THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Reportable

Case no: 955/2019

In the matter between:

MADIBENG LOCAL MUNICIPALITY **Appellant**

and

PUBLIC INVESTMENT CORPORATION LTD **Respondent**

Neutral citation: *Madibeng Local Municipality v Public Investment Corporation Ltd* (955/2019) [2020] ZASCA 157 (30 November 2020)

Coram: Ponnan, Saldulker and Plasket JJA and Ledwaba and Weiner AJJA

Heard: 19 November 2020

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 be 09h45 on 30 November 2020.

Summary: Claims for payments of debts – quantum admitted or deemed to be admitted on the pleadings – Prescription Act 68 of 1969 – s 11*(b)* – the Public Investment Corporation Ltd not 'the State' for purposes of the running of prescription – 15 year prescription period not applicable – s 14 – partial payments of debts and request for balance owing amounting to tacit acknowledgments of liability interrupting prescription – mora interest – running from date on which debts due.

ORDER

On appeal from: Gauteng Division of the High Court, Pretoria (Sardiwalla J sitting as court of first instance):

1 Save to the extent set out in paragraph 2, the appeal is dismissed with costs, including the costs of two counsel. The costs in relation to the preparation, perusal and copying of the record are limited to ten percent of the costs incurred in these tasks.

2 Paragraph 2 of the order of the court below is amended to read:

'The defendant is ordered to pay the plaintiff the sum of R162 639 962.00 together with interest thereon at the rate of 10% per annum with effect from 30 June 2003 in the case of certificate BR25 and with effect from 30 November 2003 in the case of certificates BR20 and BR26.'

3 The Registrar is requested to deliver a copy of this judgment to the administrator of the Madibeng Local Municipality, the MEC for Cooperative Governance and Traditional Affairs of the North West Province and the Minister of Cooperative Governance and Traditional Affairs in the national government.

JUDGMENT

Plasket JA (Ponnan and Saldulker JJA and Ledwaba and Weiner AJJA concurring)

[1] This appeal has a long and unfortunate history. This is the second foray by the appellant, the Madibeng Local Municipality (Madibeng), to this court in relation to the same proceedings, instituted against it by the Public Investment Corporation Ltd (the PIC) to recover three debts of substantial proportions. In the previous appeal, Madibeng was unsuccessful in its attack on a finding, on a separated issue, that the

debts were unenforceable for want of the consent of the Administrator of the Transvaal to the borrower, its predecessor in title, the Brits Transitional Local Council (Brits).[1] Madibeng now appeals against the order of Sardiwalla J in the Gauteng Division of the High Court, Pretoria dismissing a special plea of prescription and granting judgment in favour of the PIC in the amount of R162 639 962, plus interest. It does so with his leave.

Background[2]

[2] During the late 1980s and early 1990s, Brits raised a number of short-term loans from a variety of institutions. It planned to invest the borrowed funds in the hope that the returns would outperform the cost of the loans. The profits could then be used for future capital projects.

[3] Matters did not turn out as planned. By 1993, Brits found itself in financial trouble. Urgent remedial action was required to deal with the looming fiscal crisis as well as a breakdown in accountable administration in Brits' treasury.

[4] To address the fiscal problem, it became necessary to re-schedule a number of loans, as the loans were of a short-term nature while the underlying investments matured at later dates. Brits borrowed a large amount of money from the PIC in order to pay its existing short-term loans. On 11 January 1994, in order to repay the loans it had taken from the PIC, Brits issued to the PIC a series of zero coupon stock certificates – essentially promissory notes. It also pledged a number of insurance policies to the PIC.

[5] When Madibeng, which by now had succeeded Brits, failed to repay the loans when they fell due, the PIC first exercised its rights in terms of the pledged policies. They were insufficient to cover the full extent of Madibeng's indebtedness. The PIC then proceeded to institute proceedings against Madibeng on the strength of the zero coupon stock certificates.

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[1] See *Madibeng Local Municipality v Public Investment Corporation Ltd* [2018] ZASCA 93; 2018 (6) SA 55 (SCA). I shall refer to this judgment as *Madibeng (1)*.
[2] I have based the factual background closely on what was set out in *Madibeng (1)* paras 2-6.

[6] Three zero coupon stock certificates are in issue in this case. The first, BR 25, is in respect of a loan of R29 306 987.70. It had a face value on maturity of R93 million. The second, BR20, is in respect of a loan of R10 219 836.60. It had a face value on maturity of R37 million. The third, BR26, is in respect of a loan of R26 072 786.40. It had a face value on maturity of R87 million.

