



THE SUPREME COURT OF APPEAL OF SOUTH AFRICA
JUDGMENT

Reportable

Case no: 952/2020

In the matter between:

WK CONSTRUCTION (PTY) LTD

APPELLANT

and

MOORES ROWLAND

FIRST RESPONDENT

MAZARS MOORES ROWLAND

SECOND RESPONDENT

MAZARS

THIRD RESPONDENT

Neutral citation: *WK Construction (Pty) Ltd v Moores Rowland and Others*
(Case no 952/2020) [2022] ZASCA 44 (6 April 2022)

Coram: PETSE DP, NICHOLLS, GORVEN and HUGHES JJA and
TSOKA AJA

Heard: 15 March 2022

Delivered: This judgment was handed down electronically by circulation to the parties' legal representatives by email, publication on the Supreme Court of Appeal website and release to SAFLII. The date and time for hand-down is deemed to have been at 09h45 on 6 April 2022.

Summary: Civil procedure – extinctive prescription – special plea – debt deemed due once creditor acquires, or could reasonably have acquired, knowledge of facts from which debt arises – professional negligence – test whether creditor had knowledge of facts which would give rise to a reasonable suspicion of possible negligence – knowledge of large scale fraud over a number of years by financial director reflected in company accounts – auditors failing to report any fraud – no requirement of evidence on specific duties of auditors – knowledge of facts leading to reasonable suspicion of possible negligence established – special plea correctly upheld.

ORDER

On appeal from: KwaZulu-Natal Division of the High Court, Durban (Phillips AJ, sitting as court of first instance):

The appeal is dismissed with costs.

JUDGMENT

Gorven JA (Petse DP, Nicholls and Hughes JJA and Tsoka AJA concurring)

[1] The appellant WK Construction (Pty) Ltd, which I shall refer to as WK Construction, had employed a Mr Maartens as its financial director. Mr Maartens defrauded WK Construction between 2006 and 2013. He did so by including fraudulent transactions in its books of account. WK Construction was defrauded of R80 132 548. It recovered R26 million from Mr Maartens. The net loss sustained by WK Construction from the fraudulent activity was thus R54 132 548. It is pleaded by the respondents that the auditor for WK Construction from 2007 was a partnership known during various periods by the names of the three respondents. From 31 August 2013, it is pleaded that the partnership was dissolved and the erstwhile partners and others became directors of an incorporated entity, Mazars Incorporated. This was the auditor of WK Construction from then until 28 February 2015. If any issues arise from the identity of these entities, they do not concern us here. I shall collectively refer to them as Mazars. Mazars failed to report

on the fraudulent transactions during its term as auditor, rendering a clean audit report each year. The claim relates to the audits for the financial year ending 28 February 2007 to that ending 28 February 2013.

[2] WK Construction sued Mazars in the KwaZulu-Natal Division of the High Court, Durban (the high court). The summons was served on 23 August 2016. The cause of action was an alleged breach of the auditing contract or contracts. Mazars entered a special plea that the claim of WK Construction had been extinguished by prescription. As an alternative, it contended that WK Construction was time barred from claiming from Mazars on the basis of a clause in the contract governing their relationship.

[3] These two issues were separated from the others in terms of rule 33(4) of the Uniform Rules of Court. The evidence of one witness was led by Mazars, after which Phillips AJ upheld the special plea of prescription. He also held that WK Construction was time barred under the contract or contracts from claiming against Mazars. The appeal is before us with his leave.

[4] It is not disputed that Mazars bore the onus on both issues. The special plea of prescription invoked the provisions of the Prescription Act 68 of 1969 (the Act). The salient provisions are:

Section 10(1) of the Act provides:

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

This introduced what is known as ‘strong’ prescription. Not only does the debt become unenforceable after the lapse of the period in question, but, subject to certain

exceptions, it is extinguished such that a right of action based on it no longer exists.¹ Section 11(d) of the Act fixes three years as the period for extinguishing a debt of the kind in question. Section 12(1) of the Act provides:

‘Subject to the provisions of subsections (2), (3), and (4), prescription shall commence to run as soon as the debt is due.’

And s 12(3) of the Act provides:

‘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.’

As is the case in the present matter, this provision has provided fertile soil for litigation over the years.

