argument before Pasket J. He put to the plaintiff that the rectification as it stood would never have succeeded because that was never his intention. The plaintiff could not give a proper answer as he seemingly did not understand. The answer proffered by the plaintiff was that he thought the terminology used by the lawyers in that regard was premised on what he intended.

[27] Plasket J found as follows in his judgment:

> "No agreement was reached at the first consultation about the exclusion of assets"

This, the plaintiff disputed as being in conflict with his evidence and that of his ex-wife. According to the plaintiff and the record of proceedings, Plasket J erred in the finding that:

> "Similarly no agreement was reached at any time prior to the signing of the ANC".

[28] The plaintiff further agreed with the defendant that Plasket J erred in finding that "(a)t best for Mr M[…] the common intention of the parties was no more than they would marry by ANC with the accrual system because there was an agreement between the parties that the listed assets were to be excluded". (*Sic)*

[29] Plaintiff testified that on 9 May 2014 that he was advised by the defendant that there was a problem with the manner in which the ANC was drafted by Mr

Schultz and Mr Kay. He was advised further that the defendant could not continue to represent him because there was a conflict of interest and that he should get other attorneys to represent him. The meeting was followed by a registered letter which confirmed the withdrawal of the defendant as his attorney. The relevant portion relied upon by the defendant reads:

> ". . . without any admission of liability or negligence we have informed you that this may lead to a claim against our firm for which you should seek independent advice. I confirm that in the circumstances we need to withdraw from representing you any further".

[30] The same sentiments, were conveyed to the plaintiff's newly appointed attorneys per letter dated 12 May 2014 by the defendant advising them of a potential claim he has against the defendant.

[31] It was further raised with the plaintiff, by Mr Ford that the defendant's insurers instructed the defendant to address a letter to the plaintiff's attorneys that any claim against the defendant would be defended. Furthermore, the insurers raised the issue of whether the plaintiff had intentions of appealing Plasket J's judgment. The defendant's insurers strongly felt that the judgment was incorrect and ought to have been appealed against. It was put to the plaintiff that, he, through his legal representatives compromised the case against his ex-wife by not appealing the judgment of Plasket J.

[32] It was further put to the plaintiff that had his lawyers researched the law, they would have found judgments which would have shown them that they would not succeed in their application for rectification.

[33] The defendant's plea is that the breach relied upon by the plaintiff occurred during 1998, at the time the ANC was signed, a period which is more than three years before the summons was issued. Alternatively, the cause of action arose in May 2014 when the plaintiff was advised by Mr Krestzmann personally and subsequently followed by correspondence confirming that. Therefore, as at that period the plaintiff became aware of all the material facts upon which the purported claim against the defendant could be formulated. The plaintiff failed to take action within three years subsequent thereto. The defendant pleaded further, that as at 12 May 2014 the law on the issue was clear and the plaintiff could have acquired knowledge about the claim he had against the defendant by exercising reasonable care. Therefore the claim against the defendant had prescribed.

[34] Mr Ford submitted that the contention by the plaintiff that the defendant disputed that there was a valid claim against it and that a concession was required by the defendant before prescription could run, and further that the plaintiff only became aware of the material facts upon the judgment of Plasket J, was misguided.

[35] Mr Ford argued that the essential facts which the plaintiff knew or ought to have known in order to avoid prescription were, (a) the identity of the debtor; (b) that

the ANC had not been drafted in accordance with his instructions and mandate; (c) that the aforegoing constituted a breach of contract; (d) that the ANC required rectification; (e) that absence rectification, the contract was void *ab initio*; and (f) that he suffered a loss in the aforegoing circumstances.

[36] The defendant initially submitted that the plaintiff did not require any declaration by the court that the ANC was unenforceable because it was so from 1998 when it was signed. The submission goes that the loss of exclusive ownership in the assets by the plaintiff was an immediate reality albeit not appreciated by him. The fact that the plaintiff did not know the extent of his damages and their precise future quantification, does not alter the fact that prescription started to run from the date of the breach[1]. I should mention upfront that this submission was abandoned by Mr *Ford* in argument.

[37] Furthermore, the defendant submitted that the prescriptive period started to run on 9 May 2014 when the plaintiff had a meeting with Mr Kretzmann at the defendant's office alternatively shortly thereafter and upon consultation with his new attorneys of record which was prior to 12 October 2014.

