THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Reportable
Case No: 108/2014

In the matter between:

LANCELOT STELLENBOSCH MOUNTAIN RETREAT (PTY) LTD **APPELLANT**

and

STEPHEN MALCOLM GORE NO **FIRST RESPONDENT**

BRYAN NEVILLE SHAW NO **SECOND RESPONDENT**

SADECK ZHAUN AHMED NO **THIRD RESPONDENT**
(In their capacity as the duly appointed liquidators of Queensgate Wealth Manager (Pty) Ltd (in liquidation))

Neutral citation: *Lancelot Stellenbosch Mountain Retreat v Gore NO* (108/14) [2015] ZASCA 37 (25 March 2015)

Coram: Maya, Bosielo, Willis, Zondi JJA and Gorven AJA

Heard: 3 March 2015

Delivered: 25 March 2015

Summary: Interruption of prescription – onus – person asserting prescription to allege and prove date from which prescription commenced to run –

failure to do so – no need to determine whether prescription interrupted.

ORDER

On appeal from: Western Cape High Court, Cape Town (Griesel J sitting as court of first instance).

The appeal is dismissed with costs including costs of two counsel.

JUDGMENT

Zondi JA (Maya, Bosielo, Willis JJA and Gorven AJA concurring):

[1] The central issue in this appeal is whether the debt, on which the respondents relied for their locus standi to apply for the liquidation of the appellant, had prescribed or whether the running of the prescription period had been interrupted in terms of s 14(1) of the Prescription Act 68 of 1969 (the Prescription Act).[1] But the need to determine the second question may fall away if the enquiry on the first question yields a negative outcome. The manner in which this issue arose for decision on appeal, however, requires some explanation.

[2] On 14 May 2012 the respondents (the liquidators) brought an application in the Western Cape High Court, Cape Town for the liquidation of the appellant in their capacities as liquidators of Queensgate Wealth Manager (Pty) Ltd (in liquidation) (Queensgate Wealth) which was placed under a final winding-up order on 30 November 2009. The appellant, Queensgate Wealth and various other companies formed part of what used to be the Queensgate Group of Companies (the Group).[2] It appears that there

[1] Section 14(1) provides as follows:
'The running of prescription shall be interrupted by an express or tacit acknowledgement of liability by the debtor.'

[2] Queensgate Holdings (Pty) Ltd ('Queensgate Holdings, which was placed in liquidation on 10 June 2010'); Queensgate Wealth ('the respondent', now in liquidation);Black River Development (Pty) Ltd (which was liquidated on 28 July 2009); Lancelot Development Holdings (Pty) Ltd ('Lancelot Development'); Lancelot Stellenbosch Mountain Retreat (Pty) Ltd ('the

was probably some commonality of proprietary interest in or control over the component entities in the Group, whether direct or indirect. According to the appellant's answering affidavit, Queensgate Wealth was established as the funding arm of the Group, for the express purpose of obtaining loans in its own name. In turn it on-lent loans to other companies such as Black River Development (Pty) Ltd (Black River) within the Group in which the developments were taking place or were to take place. Queensgate Wealth did not, itself, engage in development projects.

[3] It is common cause that Queensgate Wealth, as the funding arm of the Group, on 15 April 2008 concluded a loan agreement with AIK Credit PLC, a Mauritian company (AIK) in terms of which AIK lent and advanced an amount of €2 350 000 to Queensgate Wealth (the AIK loan). The purpose of the loan was to 'fund the restructure and development of Waterkloof and Agapé Developments . . . .' Clause 9 of the loan provided as follows for the Capital Repayment:

'At any time, subject to two days notice, provided that the entire amount due, including interest, shall be payable in full at the end of 6 months, or if renewed at the end of the renewal period.'

[4] Black River executed a deed of suretyship in favour of AIK, binding itself as surety and co-principal debtor with Queensgate Wealth for the payment of the loan by Queensgate Wealth to AIK. Upon receipt of the funds from AIK, Queensgate Wealth on-loaned a portion thereof to Black River. The amount of R6 480 000 is part of that amount which Queensgate Wealth on-lent to Black River. The terms and conditions of that on-loan are in dispute, in particular the date of its repayment. When Queensgate Wealth defaulted on the AIK loan, AIK sent a letter of demand to Queensgate Wealth on 20 October 2008, demanding payment of €2 350 000. The letter recorded the following:

'We refer to the Loan Agreement ("the Agreement") between AIK Credit PLC ("AIK") and Queensgate Wealth Manager Pty Ltd ("Queensgate") dated the 15th April 2008.

