THE SUPREME COURT OF APPEAL OF SOUTH AFRICA
JUDGMENT

REPORTABLE
Case No: 623/12

In the matter between:

LOURENS WEPENER VAN REENEN **Appellant**

and

SANTAM LIMITED **Respondent**

Neutral citation: *Van Reenen v Santam Ltd* (623/12) [2012] ZASCA 74 (29 May 2013)

Coram: MAYA, LEACH, THERON, WILLIS JJA and MEYER AJA

Heard: 21 May 2013

Delivered: 29 May 2013

Summary: Prescription Act 68 of 1969 – when 'debt' claimed in terms of 156 of the Insolvency Act 24 of 1936 becomes due under s 12(1) and (3) of the Prescription Act – whether insurer's opposition of third party's action against liquidated insured constitutes acknowledgement of liability and interrupts running of prescription in terms of s 14(1) of the Prescription Act.

ORDER

On appeal from: North Gauteng High Court (Pretoria) (Webster J sitting as court of first instance):

The appeal is dismissed with costs.

JUDGMENT

MAYA JA (LEACH, THERON, WILLIS JJA and MEYER AJA concurring):

[1] This is an appeal against the judgment of the North Gauteng High Court, Pretoria (Webster J) which upheld the respondent's special plea of prescription and dismissed the appellant's claim with costs. The appeal is with the leave of the court below.

[2] The background facts are common cause. The appellant conducted a cattle feedlot business under the name 'Beefmaster'. On 19 May 1993, he concluded a six-month agreement with Abakor Ltd (Abakor), a merchant seller of tallow, for the purchase and supply of tallow to be used as an ingredient in cattle feed. The contract commenced on 1 April 1993. It was, subsequently, tacitly extended on various occasions until 1997 when problems concerning the quality of the tallow arose. According to the appellant, between February and August 1997, Abakor supplied him with tallow that had latent defects in the form of water and impurities which substantially impaired its utility and caused him damages in the sum of R1 917 924,71.

[3] As a result, during January 2000, the appellant brought a suit in the North Gauteng High Court against Abakor for breach of warranty and damages resulting from the latent defects in the sum of R1 970 926,60. The matter was enrolled for hearing on 25 November 2001. However, it did not proceed on that date because on 10 October 2000 Abakor was placed under provisional liquidation. It was finally wound up on 31 October 2000 and the appellant became aware of this fact by 27 November 2000. The final appointment of Abakor's liquidators was made on 16 March 2001.

[4] During the material time – February to August 1997 – Abakor and the respondent (Santam) were bound by a written contract of insurance. In terms of that agreement Santam indemnified Abakor, by means of an insurance policy issued by it, against any liability incurred against third parties for claims arising from the sale and supply of defective tallow up to the sum of R1,5 million. As at 6 August 1998, the appellant, as he acknowledged in a letter to his erstwhile attorneys, was aware of the existence and terms of this insurance policy and that it covered the claims he would later institute against Abakor.

[5] On 13 January 2004, the appellant issued summons against Santam for payment of the sum of R1,5 million for which Santam was obliged to indemnify Abakor under the insurance policy. The claim was brought on the basis that the contract of insurance obliged Santam to indemnify Abakor towards a third party as contemplated in section 156 of the Insolvency Act 24 of 1936.

[6] Santam disputed liability and raised a special plea. It pleaded that the appellant's claim had been extinguished by prescription under section 11 of the Prescription Act 68 of 1969 because his summons was issued more than three years after the debt became due. This was so, it contended, because according to section 156 of the Insolvency Act, read with sections 339 and 348 of the Companies Act 61 of 1973, the claim became due upon application for Abakor's winding-up, on 10 October 2000, alternatively on 31 October 2000 when it was made final. It was further contended that the appellant knew the debtor's identity and the facts from which the debt arose; or could have acquired such knowledge by the exercise of reasonable care by the dates of Abakor's provisional and final winding-up, alternatively 27 November 2000 when he admittedly became aware of the liquidation.