[7] Madibeng pleaded that when Bits made the loans, it required the prior authorization of the Administrator of the former province of the Transvaal, in terms of s 52 of the Local Government Ordinance 17 of 1939 of the Transvaal. It also pleaded that the PIC's claims against it had been extinguished by prescription. The first issue was separated and was decided against Madibeng. In the first appeal, this court upheld the finding of the court below. It concluded:[3]

'The point can be disposed of easily. The facts establish that the loans that Brits raised were for the purpose of paying back other loans. They are loans contemplated by s 52(1)(*a*). In terms of s 52(2), such loans do not require the prior written approval of the Administrator. There is, accordingly, no merit in the point. This means that in respect of the separated issue, Jansen J arrived at the correct conclusion.'

All that then remained for determination was the special plea that the PIC's claims against Madibeng had prescribed, the merits and the PIC's claim for mora interest.

[8] It appears from the judgment of the court below that Sardiwalla J laboured under the misapprehension that he was only required to decide the special plea. As a result, his order was restricted to a dismissal of the special plea. The PIC's attorneys wrote to him to remind him that there had been no separation of issues and that all of the outstanding issues had been dealt with in the trial. He recalled his order and replaced it with an order dismissing the special plea and declaring that the PIC had 'proved its claim of R162 639 962.00 together with interest thereon at the rate of 10% per annum with effect from 30 June 2003'. It is that order that is appealed against.

The pleadings

[9] The uniform rules provide that every pleading is required to contain 'a clear and concise statement of the material facts upon which the pleader relies for his claim,

[3] *Madibeng (1)* para 23.

defence or answer to any pleading . . . with sufficient particularity to enable the opposite party to reply thereto'.[4] They also provide that when a party denies an allegation of fact, he or she 'shall not do so evasively, but shall answer the point of substance'.[5]

[10] Rule 22 of the uniform rules deals with the plea. Rule 22(2) provides that a defendant 'shall in his plea either admit or deny or confess and avoid all the material facts alleged in the combined summons or declaration or state which of the said facts are not admitted and to what extent, and shall clearly and concisely state all material facts upon which he relies'. Eksteen JA, in *FPS Ltd v Trident Construction (Pty)* Ltd,[6] held that rule 22(2) required a defendant in his or her plea to 'give a fair and clear answer to every point of substance raised by a plaintiff in his declaration or particulars of claim, by frankly admitting or explicitly denying every material matter alleged against him'.

[11] Rule 22(3) provides that '[e]very allegation of fact in the combined summons or declaration which is not stated in the plea to be denied or to be admitted, shall be deemed to be admitted' and that any explanation or qualification of a denial that is necessary must also be stated in the plea. Davis AJA, in *Gordon v Tarnow*,[7] held that the effect of an admission, whether express or, as in that case, deemed, is that it renders it 'unnecessary for the other party to adduce evidence to prove the admitted fact, and incompetent for the party making it to adduce evidence to contradict it'.

[12] I turn now to the pleadings themselves in respect of both the debts alleged to be due and the interest that is claimed on them. Each of the claims was pleaded in precisely the same way in the particulars of claim but answered in progressively more cryptic terms in the plea. In paragraphs 4.1 and 4.2 of the amended particulars of claim, the PIC pleaded that BR25 fell due for payment on 30 June 2003 and that Madibeng failed to make full payment, but paid R10 million on 1 July 2003. The outstanding amount due was thus R83 million. These facts were expressly admitted

[4] Rule 18(4).
[5] Rule 18(5).
[6] *FPS Ltd v Trident Construction (Pty) Ltd* 1989 (3) SA 537 (A) at 542B.
[7] *Gordon v Tarnow* 1947 (3) SA 525 (A) at 531.

by Madibeng in its plea but it pleaded that the claim had been extinguished by prescription. Then, in paragraph 4.3 of the particulars of claim, the PIC pleaded that Madibeng subsequently made a number of further payments, both before and after the service of the summons. Madibeng expressly admitted the allegations made in paragraph 4.3 of the particulars of claim. It pleaded, however, that it 'was not in law obliged to make the payments due to the fact that the issuing of the zero coupon stock certificates was not authorized by law'.

[13] In paragraphs 5.1 and 5.2 of the particulars of claim, the PIC pleaded that when BR20 fell due on 30 November 2003, Madibeng failed to pay with the result that, on that day, payment to it of R37 million was due. In paragraph 5.3, the PIC pleaded that while Madibeng had not paid the debt in full, it made partial payments on a number of occasions, both before and after the service of the summons. Madibeng pleaded to paragraph 5.1 to 5.3 as follows:

'13 The defendant admits that it did not make payment to the plaintiff.

14 The defendant denies that it is indebted to the plaintiff in the amount of R37 000 000.00 referred to in paragraph 5.2.

15 Insofar as the amount of R37 000 000.00 became due on 30 November 2003, the plaintiff's claim in relation to that amount has been extinguished by prescription as stated in the special plea.'