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appellant'); and Great Force Investments 109 (Pty) Ltd ('Great Force'), a subsidiary of Lancelot Development.

In terms of the Agreement, a Loan was granted to Queensgate from AIK with specific terms and conditions (the conditions). Inter alia, the conditions stipulated that timely repayment of the Loan amount, interest and costs were due to be effected on or before the 17th of October 2008.

The total capital, outstanding amount of €2,350,000 (Euro Two Million Three Hundred and Fifty Thousand Only) exclusive of interest as per our statement sent to you on October 8, 2008 has not been received by us on due date.

We note that you have failed or neglected to make the capital repayment as aforesaid and have breached the Agreement. You are therefore most formally requested to settle the above amount within 10 business days on receipt of this letter failing which we will refer the matter to our Legal Advisors to proceed with the default proceeding inclusive of execution of the encumbered properties as per the Mortgage Bond Agreement (Bond Nos. B 084427/08 and B 46866/08).

Please further note that in terms of Section 5 of the conditions penalty interest of 3% p.a. will be calculated on the outstanding amount as from October 18, 2008.'

Queensgate Wealth failed to pay the amount claimed in the letter.

[5] The winding-up of the appellant was sought on the basis of the allegations that it was unable to pay its debts within the meaning of s 344(*f*) as read with s 345(1)(*a*) and (*c*) of the Companies Act 61 of 1973 (the Companies Act).[3] The appellant's indebtedness to Queensgate Wealth arose from a written agreement of assignment and delegation concluded on 23 September 2008 between Black River, the appellant and Queensgate Wealth (the assignment agreement). In terms of that agreement, as from the

[3]Section 345(1)(a) and (c) provides:
'(1) A company or body corporate shall be deemed to be unable to pay its debts if—
(a) a creditor, by cession or otherwise, to whom the company is indebted in a sum not less than one hundred rand then due—
(i) has served on the company, by leaving the same at its registered office, a demand requiring the company to pay the sum so due; or
(ii) in the case of any body corporate not incorporated under this Act, has served such demand by leaving it at its main office or delivering it to the secretary or some director, manager or principal officer of such body corporate or in such other manner as the Court may direct,
and the company or body corporate has for three weeks thereafter neglected to pay the sum, or to secure or compound for it to the reasonable satisfaction of the creditor; or
. . .
(c) it is proved to the satisfaction of the Court that the company is unable to pay its debts.'

effective date (which was the transfer date of the property sold by Black River to the appellant) Black River assigned and delegated to the appellant all of its obligations under, in, and to and arising from an amount of R6 480 000 owed by Black River to Queensgate Wealth in terms of a loan agreement. It is common cause that the transfer of the property from Black River to the appellant occurred on 6 January 2009 which then is the date on which the assignment agreement took effect. As, by the time of liquidation of Queensgate Wealth the debt owing to it by the appellant still remained unpaid, the liquidators' attorneys, on 26 April 2010 addressed a letter of demand in terms of s 345(1)(a) to the appellant for payment of the sum of R6 480 000. This letter was served by the sheriff at the appellant's previous registered address and at its then current registered address on 3 May 2010 and 5 May 2010, respectively.

[6] In the letter of demand the liquidators referred to the assignment agreement in terms of which the appellant assumed the obligations of Black River arising from the loan between Black River and Queensgate Wealth. The letter proceeded to state:

'3. The loan amount is now due and payable by you;

4. We therefore call on you , as assignee, to make payment of the said sum of R6, 480, 000,00 within 3 weeks (i.e. 21 calendar days) from the date of the delivery of this demand, as contemplated in terms of section 345(1)(*a*)(i) of the Companies Act. . . .'

The appellant failed to respond to the letter of demand, and neither did it discharge its indebtedness to Queensgate Wealth.