[7] In his replication, the appellant denied that his claim had prescribed. He pleaded that the debt became due no earlier than 10 April 2001 when Santam repudiated Abakor's claim for indemnification arising out of liquidators' failure to comply with certain obligations under the insurance contract. Thus, the period of prescription ran afresh from that date. An alternative allegation was that if the debt became due before the issue of summons on 13 January 2001, the running of prescription was interrupted by Santam's express or tacit admission of liability to indemnify Abakor. This admission, it was pleaded, manifested in Santam's engagement of attorneys to defend his action against Abakor to whom it paid fees and a portion of their disbursements incurred up to 9 April 2001.

[8] The parties agreed at pre-trial proceedings held in terms of Uniform rule 37 that only the issues raised in the special plea and replication would be adjudicated. No

evidence would be adduced and the matter would be decided solely on the basis of 'agreed facts' which are set out above as background facts. These were duly recorded in a pre-trial minute. It was agreed that the period of prescription applicable to the appellant's claim is three years in terms of section 11 of the Prescription Act. Santam further accepted that until its repudiation of Abakor's claim, on 10 April 2001, it had conducted itself on the basis that it would indemnify Abakor under the insurance contract.

[9] The court below dismissed the claim on the bases that the appellant's right to institute action against Santam arose when Abakor was liquidated, on 31 October 2000; that his summons was therefore late and that prescription had not been interrupted.

[10] The issue on appeal is crisp. We must decide when the appellant's claim became due to determine if it was extinguished by prescription. (The onus of proving when the debt became due rests on Santam.)[1] And if it became due before the institution of the action, on 13 January 2001, the ancillary question is whether the running of prescription was interrupted.

[11] Section 12 of the Prescription Act provides:

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

(2) …

[1] *Gericke v Sack* 1978 (1) SA 821 (A) at 828B.

(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.'

[12] The meaning of the words 'debt is due' in section 12(1), which must be given their ordinary meaning, is firmly established.[2] It is that there must be a debt immediately claimable by the creditor or, put differently, that there is a debt in respect of which the debtor is under an obligation to pay immediately.[3]

[13] As indicated above, the 'debt' in issue here arose in terms section 156 of the Insolvency Act. The section reads:

'Whenever any person (hereinafter called the insurer) is obliged to indemnify another person (hereinafter called the insured) in respect of any liability incurred by the insured towards a third party, the latter shall, on the sequestration of the estate of the insured, be entitled to recover from the insurer the amount of the insured's liability towards the third party but not exceeding the maximum amount for which the insurer has bound himself to indemnify the insured.'

[14] The gist of the contentions made on the appellant's behalf before us is that as these provisions allow the third party to exercise the insured's right to indemnity against the insurer, they effectively constitute a statutory cession of the insured's claim against the insured to the third party. Santam gave no hint that it would not indemnify Abakor until its repudiation of Abakor's claim on 10 April 2001. And by assisting Abakor's opposition to the appellant's claim, Santam was in fact

[2] *The Master v I L Back & Co Ltd and others* 1983 (1) SA 986 (A) at 1004G.
[3] *Ibid* at 1004; *Deloitte Haskins & Sells Consultants (Pty) Ltd v Bowthorpe Hellerman Deutsch (Pty) Ltd* 1991 (1) SA 525 (A) at 532G-I; *Benson and another v Walters and others* 1984 (1) SA 73 (A) at 82.

indemnifying Abakor and complying with its obligations under the insurance contract. Thus, Abakor, and in turn the appellant, would not have been entitled to sue Santam for specific performance of its contractual obligations before repudiation because there was no breach thereof until then. It is only at that stage, therefore, that the appellant's claim against Santam became due, on 10 April 2001. As summons was served less than three years after that date, the claim did not prescribe.

[15] Although the provisions of section 156 of the Insolvency Act refer to 'person', they apply to the winding-up of companies by virtue of section 339 of the Companies Act.[4] For present purposes, therefore, as envisaged by section 156, the insurer is Santam, the insured is Abakor and the third party is the appellant.