[14] In paragraph 6.1 and 6.2 of the particulars of claim, the PIC pleaded that when BR26 fell due on 30 November 2003, Madibeng failed to pay, and that the payment of R87 million was due on that date. It pleaded in paragraph 6.3 that Madibeng made partial payments both before and after the service of the summons. Madibeng's plea was the following:

'16 The defendant admits that it did not pay the plaintiff the amount of R87 000 000.00 when it allegedly became due on 30 November 2003.

17 Insofar as the aforesaid amount became due on 30 November 2003, the plaintiff's claim in relation to that amount has been extinguished by prescription.'

[15] In paragraphs 7, 8 and 9 of the particulars of claim, the PIC quantified the three claims. This was an arithmetical exercise of deducting what had been paid from the amounts due on the face of the zero coupon bonds. As a result, it claimed

R65 086 208.30 in respect of BR25, R28 993 449.70 in respect of BR20 and R68 560 304.24 in respect of BR26. In response to paragraph 7 Madibeng denied that it was indebted to the PIC 'in the amount claimed' and it then set out in great detail its defence of lack of authority. In respect of paragraphs 8 and 9 of the particulars of claim, it simply said that the 'contents of these paragraphs are denied', but one must infer that the bald denial of liability was also premised on the alleged lack of authority.

[16] In respect of all three debts, the PIC pleaded its claims to interest in precisely the same terms. It pleaded that interest on the amount claimed in each instance 'began to run at the *mora* rate of 15.5% *per annum* from midnight' on the due date 'to and including payment thereof' but that the PIC had waived its entitlement to interest of 15.5 percent and had 'charged interest at the reduced rate of 10% *per annum*'. Madibeng never pleaded to these allegations at all.

[17] The effect of Madibeng's plea is that, in respect of BR25, BR20 and BR26, it either admitted or is deemed to have admitted that the debts were due on 30 June 2003, 30 November 2003 and 30 November 2003 respectively, as well as the amounts due on those dates, subject to the defences of lack of authority and prescription. It also admitted or is deemed to have admitted that it paid the amounts listed in the particulars of claim towards the reduction of its debts, and that it did so on the dates specified. The only basis for its denial of the quantum of the claims is the alleged lack of authority, a defence that has been found to be without merit. In respect of interest, the facts alleged by the PIC are deemed to have been admitted.

The issues

[18] Three issues arise for determination. They are whether the PIC's claims have prescribed; if not, whether it has made out a case on the merits for the amounts claimed; and whether it is entitled to interest from the date the debts were due. I shall deal with these issues in that order.

Prescription

[19] Two points were raised by the PIC to Madibeng's special plea of prescription. They are that the prescription period in this instance is 15 years and not three years,

and the second is that the running of prescription was interrupted by a number of admissions of liability by Madibeng.

[20] As a general rule, prescription begins to run when a debt is due.[8] Section 11 of the Prescription Act 68 of 1969 provides for periods of prescription in respect of different types of debts. It states:

'The periods of prescription of debts shall be the following:

(a) thirty years in respect of-

(i) any debt secured by mortgage bond;

(ii) any judgment debt;

(iii) any debt in respect of any taxation imposed or levied by or under any law;

(iv) any debt owed to the State in respect of any share of the profits, royalties or any similar consideration payable in respect of the right to mine minerals or other substances;

(b) fifteen years in respect of any debt owed to the State and arising out of an advance or loan of money or a sale or lease of land by the State to the debtor, unless a longer period applies in respect of the debt in question in terms of paragraph (a);

(c) six years in respect of a debt arising from a bill of exchange or other negotiable instrument or from a notarial contract, unless a longer period applies in respect of the debt in question in terms of paragraph (a) or (b);

(d) save where an Act of Parliament provides otherwise, three years in respect of any other debt.'

[21] The most usual way in which the running of prescription is interrupted is by the service on a debtor of a legal process, such as a summons, in which payment of the debt is claimed.[9] There are, however, other ways in which prescription may be interrupted. Section 14 of the Act provides one such way. It states:

'(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 day on which the interruption takes place or, if at the time of the interruption or at any time thereafter the parties postpone the due date of the debt from the date upon which the debt again becomes due.'

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[8] Prescription Act 68 of 1969, s 12(1).

[9] Prescription Act, s 15(1).

[22] It is common cause that the debts in this case fell due on 30 June 2003, 30 November 2003 and 30 November 2003 respectively. It is also common cause that the summons was served on Madibeng on 3 March 2010. I shall first consider whether the prescription period is, as the PIC pleaded in the alternative in its replication, 15 years, rather than three years. I shall then consider whether the running of prescription was interrupted from time to time by admissions of liability.