[5] Boiled down to its essentials, the issue on prescription is when the alleged debt was deemed to have become due. This required a finding on when WK Construction had the relevant knowledge or could have acquired the relevant knowledge by exercising reasonable care. This, in turn, required an assessment of what comprised the relevant knowledge. If this was acquired prior to 23 August 2013, the debt had been extinguished by the time action was instituted.

[6] The sole witness called in the proceedings was one Ms De Coster. She had been employed by WK Construction as its financial manager from May 2006 to May 2018. She was a qualified chartered accountant. She reported directly to Mr Maartens. She testified about the accounting systems employed by WK Construction at the time. There was no dispute as to her testimony in this regard.

¹ *Standard General Insurance Co Ltd v Verdun Estates (Pty) Ltd and Another* 1990 (2) SA 693 (A) at 698I–699C. In contrast, s 3(1) of the Prescription Act 18 of 1943 provided that ‘[e]xtinctive prescription is the rendering unenforceable of a right by the lapse of time’. This is known as ‘weak’ prescription.

In order to properly assess the matter, it is of some importance to delve into these systems.

[7] Each project undertaken by WK Construction was allocated an account number. An example pertinent to this matter was account number 69990, for a project designated East Cape Small Contracts. An account was either open or closed. Three digit general ledger codes were allocated for various types of expenditure. This allowed ready identification of the nature of the expenses incurred which could then be reconciled against the project in question. For example, general ledger code 423 related to materials. When these were procured for a project, that code and the amount were entered under the account number for that project. All of the items allocated to any one project could be extracted from the system so as to see at a glance all of the entries, their codes, and the dates. This enabled WK Construction to establish the profit or loss made on each project and identify the items on which the expenses had been incurred. When a project had been completed, the account relating to it was closed. A closed account was an historical account that was not in use any longer. No transactions would take place on that account. At all times material to this matter, the project with account number 69990 had been completed and the account was a closed one.

[8] Ms De Coster testified that the directors had devised a system involving what were termed bonus accounts. One of the bonus accounts was 67997 which was a live account. The bonus accounts did not relate to projects, only to directors. Each director was allocated a general ledger code number for use in those accounts. So, directors whose expenses were being paid by WK Construction would have them posted to account 67997 or one of the other bonus accounts and allocated to their codes. These code numbers corresponded to general ledger codes used for legitimate

expense items in account numbers relating to projects. The code for Mr Maartens, for example, was 423. Where his personal expenses of whatever nature had been paid by WK Construction, they would be allocated to account 67997 against general ledger code number 423. In an account relating to projects, general ledger code number 423 would relate to materials for that project. This made it appear as if account 67997 and the other directors' bonus accounts were projects for which the goods or services with that general ledger code number had been procured.

[9] The bonus account system was accordingly a mechanism by which some of the directors' personal expenses would be paid by WK Construction as if they had been expended on projects of the company. These included items unrelated to construction, one example being school fees. Directors' meetings, to which Ms De Coster was not privy, decided which of the directors' expenses could be paid by WK Construction and dealt with in this manner. The company accounts would not reflect these payments as income to the directors concerned and, because they were paid by the company, would correspondingly inaccurately inflate company expenses in the books of WK Construction. Payments on behalf of directors were thus portrayed as payments for expenses incurred by WK Construction in its projects.

[10] Ms De Coster testified that during February 2013 her attention was drawn to a payment which had been posted to closed account 69990 in contravention of the system. An amount of R543 022.76 had been paid by WK Construction to Leigh Ebben Services CC. This did not relate to a project of the company. She sought clarity from other employees of WK Construction, questioning it as a possible 'gremlin'. It had been posted from one of the directors' open accounts, 67997 to the closed account 69990. As I have mentioned, nothing should have been posted to a closed account. If expenses were moved from one open account to another, a journal

entry would be made debiting the one and crediting the other. The payment in question had originally been posted to account 67997. No corresponding journal entries had been made when it was moved from 67997 to 69990. This meant that there was no proper audit trail for the posting. It would simply have disappeared from account 67997 without any indication as to where it had gone. As Ms De Coster put it, the amount appeared to have been ‘paid from the ledger’. She testified that she thought at the time that it was as if the person posting it to account 69990 wanted it to disappear.

[11] As a result, she reported this to Mr Maartens by email dated 12 February 2013, saying:

‘Boss, I’ve noticed some funnies in the ledger to an account 69990. I have asked Vanessa to investigate.

Do you know something about something in December?’