[7] The appellant opposed the winding-up application and raised a point *in limine* that the liquidators lacked locus standi to bring the liquidation proceedings because the debt on which they relied had prescribed. In this regard it was contended by the appellant that the debt became due, owing and payable on 17 October 2008 and was extinguished by prescription on 16 October 2011 (which is three years after it became due). The basis for this contention was the allegation that the amount of R6 480 000 advanced by Queensgate Wealth to Black River was part of the funds sourced by Queensgate Wealth

from AIK and the terms of its payment were governed by the AIK loan. The appellant's position was that the loan between Queensgate Wealth and Black River became due for payment on 17 October 2008 which is the date on which the AIK loan became due for payment by Queensgate Wealth. The appellant contended that the assignment agreement did not alter the terms and conditions relating to the payment of the portion of the loan (R6 480 000) which was assigned by Black River to the appellant.

[8] The liquidators denied that the debt had prescribed. They alleged that the appellant had on a number of occasions prior to the alleged date of prescription tacitly acknowledged the existence of the debt, which acknowledgement they contended, interrupted the running of the prescription as contemplated in terms of s 14(1) of the Prescription Act. In particular, they relied on the failure to challenge the letter sent in terms of s 345(1)(*a*) mentioned above as a tacit acknowledgement of liability.

[9] In dealing with the defence of prescription, the high court (Griesel J) assumed in favour of the appellant that the prescription period commenced to run more than three years before the application was launched. It found, however, that the appellant's failure to respond to the liquidators' 345(1)(*a*) letter of demand constituted a tacit acknowledgement of liability which had the effect of interrupting the running of prescription. It accordingly granted an order for the final liquidation of the appellant. The high court refused leave to appeal. The appeal is with the leave of this Court.

[10] For the reasons that will become apparent later, my approach to the matter is somewhat different from the one adopted by the court below. As I have pointed out above, the first question is whether it was established that the debt on which the liquidators' locus standi was based, had prescribed. It is a determination that must precede the question whether or not the running of the prescription had been interrupted. Depending on the outcome of the enquiry on the first question, the determination of the latter question may or may not arise at all. This is so because when a debtor raises the

defence of prescription he bears the full evidentiary burden to prove it. And that burden shifts to the creditor only if the debtor has established a prima facie case. In that event, a creditor bears the onus to allege and prove the interruption of prescription through either an express or tacit acknowledgement of liability by the debtor, in terms of s 14 of the Prescription Act.[4]

[11] The debate before us focused on whether the date of inception of the prescription period had been established. It was submitted on behalf of the appellant that the prescription began to run on 17 October 2008 which, it was contended, was the date on which the AIK loan to Queensgate Wealth became due and payable. It was argued that it is wrong to use the effective date (6 January 2009) referred to in the assignment agreement as the date on which the loan became due and payable. The argument was that the AIK loan had already become due and payable by the time the assignment agreement took effect on 6 January 2009. This was so, it was argued, because the appellant stepped into the shoes of Black River when the assignment agreement came into effect. Counsel for the appellant maintained that, in general, there was nothing improbable about the on-loan to be on the same terms as the main loan. He also rejected the suggestion that the debt became due and payable on 26 April 2010 when the s 345 statutory demand was addressed to the appellant.

[12] Section 10 of the Prescription Act provides for the extinctive prescription of a debt and the prescriptive period of 3 years is applicable to the liquidators' claim.[5] Prescription commences to run as soon as the debt is due.[6] For the purpose of the Prescription Act the debt is due when it is immediately claimable by the creditor and it is immediately payable by the debtor. In other words, the debt must be one in respect of

[4] *Benson & another v Walters & another* 1984 (1) SA 73 (A) at 86D-87A; *MacLeod v Kweyiya* 2013 (6) SA 1 SCA para 10.
[5] Section 11(d).
[6] Section 12(1) provides:
'Subject to the provisions of subsections (2), (3) and (4), prescription shall commence to run as soon as the debt is due.'

which the debtor is under obligation to pay immediately.[7] It was said in *List v Jungers* 1979 (3) SA 106 (A) at 121C-D that:

'. . . the date on which a debt arises usually coincides with the date on which it becomes due, but that that is not always the case. The difference relates to the coming into existence of the debt on the one hand and the recoverability thereof on the other hand.'