[23] Section 11*(b)* of the Act provides for a prescription period of 15 years in respect of any debt owed to the State and arising out of an advance or loan of money. This provision can only avail the PIC if it is 'the State' for purposes of the Act. This issue was dealt with by this court in *Holeni v Land and Agricultural Development Bank of South Africa*.[10] The Land and Agricultural Development Bank of South Africa (the bank) is an organ of state as defined in s 239 of the Constitution. It had extended two loans to Holeni, who, it claimed had fallen in arrears, thus accelerating payment of the full amounts. It issued summons for the recovery of the debts more than three years after they were due. A special plea of prescription was taken. The bank contended, however, that s 11*(b)* of the Act applied, with the result that the debts were only extinguished by prescription 15 years after they fell due. The case raised squarely the question of what was meant by the term 'the State' in s 11*(b)*.

[24] Navsa JA observed that the term 'the State' does not have one settled meaning; that its precise meaning in any given case depends on the context; and that courts 'have consistently refused to accord it any inherent characteristics and have relied, in any particular case, on practical considerations to determine its scope'.[11] He rejected the argument that, for purposes of the Act, an organ of state was 'the State'. Instead, he held:[12]

'The benefit for the State provided by s 11*(b)* came about because it was thought that the treasury should be protected. To my mind, contextually, the plain meaning of "the State" as it appears in s 11*(b)* of the Act is that of a juristic person, capable of suing in its own name for

[10] *Holeni v Land and Agricultural Development Bank of South Africa* [2009] ZASCA 9; 2009 (4) SA 437 (SCA).
[11] Para 11.
[12] Para 19.

what is due to the treasury. It is being referred to in its incarnation as government, going about government business and recovering moneys due to treasury.'
In other words, in the Act, 'the State' means 'the State as government'.[13]

[25] Navsa JA found that the Land and Agricultural Development Bank Act 15 of 2002 – the current statute regulating the functioning of an institution that is over 100 years old – made it clear that the bank was 'a separate juristic person acting in its own name and right, distinct from, although not entirely independent of, government'.[14]

[26] The PIC is an organ of state created by the Public Investment Corporation Act 23 of 2004. It is a company that is wholly owned by the government[15] and operates as a financial service provider in respect of government funds.[16] It, like the Land and Agricultural Development Bank, is distinct from the government. It was held in *The Isibaya Fund v Visser and Another*,[17] on the basis of these characteristics, that a fund established by the PIC was not 'the State' for purposes of s 11*(b)*. That same conclusion must follow in relation to the PIC itself. Section 11*(b)* of the Act does not apply to debts due to it. Instead, in terms of s 11*(d)* of the Act, the usual three-year prescription period applies. The special plea will be determined on that basis.

[27] I turn now to s 14 of the Act. The policy that underpins the rules of prescription relate to the value of certainty. If claims are not pursued with reasonable expedition, doubt as to their validity may arise, and will inevitably intensify with the passage of time. Creditors are thus afforded periods of time thought to be appropriate to the nature of different types of debts within which to pursue their claims, failing which they will lose their right to do so. But, if a debtor acknowledges liability for a debt, there is no uncertainty, and a creditor would be safe to negotiate and even give time to the debtor to pay, without, as Lord Hoffman put it in *Bradford & Bingley PLC v Rashid*,[18] 'being distracted by the sound of time's winged chariot behind him'. Furthermore, he said, it was also unconscionable for a debtor who does not dispute his or her indebtedness

[13] Para 22.
[14] Para 38.
[15] Section 3. Interestingly, the term 'the State' is defined in s 1 of the Act as 'the National Government of the Republic'.
[16] Section 4.
[17] *The Isibaya Fund v Visser and Another* [2015] ZASCA 183 paras 10-11.
[18] *Bradford & Bingley PLC v Rashid* [2006] UKHL 37.

to ask for time to pay and then use that indulgence to assert that the debt has prescribed.[19]

[28] In *Cape Town Municipality v Allie NO*[20] Marais AJ identified what he described as five self-evident aspects of s 14. He said:[21]

'Firstly, I do not think the acknowledgment of liability need amount to a fresh undertaking to discharge the debt. "I admit I owe you R100" is manifestly an acknowledgment of a liability to pay R100 but it is not a fresh or new undertaking to pay it . . .