[16] The purpose and meaning of the section has been considered by our courts. In *Coetzee v Attorneys' Insurance Indemnity Fund*,[5] this court described it thus:

'In the absence of [the] section the insured's creditor, upon the former's sequestration, would have to prove a claim in his insolvent estate and be content with whatever dividend is paid to the concurrent creditors; whilst the insured's rights under the policy would vest in his trustee, who would claim from the insurer for the benefit of the general body of creditors. The effect of the section, therefore, is that the creditor is granted the considerable advantage that he does not have to share the proceeds of the policy with other creditors. To that end he is given a direct right of action against the insurer. However … the section was not designed to confer any additional favour upon

[4] The section reads: 'In the winding-up of a company unable to pay its debts the provisions of the law relating to insolvency shall, in so far as they are applicable, be applied *mutatis mutandis* in respect of any matter not specially provided for by this Act.' See *Supermarket Leaseback (Elsburg) (Pty) Ltd v Santam Insurance Ltd* 1991 (1) SA 410 (A) at 411H.

[5] *Coetzee v Attorneys' Insurance Indemnity Fund* 2003 (1) SA 1 (SCA) paras 19-20.

that creditor. He would have to prove not only his claim against the insured, but also that the insured would have succeeded against the insurer in his claim for an indemnity.'[6]

[17] What may be gleaned from these authorities and indeed the clear wording of section 156, therefore, is that its provisions create a right which does not exist before insolvency. Whilst it allows the third party to exercise the insured's rights against the insurer, it nonetheless confers upon the third party no greater rights than those enjoyed by the insured. And, importantly, the section does not transfer to, nor vest the existing rights of an insolvent in the third party.[7] In that case, the notion proposed by the appellant's counsel, that the section creates some form of statutory cession, is without merit. The section rather creates a new and distinct cause of action for the third party, on the sequestration of the insured, as a means to recover from the insurer precisely what the latter owes the insured under the insurance contract.

[18] I find no ambiguity in the words 'on the sequestration of the insured' used in section 156. Given their ordinary meaning, they must mean what they say – when the insured is wound up by an order of court. In the present matter, that occurred on 31 October 2000. That is the date on which the appellant's claim arose. All that the appellant had to do to bring himself within the purview of the section was to show (a) that Abakor had incurred a liability to him; (b) that Santam was contractually obliged to indemnify Abakor in respect of that liability; and (c) the amount which Santam

[6] See also *Unitrans Freight (Pty) Ltd v Santam Ltd* 2004 (6) SA 21 (SCA) paras 7 and 8; *Le Roux v Standard General Versekeringsmaatskappy Bpk* 2000 (4) SA 1035 (SCA) at 1046J-1047G; *Canadian Superior Oil Ltd v Concord Insurance Co Ltd (formerly INA Insurance Co Ltd* 1992 (4) SA 263 (W) at 273H-274B; *Woodley v Guardian Assurance Co of SA Ltd* 1976 (1) SA 758 (W) at 759E-H.
[7] *Gypsum Industries Ltd v Standard General Insurance Co Ltd* 1991 (1) SA 718 (W) at 722D.

would have been obliged to pay Abakor.[8] The subsequent repudiation of Abakor's claim by Santam is wholly irrelevant for purposes of the appellant's claim.

[19] As mentioned, it is not in dispute that the appellant knew (a) the identity of Abakor, its debtor, and the facts from which the debt Abakor owed him arose in January 2000; (b) that Santam was obliged to indemnify Abakor in respect of that liability in terms of the insurance policy; (c) the amount of the indemnity by August 1998; and (d) that Abakor had been finally wound up by 27 November 2000.