The appellant, as the party that raised prescription, bore the onus to prove that a debt, on which the liquidators' locus standi as creditors was founded, had prescribed. In other words, it had to prove when the loan between Queensgate Wealth and Black River became due for the purposes of establishing the date of inception of the period of prescription.[8]

[13] I am not satisfied that the appellant has established on a balance of probabilities that the debt on which the liquidators relied for its locus standi became prescribed. I agree with counsel for the liquidators' submission that there is no evidence for the assertion that the loan of R6 480 000 was payable on the same terms as the AIK loan. Affidavits in motion proceedings serve to define not only the issues between the parties, but also to place the essential evidence before the court. They must contain factual averments that are sufficient to support the relief sought.[9] As was held in *Swissborough Diamond Mines v Government of the Republic of South Africa & others* 1999 (2) SA 279 (T) at 324C:

'The more complex the dispute between the parties, the greater the precision that is required in the formulation of the issues.'

The terms of the oral loan agreement between Queensgate Wealth and Black River were set out by the appellant in vague terms. All that it alleged, was that the loan between Queensgate Wealth and Black River was payable on 17 October 2008 because that was the repayment date of the AIK loan, but there was no factual basis laid for that assertion. We were not told who represented the parties in concluding the loan agreement, when

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[7] *The Master v I L Back & Co Ltd & others* 1983 (1) SA 986 (A) at 1004F-H; *Umgeni Water & others v Mshengu* [2010] 2 All SA 505 (SCA) para 5.
[8] *Gericke v Sack* 1978 (1) SA 821 (A).
[9] *Die Dros (Pty) Ltd & another v Telefon Beverages CC & others* 2003 (4) SA 207 (C) para 28.

precisely it was concluded, what were the material terms and whether those terms remained the same when the assignment agreement took effect on 6 January 2009. In the absence of a properly pleaded oral loan agreement between Queensgate Wealth and Black River it is difficult to understand how the appellant reached the conclusion that the loan of R6 480 000 was payable on the same terms as the AIK loan.[10]

[14] The appellant's claim in this regard is expressed in broad and unsubstantiated terms in the answering affidavit. The court is in essence invited to independently search through the pleadings to ascertain whether there is a connection between the AIK loan and the loan agreement between Queensgate Wealth and Black River regarding the terms of their payment. The high water mark of the appellant's case is set out in para 84 of its further affidavit which reads:

'It was understood by all the aforementioned, that the terms of the loan as between AIK and Queensgate Wealth were the same as between Queensgate Wealth (which was simply the conduit) and Black River. It is however almost impossible to say that there was any particular day when Queensgate and Black River concluded such an express, alternatively tacit oral agreement relating to the loan as between Queensgate Wealth and Black River. It is therefore impossible to say, as Applicant now suggests ought to have been done, that the oral loan agreement was concluded by certain parties, at a certain place, on a certain date. I further point out however that it is also the Applicants' case, and it is therefore common cause, that such an oral loan agreement was in fact concluded.'

[15] In my view, it is not for the court in the absence of sufficient indication in the appellant's answering affidavit to accept that the payment date of the loan between Queensgate Wealth and Black River should be determined with reference to the terms and conditions of the AIK loan. I find therefore that the loan of R6 480 000 became due and payable when a demand for its payment was served on the appellant on 5 May 2010. Accordingly, when the winding-up application was launched on 14 May 2012 the debt under that loan had not become prescribed. In the light of this finding, it is unnecessary to consider whether the appellant's failure to respond to the s 345 letter of

[10] *Radebe & others v Eastern Transvaal Development Board* 1988 (2) SA 785 (A) at 793C-F.

demand constituted a tacit acknowledgement of debt and the effect thereof on the running of prescription. In the circumstances the appellant's prescription defence must fail. The court below therefore correctly granted a final liquidation order.

[16] In the result I make the following order:

The appeal is dismissed with costs including costs of two counsel.

D H Zondi
Judge of Appeal

Appearances

For the Appellant:	D W Gess
	Instructed by:
	Springer-Nel Attorneys, Cape Town
	Van der Merwe & Sorour, Bloemfontein
For the Respondents:	W R E Duminy SC (with him M D Edmunds)
	Instructed by:
	Scheibert & Associates Inc Attorneys, Cape Town
	Lovius-Block Attorneys, Bloemfontein