She testified that Mr Maartens replied by email that same day saying:

‘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. . . .’

[12] She was initially mollified by this because she ‘. . . sort of figured out that there were transactions . . . that related to directors’, although she was not sure how these worked. In about April 2013 however, while preparing the year end accounts, she met with the Chief Executive Officer of WK Construction, Mr Karl Kusel. He indicated to her that he was waiting on Mr Maartens to provide a reconciliation of account 67997. She saw this as strange and thought that this directors’ account would presumably not balance because this and any other such transactions had been ‘removed’ from it without trace. She went back to her office and printed out account

69990 and locked it in a box in her office. She was concerned that if something which had been moved to that account was moved again, she might not be able to find it. She did not know what to do because what she had found scared her. That evening, she phoned her brother who advised her to speak to Mr Karl Kusel. She described herself as being a bit hysterical and went outside to phone Mr Kusel, telling him that she had found transactions that had been moved from account 67997 to a closed account. He said that they should await the reconciliation from Mr Maartens.

[13] She continued to investigate. The closed account 69990 had had multiple expenses posted to it which were clearly private and unrelated to projects. She generated and analysed several detailed spreadsheets which showed up a number of fraudulent transactions amounting to many millions of Rand. Many of the expenses were allocated to code 423, the director's code of Mr Maartens. These were not for materials, but for private expenses despite this closed account number having been that of a project. She enquired from one of the accounts staff whether anyone could post expenses to closed accounts and was told that only systems administrators could do so. There were three systems administrators: herself, one Thabo and Mr Maartens. When she received this response on 19 July 2013, she forwarded it to Mr Karl Kusel with the comment that 'it is a problem'.

[14] On 8 August 2013, Mr Karl Kusel called her to his office and showed her the reconciliation of account 67997 he had received from Mr Maartens. She indicated that, because the values were lower than those she recalled for account 69990, she did not think the reconciliation was correct. He gave her an excel spreadsheet of the bonus reconciliation. He asked her to go through the data and requested that she meet with him. The following day, the Friday of a long weekend, they met at the home of

Mr Karl Kusel. Mr Willie Kusel, the founder of WK Construction and father of Mr Karl Kusel, was present. She was armed with printouts of all the relevant accounts for a number of years. This made up a 'big pack' of documents.

[15] She was given the amounts that had been declared as bonuses. The postings to the closed account 69990 showed amounts which were not in what Mr Maartens had tendered as the reconciled bonus schedule. The additional amounts in account 69990 were thus not payments which had been approved by the directors to be paid by WK Construction on behalf of a director and were well in excess of the approved amounts. If they had been valid directors' expenses, they should have been on the schedule supplied by Mr Maartens. She was asked by Mr Willie Kusel whether she believed that Mr Maartens 'could have done something like this . . .', that is, take money from WK Construction. Her reply was that she did not know ' . . . what else it could be' and could not conceive of another explanation if the directors were not aware of them. Counsel during cross-examination attempted to question whether that conversation had occurred but no evidence in rebuttal was led. The high court accordingly held that the conversation was entirely consistent with the context of the detailed spreadsheets having shown not only the nature and general extent of the fraud but that Mr Maartens had been the perpetrator. There was no indication that either Mr Willie Kusel or Mr Karl Kusel were unavailable to testify.

[16] Mr Maartens never returned to work after that weekend, indicating that he was unwell. On 14 August 2013, Ms De Coster sent Mr Karl Kusel a PDF document totalling 447 pages showing the transactions on the closed account 69990. This was followed by a meeting with him. A total of many millions of Rand had gone from account 67997, an active directors' account, to 69990, a closed project one. She found no reason ' . . . why you would . . . move something from an active code into

a closed code other than for a purpose in hiding it and we had the details of all the transactions’. Mr Maartens had clearly taken the money since he said that he had moved the transactions into account 69990. Of that, code 423, the director’s code of Mr Maartens, had just under R25 million allocated to it in account 69990 without authorisation from the directors.

[17] This culminated in further investigations to attempt to establish the extent of the fraud. On 18 August 2013, Mr Willie Kusel sent an email to Mr Maartens, requesting a meeting on 22 August to discuss the reconciliation. He responded on 22 August saying that he had ‘. . . taken legal counsel . . . and they have advised me that I have some issues that need to be addressed. . .’. He requested a later meeting and it was agreed that they would meet on 24 August at the office of his legal representative in Sandton.