Secondly, full weight must be given to the Legislature's use of the word "tacit" in s 14(1) of the Act. In other words, one must have regard not only to the debtor's words, but also to his conduct, in one's quest for an acknowledgment of liability. That, in turn, opens the door to various possibilities. One may have a case in which the act of the debtor which is said to be an acknowledgment of liability, is plain and unambiguous. His prior conduct would then be academic. On the other hand, one may have a case where the particular act or conduct which is said to be an acknowledgment of liability is not as plain and unambiguous. In that event, I see no reason why it should be regarded *in vacuo* and without taking into account the conduct of the debtor which preceded it. If the preceding conduct throws light upon the interpretation which should be accorded to the later act or conduct which is said to be an acknowledgment of liability, it would be wrong to insist upon the later act or conduct being viewed in isolation. In the end, of course, one must also be able to say when the acknowledgment of liability was made, for otherwise it would not be possible to say from what day prescription commenced to run afresh . . .

Thirdly, the test is objective. What did the debtor's conduct convey outwardly? I think that this must be so because the concept of a tacit acknowledgment of liability is irreconcilable with the debtor being permitted to negate or nullify the impression which his outward conduct conveyed, by claiming *ex post facto* to have had a subjective intent which is at odds with his outward conduct . . .

Fourthly, while silence or mere passivity on the part of the debtor will not ordinarily amount to an acknowledgment of liability, this will not always be so. If the circumstances create

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[19] Para 3. See too *Cape Town Municipality v Allie NO* 1981 (2) SA 1 (C) at 5G-H; *Murray and Roberts Construction (Cape) (Pty) Ltd v Upington Municipality* 1984 (1) SA 571 (A) at 578F-579B: *KLD Residential CC v Empire Earth Investments 17 (Pty) Ltd* [2017] ZASCA 98; 2017 (6) SA 55 (SCA) paras 13-17; *Investec Bank Ltd v Erf 436 Elandspoort (Pty) Ltd and Others* [2020] ZASCA 104 paras 27-28.

[20] Note 19.

[21] At 7B-8G. See too *Agnew v Union and South West Africa Insurance Company Ltd* 1977 (1) SA 617 (A) at 622H-623C; *Petzer v Radford (Pty) Ltd* 1953 (4) SA 314 (N) at 317H-318B; *Benson and Another v Walters and Others* 1984 (1) SA73 (A) at 86H-87B; *Standard Bank of South Africa Ltd v Oneanate Investments (Pty) Ltd* 1995 (4) SA 510 (C) at 556E-557D.

a duty to speak and the debtor remains silent, I think that a tacit acknowledgment of liability may rightly be said to arise . . .

Fifthly, the acknowledgement must not be of a liability which existed in the past, but of a liability which still subsists.'

This statement of the meaning and import of s 14 was cited with approval by this court fairly recently in *Investec Bank Ltd v Erf 436 Elandspoort (Pty) Ltd and Others*.[22]

[29] It is clear from the evidence of Mr Leonardo Smith, who holds the position of general manager of fixed income at the PIC, as well as from the documents that form part of the record, that Madibeng's liability has never been denied, but, on the contrary, has been openly and repeatedly acknowledged not only to the PIC but to other relevant government bodies. As early as 15 May 2003, even before the first debt was due, Madibeng expressly admitted owing the money when the municipal manager wrote to the PIC to request an extension of time for the repayments. He said that Madibeng was unable to pay but was seeking the assistance of the national and provincial government to meet its obligations. He concluded the letter by saying that 'you must please not see our request as a ploy to shirk Madibeng's liability, but rather as a serious action to find a solution for the whole matter'. What is more, in addition to Madibeng having made five payments in respect of BR25 between when it fell due and the issue of the summons, it also made three payments *after* the summons had been served on it. It did the same in relation to BR20 and BR26.

[30] This attitude, both before the debts were due and after the summons had been served, is consistent with Smith's evidence that, on an annual basis, Madibeng approached the PIC for a balance on each loan so that it could reflect them as liabilities in its annual financial statements. He referred to various other documents in which Madibeng acknowledged its liability and he concluded that 'I do not recall one that disputes it'. What is more, counsel for Madibeng could not point us to any such document. I shall return to the requests for balances below, but first it is necessary to say something of the partial payments of the debts that are alleged in the particulars of claim and either admitted or deemed to be admitted by Madibeng in its plea.

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[22] Note 19.

[31] Smith confirmed, first in respect of BR25, that the payments of those amounts indeed represented partial payments of the debt. The first payment, of R10 million, was made on 1 July 2003 from the proceeds of the ceded policies that liquidated other debts in full. With reference to all three debts, he said that when Madibeng made one globular payment to the PIC, it allocated that payment pro rata 'to the three outstanding loans'. (That appears to have been the case in respect of payments made on 1 August 2007 and 30 November 2008.)

[32] BR25 was the first debt to fall due – on 30 June 2003. That was about six weeks after the municipal manager's assurance that Madibeng would not try to avoid its obligations to pay. On the following day, an amount of R10 million was paid. Thereafter, amounts were paid on 30 June 2006, 2 April 2007, 1 August 2007, 30 November 2007 and 22 February 2008.