[20] On the appellant's own version, his cause of action against Santam had fully accrued in terms of section 12(3) of the Prescription Act by the latter date, less than four weeks after the winding-up.[9] Nothing at any time thereafter precluded him from instituting action and obtaining judgment against it. This view is, in fact, fortified by allegations made by the appellant himself in his Particulars of Claim which read:

'15.1 The … contract of insurance was one in terms whereof the defendant was obliged to indemnify Abakor Limited in respect of a liability incurred by Abakor Limited towards third party, in particular the [appellant], as contemplated in section 156 of the Insolvency Act 24 of 1936.

15.2 *In the premises the [appellant] became entitled, on liquidation of Abakor Limited, to recover from the defendant the amount of Abakor Limited's liability towards the plaintiff …*'.

Emphasis added.

Therefore, whether one counts from the date of winding-up or benevolently in favour

[8] *David Trust and others v Aegis Insurance Co Ltd and others* 2000 (3) SA 289 (SCA) para 2.
[9] *Deloitte Haskins & Sells Consultants (Pty) Ltd v Bowthorpe Hellerman Deutsch (Pty) Ltd* 1991 (1) SA 525 (A) at 532G-I.

of the appellant, from 27 November 2000, three years had elapsed when summons was issued on 13 January 2004.

[21] The appellant made an alternative contention. If we should find as we have – that his claim became due before the issue of summons – then the running of prescription was continuously interrupted by Santam's express or tacit acknowledgement of liability until it repudiated Abakor's claim. Santam's admission of its liability to indemnify Abakor and its conduct of engaging attorneys to defend its action against Abakor and paying their fees and portion of their disbursements constituted such acknowledgment of liability, so went the argument.

[22] Section 14 of the Prescription Act reads:

'(1) The running of prescription shall be interrupted by an express or tacit acknowledgement of liability by the debtor.

(2) If the running of prescription is interrupted as contemplated in subsection (1), prescription shall commence to run afresh from the date on which the interruption takes place …'

[23] These provisions envisage an acknowledgement of liability for the debt made by the debtor to the creditor or his agent.[10] The appellant did not contend that Santam made any such acknowledgement to him. He could not do so because the record, in fact, points to the contrary. As far back as March 1998, Santam made it clear to him that whilst it indemnified Abakor's claims, both it and Abakor denied any liability to him. The attorneys engaged by Santam were employed, in terms of clause 7 of the

[10] *Markham v South African Finance & Industrial Co. Ltd* 1962 (3) SA 669 (A) atb676F; *Pentz v Government of the RSA* 1983 (3) SA 584 (A) at 594A-D.

insurance policy,[11] specifically to resist his claim and safeguard its rights. I have said that section 156 does not transfer to or vest the existing rights of an insolvent estate in the third party. For that reason too, an acknowledgement of liability by the insurer to its insured does not avail the third party. There was, therefore, no interruption of prescription once it started running. The claim prescribed and the appeal must, accordingly, fail.

[24] Lastly, there is a related issue that requires comment. It is not clear from the record when the matter was heard by the court below. But in his application for leave to appeal, the appellant mentioned that a period of three and a half years had elapsed before the high court delivered its judgment. The trial judge offered no explanation for the lengthy delay in his judgment. There may well be a good reason, although I find it extremely difficult to think of one especially in a matter which turned on a narrow question of law such as this one. Suffice it to repeat the trite saying that 'justice delayed is justice denied'. Failure by judicial officers to dispose of cases speedily and efficiently cannot be countenanced as it prejudices litigants and erodes the respect and confidence of the public in the courts.

[11] The relevant part of the clause, loosely translated from Afrikaans, provides:
'(a) If any event takes place in respect of which a claim in terms of this policy was or is being instituted, the company and every person authorised by it may, without incurring any liability and without prejudice to the company's right to rely on any condition of this policy

(i) . . .
(ii) Take over and conduct in the name of the insured the defence or settlement of any claim and conduct for own benefit in the name of the insured any claim for indemnity or damages or otherwise and has full authority over the conduct of any legal proceedings and over the settlement of any claim. No admission, statement, offer, promise, payment or indemnity may be made by the insured without the written consent of the company.'

[25] The following order is made:

The appeal is dismissed with costs.

MML Maya

Judge of Appeal

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