[18] In the meantime, by 22 August 2013, further transactions in addition to those involving the closed account 69990 had been unearthed. It was discovered that payments had been made to conveyancers unrelated to the business of WK Construction. This prompted a letter from the present attorneys of WK Construction to a member of one of the firms of conveyancers to which such payments had been made. It was written on the instructions of Mr Willie Kusel and Mr Karl Kusel. It recorded that Mr Walden and the Kusels had met that day and went on to say:

‘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.’

It then requested that the conveyancing files be drawn in advance of the meeting to take place on 24 August 2013. This elicited an emailed windeed printout from the

conveyancers dated 22 August showing six properties that had been transferred to Mr Maartens.

[19] Also on 22 August 2013, Ms De Coster sent an email to Mr Karl Kusel with documents attached. She said in it: 'I must talk to you when you get this, please call me.' At 13h50 that day, she sent an email to him saying of Mr Maartens that she had 'revoked his user certificate on the Nedbank system. It won't work now'. At some stage after the weekend of 9 August, Ms De Coster was instructed to, and did, arrange for the locks on his office door to be changed.

[20] From all of this, it was quite clear to WK Construction by 22 August 2013 that Mr Maartens had defrauded it of a large sum of money. This was subsequently confirmed at the meeting of 24 August 2013. WK Construction, in its heads of argument, sought to submit that, on 22 August 2013, it did not know of the fraud, but had only a suspicion. During argument, however, it was conceded that no other construction could be put on the letter written by its own attorneys to the conveyancers on that date than that it asserted that funds had been taken from WK Construction by Mr Maartens without authorisation. The concession was bolstered by the detailed information which had come to light from the books of account as mentioned above. In my view, that concession was entirely appropriate.

[21] In summary, therefore, Ms De Coster was instructed sometime after the 9 August 2013 meeting with the Kusels to ensure that the locks on the office of Mr Maartens were changed and this was done. Secondly, she testified that, on 22 August 2013, she informed Mr Karl Kusel that, in accordance with his instructions, she had caused the 'user certificate' of Mr Maartens on the Nedbank system of WK Construction to be revoked. Thirdly, the attorneys of

WK Construction wrote to conveyancing attorneys on 22 August 2013 indicating that Mr Maartens had purchased properties ‘. . . from funds provided by WK Construction without the knowledge and authority of Mr Willie Kusel’. The properties in question had been provided by the conveyancers and reflected Mr Maartens as the transferee. Fourthly, Mr Willie Kusel had called Mr Maartens to a meeting which was to take place the following Saturday to account for the issues which had arisen. These are not actions to be taken against a director of a company on a mere suspicion. It is clear that WK Construction had concluded that Mr Maartens had defrauded it over a number of years of many millions of Rand.

[22] However, WK Construction went on to contend that it did not, by 22 August 2013, have knowledge of the requisite facts giving rise to liability on the part of Mazars. This is, of course, an entirely different matter from having knowledge that Mr Maartens had perpetrated a fraud. The special plea is framed as follows:

‘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 (assum[ing] 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.’

[23] WK Construction had the knowledge asserted in paragraphs 4.1.1 and 4.1.3. This was unchallenged and is incontrovertible. As mentioned above, it also correctly conceded, after some debate, that it had the knowledge asserted in paragraph 4.1.2. It did not, however, concede that Mazars had proved that it had knowledge of the ‘facts from which the debts arose’. In this regard, WK Construction founded its submissions on two remaining pillars. The first was that the high court applied the incorrect test, confining itself to a finding that, ‘because WK Construction had knowledge of “the fraud” by 22 August 2013 . . . there was sufficient knowledge for prescription to commence running . . . because as at that date there had been unqualified audit reports’. The second was that it was not proved that WK Construction knew that the money could not be recovered from Mr Maartens. The third pillar of its argument, which I dealt with initially, was that WK Construction did not have knowledge of the fraud perpetrated by Mr Maartens before 23 August 2013. As indicated, this requires no further mention. I shall deal with the second pillar next and conclude with the first one.

[24] WK Construction submitted that prescription only begins to run when it is established that the debtor who caused the primary loss cannot repay it. In other words, Mazars had to prove that Mr Maartens was unable to satisfy the claim for repayment before WK Construction had the requisite knowledge. Since this was not proved, the running of prescription had not commenced prior to 23 August 2013. For this proposition, it called in aid a number of cases.