[33] BR20 fell due on 30 November 2003. Madibeng made payments towards the reduction of this debt on 28 September 2006, 1 August 2007 and 30 November 2007. BR26 also fell due on 30 November 2003. The first payment thereafter towards the reduction of this debt was made on 29 December 2006. That was followed by payments on 1 August 2007, 30 November 2007 and 22 February 2008.

[34] I turn now to the requests for balances. The first is dated 17 August 2004, an earlier request of 25 June 2004 having, apparently, gone unanswered. Madibeng requested the PIC to 'PLEASE SUPPLY MY COUNCIL WITH BALANCE CERTIFICATES FOR THE FOLLOWING LOANS AND INVESTMENTS' as at 30 June 2004. The loans listed were loan numbers 20, 25 and 26 and the letter said that the information was required for the compilation of Madibeng's financial statements for the 2003/2004 financial year. A few days later, the PIC gave the requested information in respect of BR20, BR25 and BR26. A similar process occurred in following years – on 20 June 2005 and 29 June 2006, for instance – where requests in identical terms to that of 2004 were made to the PIC. For present purposes, it is unnecessary to consider any more requests for balances. Suffice it to say, that there are indications in the documents that every year, Madibeng reflected the loans as liabilities in favour of the PIC in its annual financial statements.

[35] Regard must be had to the context within which the payments listed above were made. That context includes the statement by Madibeng's municipal manager shortly before the debts fell due that Madibeng acknowledged its liability and would not shirk from its obligations, and that it was experiencing difficulties in paying the debts in full. It also includes the fact that Madibeng has never disputed that it owed the PIC in respect of the loans and that the payments it made were made over a number of years both before and after the service of summons. Viewed within that context, the payments made prior to the service of summons amount to a series of unequivocal tacit acknowledgements of liability by Madibeng to the PIC. Those payments had the effect of interrupting the running of prescription. The annual requests for balances were also unequivocal tacit acknowledgements of liability and similarly had the effect of interrupting the running of prescription.

[36] In respect of BR25 and BR20, the first payment was made within three years of the debt falling due and the payments that followed were within three years of the preceding payments. The last payment before the service of the summons was effected within three years of that event. In other words, the payments on their own had the effect of successfully interrupting the running of prescription in respect of BR25 and BR20.

[37] In the case of BR26, however, the first payment, after the debt fell due on 30 November 2003, was effected on 29 December 2006, more than three years after the former date. On 17 August 2004, however, Madibeng acknowledged liability when it requested a balance in respect of, inter alia, BR26. That had the effect of interrupting the running of prescription on that day. The first payment was made within three years of 17 August 2004. Thereafter, every other payment was effected within a three year period of the preceding payment and the summons was served within three years of the last payment, made on 22 February 2008.

[38] The effect is that the special plea of prescription was correctly dismissed by the court below. I turn now to whether the PIC has established its claims.

The merits

[39] The pleadings are sufficient for the determination of the merits. Once the two technical defences failed, there simply was no defence on the merits of the claims. The allegations of the PIC were either admitted or deemed to have been admitted with the result that it was unnecessary for the PIC to adduce evidence to prove facts that were not in dispute.[23]

[40] The plea to the first claim, BR25, is a good illustration, it being the claim to which the fullest plea was made. In the particulars of claim, the PIC alleged that Madibeng had failed to pay the debt when it fell due, save for one payment of R10 million on 1 July 2003, and that as a result R83 million was due. Secondly, it alleged that eight further payments were made by Madibeng, reducing the amount due still further. Madibeng, in its plea, admitted that R83 million was due but pleaded that claim had been extinguished by prescription. It admitted the eight payments but pleaded that it was 'not in law obliged to make the payments due to the fact that the issuing of the zero coupon stock certificates was not authorised by law'. There was thus no dispute, once the authority and the prescription points failed, that the amounts claimed were due and payable by Madibeng. Those amounts were quantified in paragraphs 7, 8 and 9 of the particulars of claim and the only basis for Madibeng's denial of liability to pay the amounts set out in those paragraphs was the defence of lack of authority.

[41] In the result, the court below correctly found in favour of the PIC on the merits of its claims. It did not, however, formulate its order correctly. As these were claims sounding in money and, as I have shown, no defence to them has been established by Madibeng, the court ought to have ordered Madibeng to pay the PIC the amount claimed. This aspect of its order will be corrected below. I turn now to the question of interest.

Interest

[42] In its particulars of claim, the PIC claimed mora interest from the date the debts were due. The court below ordered Madibeng to pay interest on all three debts from 30 June 2003 to the date of payment. This order is incorrect because while BR25 fell

[23] *Gordon v Tarnow* (note 7) at 531.

due on that date, BR20 and BR26 only fell due on 30 November 2003. If we accept the PIC's entitlement to mora interest, we shall have to interfere with the order of the court below to a limited extent.