[38] Mr *Cole*, for the plaintiff, argued that the plaintiff's cause of action arose only at the time the court declared the ANC to be void *ab initio.* In furtherance thereof, he

[1] Which I assume the defendant in this context refers to 1998.

stated that the plaintiff would not have known or anticipated that there was a problem with the ANC until such time that it was declared to be such by Plasket J.

D. ***Prescription:***

[39] Mr *Cole* submitted that extinctive prescription commences to run when the debt becomes due. It can only become due once the debtor is under an obligation to pay immediately and in order to claim recovery of the debt, a creditor must have a complete cause of action so he argued. Relying on the matter of *Stockdale and Another v Stockdale*[2], he submitted that there is a vital difference between the coming into existence of a debt and the recoverability thereof and the purpose of section 12(1) of the Act was to crystalise that difference. He concluded by arguing that prescription starts to run not necessarily when the debt arises but only when it becomes due thus making the point that a debt must be immediately enforceable before it can be claimed.

[40] Mr *Cole* further referred to *Electricity Supply Commission v Stewarts and Lloyds of SA (Pty) Ltd*[3] in submitting that a debt which arises from a breach of contract, does not become recoverable until the loss or damage has been suffered.

[2] 2003 (3) All SA 358 (C) at 362 A to C.
[3] 1981 (3) SA 340 AD at 344 F – G and Loubser: Extinctive Prescription: Juta 1996 at page 78.

[41] Mr *Cole* stated that the defendant conceded in its plea that not even an attorney would have known that the ANC would be declared null and void in the future.

E. ***Other defences raised by the defendant:***

[42] In the event I do not uphold the plea of prescription, the defendant raised issues which are relevant to causation, alternatively a failure by the plaintiff to mitigate his damages. In respect of the issue of causation the defendant avers that any damages which may have been suffered by the plaintiff were occasioned by his own action or inaction and not caused by any alleged breach of mandate on the part of the defendant, such including the following.

42.1 his failure to pursue an appeal against the judgment of Plasket J;

42.2 his failure to plead a sustainable rectification or rather to pursue a claim for rectification which went beyond the evidence available and which was not sustainable; and

42.3 his failure to provide coherent and truthful evidence in the divorce proceedings.

[43] The defendant deferred to the evidence of the parties, and Mr Schultz regarding what took place in the consultation between them and the general practise of the latter. In its reasoning the defendant avers that the factual findings of Plasket J, were not in accordance with the uncontroverted evidence of the plaintiff

and the latter's evidence was further supported by the evidence of Mr Schultz as to his general *modus operandi.*

[44] The defendant argued that the failure of the plaintiff to pursue an appeal, alternatively, to plead and pursue a sustainable rectification, resulted in a break in the casual chain, resulting in the damages occasioned by the defendant's conduct in drafting the ANC in 1998 as being too remote. The probability is that the judgment of Plasket J would have been overturned on appeal. I shall refer to the defendant's heads of argument in this regard which read as follows:

> "63.1. In paragraph 25 of his judgment[4] Plasket J found as follows:
>
> 'I am of the view that the probabilities favour the version of Mr M[…] that, having been introduced to Mr Schultz, he and Ms M[…] later consulted with him, … and they returned to sign the document at a later stage. It is improbable that only one consultation would have occurred and that the ANC was signed at that first and only consultation. That version is also at odds with Mr Schultz's evidence, which strikes me as probable and a rational way of doing things, that as a matter of course he consulted with both parties to a proposed marriage prior to drafting the ANC and arranging for them to sign it'.

[45] The defendant submitted therefore that the plaintiff has failed to show that the breach on the part of the defendant was a *causa sine quo non* of his loss and therefore the question whether there was legal-causation does not arise.

[4] See: Exhibit "B" at page 51.

[46] The defendant pleaded that the plaintiff was the cause of his own loss because he failed at the divorce hearing to testify coherently and truthfully.

[47] The defendant argued that had the rectification claim succeeded, the plaintiff would have mitigated his damages in full and thus the breach of the mandate on the part of the defendant would not have been a *causa sine quo non* of his loss.