[25] The first of these was *ATB Chartered Accountants (SA) v Bonfiglio*.² In *ATB*, the seller of a members' interest and loan account in a close corporation was advised by ATB that the purchaser had the financial ability to pay the purchase price. The purchaser, who was to fund the payments from profits made by the close corporation, defaulted on the first instalment due on 3 April 2003. The seller was advised at that time that the close corporation, having been converted to a company, had been liquidated. The seller sued ATB on 30 June 2006 on the basis that it had breached its mandate to advise it. ATB entered a special plea of prescription claiming that the cause of action arose at the time the seller had concluded the sale agreement, alternatively when her attorney informed ATB that she intended to hold it responsible for her losses and further alternatively by no later than the date on which the purchaser defaulted and she was informed that the company had been liquidated.

[26] This Court held that it was unnecessary to determine the exact date on which her cause of action arose, but that it had done so at the latest by the time she was informed that the purchaser had defaulted and that the company had been liquidated. The special plea of prescription was upheld on appeal as a result. WK Construction submitted that different dates of the commencement of prescription were accepted in *ATB*: as against the thief on 30 April 2002, but against the auditors on 3 April 2003. However, as shown above, that proposition is not supported by *ATB* which found only that this was the latest date on which the knowledge had been acquired and not that knowledge of the inability of the purchaser to pay was required.

² *ATB Chartered Accountants (SA) v Bonfiglio* [2010] ZASCA 124; [2011] 2 All SA 132 (SCA) (*ATB*).

[27] The next matter relied upon was *Thoroughbred Breeders' Association of South Africa v Price Waterhouse*.³ This was a claim against an auditor but did not deal directly with prescription. Theft by an employee had come to light. The theft was believed to have started after October 1994, after the last audit undertaken by Price Waterhouse (PW). PW was tasked to investigate and quantify TBA's loss. The thief was sued, summary judgment taken and R100 000 or so recovered. During the investigation, it was found that, contrary to the earlier belief, the thefts had begun prior to the last audit period. This gave rise to the claim against the auditor, PW, on the basis that it had negligently failed to discover the thefts during the audit in question.

[28] Prescription was invoked by Price Waterhouse. WK Construction submitted that in *Thoroughbred Breeders* this Court held that the claim 'arose only once it was clear that the thief was unable to repay the amount in question.' It relies upon the following dictum:

'... PW, it was common cause, was contractually bound to exercise reasonable care in the execution of its audit and not to do the work negligently. The allegation is that it failed in that respect; that had the work been done properly, Mitchell's theft would have been uncovered in January 1994; and that all the direct losses suffered by TBA due to Mitchell's subsequent thefts and his inability to repay were accordingly for the defendant's account ...'⁴

This comes nowhere near to a finding by this Court that, until it was shown that the thief was unable to pay, Thoroughbred Breeders Association lacked knowledge of the requisite facts for prescription to commence running.

³ *Thoroughbred Breeders' Association of South Africa v Price Waterhouse* 2001 (4) SA 551 (SCA) paras 32, 45 & 55 (*Thoroughbred Breeders*).

⁴ *Ibid* fn 3 para 9.

[29] The next two matters relied upon concerned claims for indemnification. The first is *Magic Eye Trading 77 CC v Santam Limited*.⁵ That matter dealt with the prescription of a claim for a declaratory order based on a contingent liability. It dealt with claims for indemnification mostly under contracts of insurance and, in that context, concluded that:

‘A claim to be indemnified against liability to a third party only arises once liability, in a fixed amount, has been established. The corollary, which applies to the present matter, is found in the third proposition set out in *Pereira*:

“That the disclaimer by the insurer, from which the period of three months allowed for the institution of action commences to run, must follow on a claim by the insured of the character described in (1) and (2) above. The condition does not admit of a general disclaimer of future claims at a stage when a precise claim in a fixed amount has not, and cannot, be made by the insured”.’⁶

[30] The second such matter is *David Trust and Others v Aegis Insurance Co Ltd and Others*.⁷ One of the paragraphs relied upon, in this claim for indemnification, read:

‘Katz Salber's inability to requisition payment from Investec was a direct consequence of its failure to perform its mandate honestly and diligently. If Lombard had not stolen the money there would have been no shortfall and Katz Salber would have been able to obtain the funds from Investec to repay the plaintiffs; if the thefts had been discovered earlier, before the shortfall reached a point where Katz Salber was no longer able to absorb it, the plaintiffs would also have been repaid. In neither situation, in the absence of a claim from the plaintiffs against Katz Salber, could there have been a claim by Katz Salber against the defendants under the policy. But once the stage was reached where Katz Salber was faced by claims which, as a result of theft, it was no longer able to meet, it is idle to suggest, as was done, that the plaintiffs' loss was due to Katz Salber's insolvency and not to Lombard's dishonesty. . . .’