[43] The PIC's entitlement to mora interest has been assailed by Madibeng, despite it not having pleaded at all to those paragraphs of the particulars of claim dealing with interest. That interest was claimed at a rate of 10 percent per annum, it having been decided by the PIC to waive its rights to higher rates of interest as a gesture of goodwill.

[44] Mora interest is 'a species of damages'[24] which does not have to be proved in the usual way, it being presumed that 'a party who has been deprived of the use of his capital for a period of time has suffered loss'.[25] The liability to pay mora interest was described by Fagan JA in *Union Government v Jackson and Others*[26] as a 'consequential or ancillary obligation' that attaches automatically to the principal obligation to pay by operation of law. In these circumstances, he continued, the court 'does not weigh the pros and cons in order to exercise an equitable judgment as to whether, and to what extent, the interest bearing potentialities of money are to be taken into account in computing its award'; instead, the 'only issue is whether the legal liability exists or not' and 'if it does, the rest is merely a matter of mathematical calculation: the legal rate of interest on a definite sum from a definite date until date of payment'.

[45] A debtor's obligation to pay mora interest arises either when a time for the performance of a monetary obligation has been stipulated in a contract and has passed, or, where no time for performance has been stipulated, when a demand for payment has been made and has not been met. As Ponnan JA explained in *Crookes Brothers Limited v Regional Land Claims Commission for the Province of Mpumalanga and Others*,[27] in such circumstances, a creditor 'is entitled to be compensated by an award of interest for the loss or damage that he has suffered as a result of not having

[24] *Davehill (Pty) Ltd and Others v Community Development Board* 1988 (1) SA 290 (A) at 298I.
[25] *Thoroughbred Breeders' Association v Price Waterhouse* 2001 (4) SA 551 (A) para 85.
[26] *Union Government v Jackson and Others* 1956 (2) SA 398 (A) at 411G-H.
[27] *Crookes Brothers Limited v Regional Land Claims Commission for the Province of Mpumalanga and Others* [2012] ZASCA 128; 2013 (2) SA 259 (SCA) para 14.

received his money on due date'. The rationale for mora interest was explained more fully by this court in *Bellairs v Hodnett and Another*[28] as follows:

'It may be accepted that the award of interest to a creditor, where his debtor is in *mora* in regard to the payment of a monetary obligation under a contract, is, in the absence of a contractual obligation to pay interest, based upon the principle that the creditor is entitled to be compensated for the loss or damage that he has suffered as a result of not receiving his money on due date (*Becker v Stusser*, 1910 CPD 289 at p. 294). This loss is assessed on the basis of allowing interest on the capital sum owing over the period of *mora* (see *Koch v Panovka*, 1933 NPD 776). Admittedly, it is pointed out by Steyn, *Mora Debitoris*, p. 86, that there were differences of opinion among the writers on Roman-Dutch law on the question as to whether *mora* interest was lucrative, punitive or compensatory; and that, since interest is payable without the creditor having to prove that he has suffered loss and even where the debtor can show that the creditor would not have used the capital sum owing, this question has not lost its significance. Nevertheless, as emphasized by CENTLIVRES, C.J., in *Linton v Corser*, 1952 (3) SA 685 (AD) at p. 695, interest is today the "lifeblood of finance" and under modern conditions a debtor who is tardy in the due payment of a monetary obligation will almost invariably deprive his creditor of the productive use of the money and thereby cause him loss. It is for this loss that the award of *mora* interest seeks to compensate the creditor.'

[46] In this matter, BR25, BR20 and BR26 stipulated a due date for payment by Madibeng – 30 June 2003 in the case of the former and 30 November 2003 in the case of the last two. A right to be paid mora interest arose by operation of law on those dates when Madibeng failed to pay, and continues to run until payment in full is made. The rate of interest is 10 percent per annum, rather than the higher rates of interest that were waived by the PIC as a gesture of goodwill. This being so, it is necessary to amend the order of the court below to reflect the correct commencement dates for the running of mora interest in respect of BR20 and BR26.

The conduct of the parties

[47] It is necessary to say something of the conduct of Madibeng in this entire matter and of the legal representatives of both Madibeng and the PIC in relation to the record.

[28] *Bellairs v Hodnett and Another* 1978 (1) SA 1109 (A) at 1145D-G.

Madibeng

[48] In *Madibeng (1)*, I had occasion to criticize Madibeng's conduct of the matter. I said:

'[29] In turning to consider the propriety of Jansen J's costs order it is, unfortunately, necessary to say something about the way in which Madibeng conducted its case. It took the money on offer from the PIC in order to avert a crisis of Madibeng's own making. It agreed to a means of repayment. When its debts fell due, it made certain payments. Then, after it had reneged and summons was issued against it, it raised the unenforceability of the loans as a defence.