[48] This, the defendant based on the general principle that when a contract has been breached, the innocent party is not entitled to sit back and allow damages to multiply. He has a duty to mitigate his damages.[5] The defendant submitted that for the reasons highlighted in paragraph 43 above, a reasonable person in the position of the plaintiff would have considered and pursued an appeal against the judgment of Plasket J. The defendant averred that the plaintiff acted unreasonably in this regard by not considering an appeal even after the defendant's insurer contended that an appeal be undertaken. The unreasonableness continued after the plaintiff compromised the proprietary aspects of his divorce in concluding a settlement on the basis of a marriage in community of property in 2017, thus rendering an appeal and condonation of its late filing unavailable, so argued the defendant.

[49] The plaintiff, contrary to the defendant, argued that he has met the standard of proving that he acted reasonably in an effort to mitigate his loss which resulted from the breach by the defendant of its mandate (having committed a breach of

[5] *Victoria Falls and Transvaal Power Co. Ltd v Consolidated Langlaagte Mines Ltd* 1915 AD 1 at 22; *Versfeld v South African Citrus Farms Ltd* 1930 AD 452 at 454.

contract). The plaintiff mitigated its loss by not embarking on expensive and uncertain litigation of lodging an appeal in an endeavour to reduce his loss.

[50] Furthermore, the plaintiff submitted that the *Bath* case was binding on Plasket J and the evidence of the parties which indicates that they had a different appreciation of what "excluded assets" meant as found by Plasket J, clearly indicates that an appeal to the Supreme Court of Appeals would have been both expensive and doubtful litigation. A reasonable and careful businessman in the position of the plaintiff would not have taken this steps in the normal course.

[51] Relying on the letter received by the plaintiff's attorneys on 19 October 2016, part of which reads:

> "It would be appreciated if you could telephone me upon receipt hereof, so that we can discuss the way forward. It appears that this could well result in a claim against your Professional Indemnity Insurers. We wish to minimise any legal costs relating to this. If you have already referred this matter to your Professional Indemnity Insurers, could you please advise me of the contact details of the person that I can deal with?" (*Sic*).

[52] The plaintiff argued that the defendant did not react expeditiously in requesting him to lodge an application for leave to appeal, nor did the defendant tender costs in respect of the legal proceedings. Instead, the defendant's insurers suggested on 26 January 2017 after the expiry of the dates for an application for leave to appeal, that an appeal should have been launched. Neither the defendant nor the insurer tendered legal costs for the application for leave to appeal, nor did

they suggest that such failure would be raised as a defence, in the event of an action like the present, so argued the plaintiff.

[53] The plaintiff in response argued that Plasket J was correct in his finding that there was no common continuing intention between the parties prior to signing the ANC and that there had been no agreement as to their precise intention apart from an acceptance that they were to marry in terms of the accrual system. Mr *Cole* submitted that the alleged failure to have a continuing common intention at the time of signing the ANC is shown by their different understanding of what the meaning of "excluded assets" implied. His ex-wife testified that she agreed and understood that there would be no sharing of the business assets itemised under 4.1 of the ANC but that "whatever was built together while they were married was one cake". On the other hand the evidence of the plaintiff before Plasket J, was that the business assets that were excluded under 4.1 of the ANC would include any further growth of those assets. Based on these facts, Plasket J had the difficulty of determining a common intention with the evidence that was based before him. The plaintiff therefore concluded that the misunderstanding between them could never be married to produce a common intention that the ANC was signed and therefore the application for rectification should fail. The plaintiff concluded that, as the onus to provide rectification rested with the plaintiff, no appeal would have succeeded.

F. ***Analysis:***

[54] The plea of prescription raised by the defendant, if upheld disposes of the matter. There shall be no need to deal with the various defences discussed briefly above.

[55] Sections 12(1) and (3) of the Act provide:

> "12. When prescriptions begins to run.
>
> (1) Subject to the provisions of subsection (2), (3), and (4), prescription shall commence to run as soon as the debt is due.
>
> (2) . . .
>
> (3) A debt shall not be deemed to be due until the creditor has knowledge of the identity of the debtor and of the facts from which the debt arises: Provided that a creditor shall be deemed to have such knowledge if he could have acquired it by exercising reasonable care".