⁵ *Magic Eye Trading 77 CC v Santam Limited* [2019] ZASCA 188 para 15.

⁶ *Ibid* fn 5 para 15.

⁷ *David Trust and Others v Aegis Insurance Co Ltd and Others* 2000 (3) SA 289 (SCA) para 23.

[31] Once again, these matters are distinguishable from the present one. The present claim is not one for indemnification. It is for damages arising from a breach of contract. A claim for indemnification is triggered when the loss for which the indemnity has been obtained has occurred and not before that. The two matters find no application here. The second pillar relied upon by WK Construction is accordingly not a compelling one.

[32] This leaves the first pillar. WK Construction contended that evidence was required as to the applicable accounting standards and that Mazars had breached these. This, in its nature, required expert evidence. Since none was adduced, it had not been shown that WK Construction had all of the requisite facts giving rise to the deemed knowledge. It was not sufficient to find that WK Construction was aware of the fraud by Mr Maartens by 22 August 2013 and that there had been unqualified audit reports which did not expose the fraud. In this regard, it relied on *Thoroughbred Breeders*.⁸ This held that, in order to succeed in a claim against auditors the standards set out in legislative enactments, the profession's codification of auditors' duties and expert evidence should be presented to the court. This, however, was a trial matter. In order to discharge the onus at the trial stage, that kind of evidence would almost invariably be necessary. An auditor would have been in breach of its duties '...if it had been careless in the execution of any aspect of its mandate, measured against the general standards prevailing in the profession at the time'.⁹ The present matter, however, concerns the facts required for prescription to begin running in a claim based on professional negligence. This is different to the facts which must be proved at a trial. The question is whether the evidence contended for by WK Construction is necessary in these circumstances.

⁸ Ibid fn 3 paras 32, 45 & 55.

⁹ Ibid fn 3 para 20.

[33] This has been contested terrain for some time. It has been established that, in order for prescription to run, the creditor need not be in a position to prove its case. In *Van Staden v Fourie*,¹⁰ this Court held that running of prescription is not postponed ‘until the creditor has established the full extent of his rights’ This was elaborated on in *Minister of Finance and Others v Gore NO*,¹¹ where it was held:

‘This court has in a series of decisions emphasised that time begins to run against the creditor when it has the minimum facts that are necessary to institute action. The running of prescription is not postponed until a creditor becomes aware of the full extent of its legal rights, nor until the creditor has evidence that would enable it to prove a case “comfortably”. . . .’

It is also ‘. . . clear that knowledge of legal conclusions is not required before prescription begins to run . . .’.¹²

[34] In *Truter and Another v Deyssel*,¹³ the position as regards professional negligence was dealt with. Surgery had been performed on one of the eyes of Mr Deyssel. He went blind in that eye and sued the surgeon. In resisting a plea of prescription, he submitted that the requisite knowledge:

‘. . . includes knowledge of facts showing that the defendant, in treating the plaintiff, failed to adhere to the standards of skill and diligence expected of a practitioner in the former’s position. Thus, it was submitted, until the plaintiff has sufficient detail – frequently if not invariably, in the form of an expert medical opinion – showing that the defendant failed to exhibit the necessary

¹⁰ *Van Staden v Fourie* 1989 (3) SA 200 (A) 216B-F).

¹¹ *Minister of Finance and Others v Gore NO* ZASCA 98; 2007 (1) SA 111 (SCA) para 17. References omitted.

¹² *Claasen v Bester* 2012 (2) SA 404 (SCA) para 15. See also the dictum of Leach JA in *Yellow Star Properties 1020 (Pty) Ltd v MEC, Department of Development Planning and Local Government, Gauteng* 2009 (3) SA 577 (SCA) para 37 where he held:

‘. . . It may be that the applicant had not appreciated the legal consequences which flowed from the facts, but its failure to do so does not delay the date prescription commenced to run’.