[30] The conduct of Madibeng was beyond the pale. As an organ of state, it is required to act ethically, and has failed dismally to do so in this matter. Litigation, said Harms DP in *Cadac (Pty) Ltd v Weber-Stephen Products Co & others*, "is not a game"; organs of state should act as role models of propriety; and they may not behave in an unconscionable manner.'

[49] My admonition, which was rather gentle given Madibeng's unconscionable conduct, appears to have fallen on deaf ears. Despite the PIC's best efforts to warn Madibeng that it remained beyond the pale in defending the claims against it in the trial, and, later, that its appeal was once again frivolous, it has persisted. It would have been plain that the prescription point had absolutely no prospect of succeeding in the light of the payments that Madibeng admitted having made and the other admissions of liability, spread over a number of years. With the exception of BR26, which required one piece of evidence in addition to the admitted payments, the prescription point was dead in the water on the pleadings alone.

[50] When that is seen in the context I outlined above, particularly the statement of the municipal manager that Madibeng acknowledged that it owed the money and would not avoid its obligations to pay what it owed, Madibeng's defence in the trial and its subsequent appeal are inexplicable and all the more reprehensible. It conducted both proceedings in the knowledge that it had no defence on the merits and that its remaining technical defence could not succeed.

[51] Madibeng, an organ of local government, has reached that extreme point of disfunction that has brought about the intervention of the provincial government in placing it under administration. Yet it has spent what must be large amounts of public

funds to pursue an ethically bankrupt and unwinnable case. Counsel for Madibeng was unable to point to any document in which Madibeng disputed that it owed the money or, indeed, that it disputed the amount that it owed. But before the court below, its counsel cross-examined the PIC's witness at length about a supposed defence that was never pleaded, and closed its case without calling a single witness. I venture to suggest that it probably was unable to find anyone who was prepared to say on oath that Madibeng did not owe the money or disputed the amounts claimed.

[52] I would have been minded to order Madibeng to once again pay costs on an attorney and client scale, in respect of this appeal, which I consider to have been a frivolous appeal. The only reason I have not done so is because the PIC has not asked for such an order. I intend to request the Registrar to deliver a copy of this judgment to the administrator of Madibeng, the MEC for Traditional Affairs and Local Government in the North West Province and the Minister of Cooperative Governance and Traditional Affairs in the national government.

The record

[53] The record in this appeal comprises nine volumes that run to 1 371 pages. Most of the record was irrelevant for the determination of the appeal.

[54] Rule 8(8)*(a)* of this court's rules provides that whenever an appeal 'is likely to hinge exclusively on a specific issue or issues of law and/or fact the appellant shall, within 10 days of the noting of the appeal, request the respondent's counsel to submit such issue or issues to the Court, failing which the respondent shall within 10 days thereafter make a similar request to the appellant'. The parties are, in terms of rule 8(8)*(b)*, required to agree on this issue or furnish their reasons for not doing so. If an agreement is reached, rule 8(8)*(e)* provides that 'only those parts of the record of the proceedings in the court a quo as may be agreed upon shall be contained in the record lodged with the registrar'.

[55] The issues for determination in this appeal were limited and narrow. They could, to a large extent, be determined with reference to the pleadings alone. In these circumstances, the parties should have agreed to a truncated record. Instead of doing so, and thus limiting the record to what was relevant, a long record containing many

irrelevant documents was placed before us. The parties simply agreed, without, it would appear, proper consideration, that the seven volumes that comprised the record before us in *Madibeng (1)*, plus a further two volumes generated subsequently, would be the record before us this time. I can see no reason why the successful party should be allowed the costs of the full record. In my view, about 90 percent of what was placed before us was not necessary or relevant. I shall make an order to that effect below.

The order

[56] I make the following order:

1 Save to the extent set out in paragraph 2, the appeal is dismissed with costs, including the costs of two counsel. The costs in relation to the preparation, perusal and copying of the record are limited to ten percent of the costs incurred in these tasks.

2 Paragraph 2 of the order of the court below is amended to read:

'The defendant is ordered to pay the plaintiff the sum of R162 639 962.00 together with interest thereon at the rate of 10% per annum with effect from 30 June 2003 in the case of certificate BR25 and with effect from 30 November 2003 in the case of certificates BR20 and BR26.'

3 The Registrar is requested to deliver a copy of this judgment to the administrator of the Madibeng Local Municipality, the MEC for Cooperative Governance and Traditional Affairs of the North West Province and the Minister of Cooperative Governance and Traditional Affairs in the national government.

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C Plasket

Judge of Appeal

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