[56] It is settled that prescription raises both questions of fact and law[6]. In applying the provisions of the Act, I have to have regard to the facts. The principles of law applicable are common cause. I have dealt with the facts above and what is left for me to decide "is when did the debt become due and payable" to the plaintiff.

[57] Prescription begins to run when the debt is immediately claimable by the debtor or put differently "that there has to be a debt in respect of which the debtor is under an obligation to perform immediately" . . . (i)t follows that prescription cannot

[6] *Njongi v MEC, Department of Welfare, Eastern Cape* 2008 (4) SA 237 (CC) at 254 A.

begin to run against a creditor before his cause of action is fully accrued, i.e. before he is able to pursue his claim".[7] There is a vital difference between the coming into existence of a debt and the recoverability thereof. There can be little doubt that the purpose of the legislature in enacting section 12(1) of the Act was to crystalise that difference. Prescription begins to run, not only necessarily when the debt arises, but when it becomes due.[8]

[58] A debt is only due when the creditor's, cause of action is complete. This notion involves two things, namely that the creditor is in a position to claim payment forthwith, and that the debtor does not have a defence to the claim for immediate payment. Corbett JA, in *Evins v Shield Insurance Company Ltd*[9], relying on other cases gave a detailed analysis of what a cause of action is as follows:

> "The meaning of the expression "cause of action", as used in various statutes defining the jurisdiction of courts or providing for the limitation of actions and in other contexts, has often been considered by the Courts. In *McKenzie v Farmers' Co-operative Meat Industries Ltd* 1922 AD 16 this Court held that, in relation to a statutory provision defining the geographical limits of the jurisdiction of a magistrate's court, "cause of action" meant -
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> > ". . . every fact which it would be necessary for the plaintiff to prove, if traversed, in order to support his right to judgment of the Court. It does not comprise every piece of evidence which is necessary to prove each fact, but every fact which is necessary to be proved".
>
> (*Per Maasdorp JA* at 23.) And in *Abrahamse & Sons v SA Railways and Harbours* 1933 CPD 626, a case concerning the prescription of a claim against the Railway Administration, which

[7] *Deloitte Haskins & Sells v Bowthorpe Hellerman Deutsch* 1991 (1) SA 525 (A) at 532 H – I; *Njongi v MEC, Department of Welfare, Eastern Cape, supra* at 257 A – B.
[8] The Law of South Africa First Reissue: Vol 21 page 55 at paragraph 142 and the authorities cited therein.
[9] 1980 (2) SA 814 (A) at page 838 D – H.

turned on the question as to when the plaintiff's cause of action arose, WATERMEYER J stated:

> "The proper legal meaning of the expression 'cause of action' is the entire set of facts which gives rise to an enforceable claim and includes every fact which is material to be proved to entitle a plaintiff to succeed in his claim. It includes all that a plaintiff must set out in his declaration in order to disclose a cause of action. Such cause of action does not 'arise' or 'accrue' until the occurrence of the last of such facts and consequently the last of such facts is sometimes loosely spoken of as the cause of action."

[59] The requirements set out by section 12(3) of the Act have been dealt with in many cases both before the Supreme Court of Appeal and the Constitutional Court[10]. The onus in this matter is on the defendant to prove or establish that the debt has become prescribed.

[60] As pointed out the principles referred to by both parties regarding prescription are what the law requires. Mr Cole argued that a debt which arises from a breach of contract, does not become recoverable until the loss or damage has been suffered. He relied on his proposition on both *Eskom v Stewarts and Lloyds* and the learned authors Loubser (Loubser).[11]

[61] The learned Loubser states in his work that:

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[10] *Truter and Another v Deyel* 2006 (4) SA 168 SCA at paragraph16; *Fluxmans Inc v Levenson* 2017 (2) SA 520 (SCA) paragraph 9 and 10; *Links v Department of Health, Northern Province* 2016 (4) SA 414 (CC); *Loni v Member of the Executive Council Department of Health, Eastern Cape, Bhisho* 2018 (3) SA 335 (CC).

[11] See paragraph 40 above.