¹³ *Truter and Another v Deyssel* 2006 (4) SA 168 (SCA).

degree of diligence, skill and care and in what respects he or she failed to do so, the plaintiff does not, in terms of s 12(3), have “knowledge of the facts from which the debt arises”.¹⁴

This submission was roundly rejected by Van Heerden JA. She held:

‘. . . 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

In that matter, she went on to cite with approval a dictum from *McKenzie v Farmers' Co-operative Meat Industries Ltd*,¹⁶ to the effect that, in this sense, a complete cause of action includes:

‘. . . every fact which it would be necessary for the plaintiff to prove, if traversed, in order to support his right to the judgment of the Court. It doe[s] not comprise every piece of evidence which is necessary to prove each fact, but every fact which is necessary to be proved. . . .’¹⁷

She accordingly found that:

‘. . . 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* . . . the presence or absence of negligence is not a fact; it is a conclusion of law to be drawn by the court’¹⁸

This shows that expert opinion evidence concerning negligence is not required for the running of prescription to commence.

[35] What, then, is the approach in a plea of prescription? In the context of a claim of medical negligence, the Constitutional Court expressed itself on the appropriate approach in *Links v Department of Health, Northern Province*.¹⁹ In that matter, the plaintiff had received treatment to his thumb which had led to it being subsequently

¹⁴ Ibid fn 13 para 13.

¹⁵ Ibid fn 13 para 16.

¹⁶ *McKenzie v Farmers' Co-operative Meat Industries Ltd* 1922 AD 16 at 23.

¹⁷ See also Ibid fn 13 para 19.

¹⁸ Ibid fn 13 para 20. Emphasis in the original.

¹⁹ *Links v Department of Health, Northern Province* [2016] ZACC 10; 2016 (4) SA 414 (CC); 2016 (5) BCLR 656.

amputated. His claim was met with a special plea of prescription, bringing into focus s 12(3) of the Act. A unanimous court held:

‘ . . . To require knowledge of causative negligence for the test in s 12(3) to be satisfied would set the bar too high. However, in cases of this type, involving professional negligence, the party relying on prescription must at least show that the plaintiff was in possession of sufficient facts to cause them on reasonable grounds to think that the injuries were due to the fault of the medical staff. Until there are reasonable grounds for suspecting fault so as to cause the plaintiff to seek further advice, the claimant cannot be said to have knowledge of the facts from which the debt arises.’²⁰

This was reiterated later in the judgment:

‘ . . . Until the applicant had knowledge of facts that would have led him to think that possibly there had been negligence and that this had caused his disability, he lacked knowledge of the necessary facts contemplated in s 12(3).’²¹

[36] WK Construction invited us to apply the test recently articulated by the Supreme Court of Canada in *Grant Thornton LLP v New Brunswick*.²² In that matter, a report from an auditor on the soundness of a company had been sought, obtained, and acted upon. It transpired that the company’s finances were not sound, as had been reported, and it defaulted. Another accounting and auditing firm was contracted. It opined that the financial statements had not been prepared to the requisite standard. In particular, the company’s assets and net earnings had been materially overstated. This had not been discovered by the auditor who had reported on the company. Action was instituted alleging negligence. The auditor invoked a statutory limitation providing that no claim could be brought after two years from the day on which the claim was discovered. The court of first instance upheld this

²⁰ Ibid fn 19 para 42.

²¹ Ibid fn 19 para 45.

²² *Grant Thornton LLP v New Brunswick* 2021 SCC 31.

defence but was reversed on appeal by the Court of Appeal of New Brunswick. The Supreme Court of Canada set out the approach of the two courts below as follows:

‘. . . The motions judge held that a plaintiff needs to know only enough facts to have *prima facie* grounds to infer the existence of a potential claim. The Court of Appeal, on the other hand, held that discovery of a claim requires actual or constructive knowledge of facts that confer a legally enforceable right to a judicial remedy, which includes knowledge of every constituent element of the cause of action being pled. Thus, on the Court of Appeal’s interpretation, in addition to knowledge of a loss and causation, a claim in negligence would include knowledge of a duty of care as well as knowledge of a breach of the standard of care.’²³

It rejected the approach of both the lower courts. It agreed with the court of first instance that the claim was statute-barred by the relevant provision. In arriving at that conclusion, it said:

‘. . . I propose the following approach instead: a claim is discovered when a plaintiff has knowledge, actual or constructive, of the material facts upon which a plausible inference of liability on the defendant’s part can be drawn’²⁴

It is of more than passing significance that this new approach was developed against the backdrop, peculiar to Canadian law, which had previously required ‘. . . *prima facie* grounds for inferring’ liability. The Supreme Court of Canada held that the new approach was necessary because ‘. . . there does not appear to be a universal definition of what qualifies as *prima facie* grounds’²⁵

[37] In the light of the clear position in our law, articulated in *Truter* and *Links*, it would not be appropriate to introduce the posited approach. It is unnecessary to consider a different test to that arrived at and applied in our law. This approach has been continued in the matter of *Loni v MEC for Health, Eastern Cape (Bhisho)*:²⁶

²³ Ibid fn 22 para 41.

²⁴ Ibid fn 22 para 42.

²⁵ Ibid fn 22 para 45.

²⁶ *Loni v MEC for Health, Eastern Cape (Bhisho)* 2018 (3) SA 335 (CC) para 23.

‘In *Links* . . . this court opined that it would be setting the bar too high to require knowledge of causative negligence. In answer to this issue, this Court held that in cases involving professional negligence, the facts from which the debt arises are those facts which would cause a plaintiff, on reasonable grounds, to suspect that there was fault on the part of the medical staff and that caused him or her to “seek further advice”.’

This approach, then, is what governs the present matter. I must therefore decline the invitation to introduce the approach of the Supreme Court of Canada.

[38] The question is, accordingly, whether, by 22 August 2013, it can be said that the known facts would have caused WK Construction, on reasonable grounds, to have suspected that there was fault on the part of Mazars so as to cause it to seek further advice. Stated differently, whether WK Construction had ‘. . . knowledge of facts that would have led [it] to think that possibly there had been negligence [on the part of Mazars] and that this had caused . . .’ its loss from the fraud perpetrated by Mr Maartens.

[39] The function of an auditor was described by Holmes JA in *Lipschitz and Another NNO v Wolpert and Abrahams*:²⁷

‘An auditor appointed under the Companies Act is a professionally qualified person. He is a scrutineer with a critically enquiring mind. He maintains his independence at all times. He takes no instructions from directors, shareholders or creditors. He carries out his statutory prescribed duties with a reasonably high degree of skill and diligence in the circumstances and in the light of modern conditions and standards. He acts in good faith; and he also has certain obligations under his own statute’

²⁷ *Lipschitz and Another NNO v Wolpert and Abrahams* 1977 (2) SA 732 (A) at 741F-H.

[40] WK Construction knew that the essential feature of the fraud was that it had largely, although not exclusively, been reflected in postings to a closed account whose project had ended. There was no justification for any entries to have been made in account 69990. In addition, these were payments ‘made through the ledger’ unsupported by journal entries. Amounts had been moved from an open account 67997 to account 69990 without any corresponding journal entries or accounting basis. The details were readily available. The fraud had been perpetrated over a number of years. By 22 August 2013, as was put in *Truter*, ‘everything [had] happened which would entitle the creditor to institute action and to pursue his or her claim’.²⁸ For the purpose of the commencement of the running of prescription, whether it was suspected that the auditors had possibly negligently failed in their duties must be distinguished from evidence which supports that suspicion. The latter is not necessary for prescription to commence as was said in *Gore* and the other cases referred to above.

[41] In the light of these facts, it can be concluded that WK Construction must have had a reasonable suspicion of possible negligence on the part of Mazars. It did act on that suspicion by contacting an accounting firm to give expert advice. In my view, this amply satisfies the test in *Link* and the other cases for the requisite knowledge causing prescription to commence running. The high court was thus correct in upholding the special plea of prescription. This first pillar relied upon by WK Construction does not provide a basis on which to uphold the appeal. Having arrived at this conclusion, it is not necessary to consider the question of the time bar clause in the contract or contracts. The appeal must fail.

²⁸ *Truter* para 16.

[42] In the result the following order is made:
The appeal is dismissed with costs.

T R GORVEN
JUDGE OF APPEAL

Appearances:

For appellant: A Subel SC (with him L Broster SC and S Pudifin-Jones)

Instructed by: Alexander Cox Attorneys, Kloof
Symington De Kok Attorneys, Bloemfontein

For respondents: S Mullins SC

Instructed by: Norton Rose Fulbright, Durban
Webbers Attorneys, Bloemfontein