"The debt to pay damages generally becomes due when loss occurs as a result of the breach of contract, provided that the plaintiff's choice of remedy may determine the due date, as illustrated below, and provided further that the plaintiff should have knowledge of the facts from which the debt arises and the identity of the debtor or should have been able to acquire such knowledge by exercising reasonable care. It is not always a simple matter to determine the time when loss occurs as a result of a breach of contract. In *Eskom v Stewarts and Lloyds SA (Pty) Ltd,* for example, a contractor installed defective piping in a power plant, resulting in an explosion a few years later, and the question was whether the loss was caused when the work was done or when the work was handed over to the owner or at the end of the maintenance period during which the contractor had to remedy defects or at the time of the explosion. The court held that the loss was handed over to the owner[12]".

[62] After reviving a number of discussions, Loubser reasoned as follows:

"The decision in the *Burger* case is difficult to reconcile with the principles that prescription in respect of a debt for damages arising from breach of contract begins to run when the debt becomes due. Such a debt becomes due when loss occurs as a result of the breach of contract. Where the Act creates a potential of loss, but it is not yet possible to determine the extent of the loss, or for that matter, whether loss will occur at all, the debt should not be considered due for the purposes of prescription. <u>The debt for damages should be considered due as soon as the loss has manifested itself to a degree that is sufficient to enable the argued party to quantify his loss</u>"[13]

[63] It cannot be disputed that prior to the divorce proceedings, the issue of the validity of the ANC did not arise. It only came to the fore during the divorce proceedings. Pursuant to that, the plaintiff consulted with Mr Kretzmann who advised him that as at that time, the facts were that the mandate was not carried out

[12] Page 77.
[13] Loubser at page 78.

properly and that he had a potential claim against the defendant. The defendant as a result could not continue to represent him and that was pursued by a letter advising him as such on 12 May 2014, further advising that he should get legal assistance from another firm of attorneys. With the bare fit of hindsight, the act of not drafting the contract correctly (the act contracting the breach) occurred in 1998 when the ANC was drafted. As at that time, it was not yet possible to determine the extent of the loss or, for that matter whether the loss will occur at all. Therefore, the debt could not be considered due for purposes of prescription. At that stage, there was no divorce which would have necessitated that the ANC be reviewed.

[64] But in May 2014, it became apparent that there was a problem with the ANC. Such problem necessitated the defendant's withdrawal from representing the plaintiff. In the words of the defendant a 'potential claim' and conflict 'of interest' was looming. The plaintiff was alarmed by the events to reality that his assets were at stake as a consequence of the divorce and the discovering of the reality that validity of the ANC was in question. It became apparent that there was a conflict between clause 4.1 and 4.2 of the ANC hence there was an application for its rectification. As at that stage it became manifest that the plaintiff was to a large extent going to lose his assets as a consequence of the wrong manner in which the contract was drafted hence the application for rectification was pursued.

[65] The plaintiff in pursuing rectification did not know whether it would succeed, or not. But the law was clear at that stage that if rectification failed, the consequence was that the marriage would be considered to be in community of property[14].

[66] The papers renewal, especially the consultation of 9 May 2014 and the correspondence between the plaintiff and defendant's attorneys, that a claim for damages was a strong possibility has the withdrawal, the involvement of the defendant's insurers and the attempt to rectify the ANC. Again in the words of Loubser, '(t)he debt for damages should be considered due as soon as the loss had manifested itself to a degree that is sufficient to enable the aggrieved party to quantify his loss', the plaintiff knew that or ought to reasonably have known that because of the problem regarding the validity of the ANC, he was to lose half of his assets.

[67] Based on the facts, the plaintiff's cause of action was complete in May 2014 except for a pronouncement by Plasket J on the validity of the ANC. Furthermore, pursuing his cause of action, the plaintiff was not dependant on Plasket J's judgment. I do not agree with the submission by Mr *Cole* in this regard for the reasons discussed above. It might have been 'one piece of evidence which was lacking to prove' his case.

[14] *Bath v Bath* [2014] ZASCA (24 March 2014; *Bath v Bath [2014]* JOL 31724 (SCA)) and *JCK v RK* (38878/200) [2014] ZAGPPHC (7 March 2014).

[68] I find therefore that prescription started to run from 12 May 2014 and a period of three years expired without the plaintiff having issued the summons. The claim has therefore prescribed.

[69] As a consequence, I make the following order.

1. The special plea of Prescription is upheld with costs.

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M MAKAULA
Judge of the High Court

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