THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Reportable

Case no: 1029/2016

In the matter between:

INVESTEC BANK LIMITED **APPELLANT**

and

ERF 436 ELANDSPOORT (PTY) LIMITED & OTHERS **RESPONDENT**

Neutral citation: *Investec Bank Ltd v Erf 436 Elandspoort (Pty) Ltd* (1029/2016) [2017] ZASCA 128 (29 September 2017)

Coram: Cachalia, Majiedt and Petse JJA and Mokgohloa and Gorven AJJA

Heard: 5 September 2017

Delivered: 29 September 2017

Summary: Practice: Civil Procedure: extinctive prescription: claim by bank for payment of a debt arising from loan agreement: mortgage bond registered over a notarial lease: lease cancelled and thus security falling away: debt no longer secured: period of prescription running from date when amount payable under the loan became due as envisaged in s 12(1) of the Prescription Act 68 of 1969.

ORDER

On appeal from: Gauteng Division of the High Court, Pretoria (Molopa-Sethosa J sitting as court of first instance):
The appeal is dismissed with costs.

JUDGMENT

Petse JA (Cachalia and Majiedt JJA and Mokgohloa and Gorven AJJA concurring):

[1] This is an appeal against a judgment of the Gauteng Division of the High Court, Pretoria (Molopa-Sethosa J) which upheld the special plea of prescription raised by the respondents against the appellant's claim. I shall, for convenience, hereinafter refer to the court a quo as the High Court.

[2] The essential facts, which are common cause may be summarised as follows: the appellant, Investec Bank Limited, which is a commercial bank and company with limited liability, instituted an action against six defendants for payment of the sum of R3 979 184.50, together with interest and costs. These were Erf 436 Elandspoort (Pty) Ltd as first defendant; Cecilia Joubert NO; Erf 1081 Arcadia (Pty) Ltd; V & J Properties (Pty) Ltd; Remaining Ext 764 Brooklyn (Pty) Ltd and Erf 22 Hillcrest (Pty) Ltd as second, third, fourth, fifth and sixth defendants respectively.

[3] The first respondent, to which the appellant had lent money, was sued as principal debtor whilst the remaining defendants were sued in their capacities as sureties. The action was subsequently withdrawn against the fourth defendant before the commencement of the trial.

[4] As security for the loan, the first respondent registered a notarial covering mortgage bond in favour of the appellant over a notarial agreement of lease that it had earlier concluded with a third party, South African Railway Commuter Corporation Limited (SARCC). During January 2002, SARCC cancelled the lease agreement. The cancellation was confirmed by court order in August 2002.

[5] On 10 September 2002, pursuant to the cancellation of the lease, the appellant addressed a letter to the first respondent, through its attorneys, in terms of which it advised the latter that it had committed a breach of the loan agreement. Consequently, the letter demanded payment of the outstanding balance of R5 633 177.42. In particular, the letter also contained an intimation that failure to pay the aforesaid amount within seven days would result in action being instituted against the first defendant. As already indicated, on 18 January 2011 – after a period of some eight years – the appellant instituted action against the respondents claiming payment of R3 979 184.50, the amount then owing.

[6] The respondents defended the action, advancing various defences to the claim. They also raised a special plea of prescription against the claim asserting that the claim had prescribed by 18 September 2002 at the latest as a result of the amount stipulated in the appellant's demand not having been paid. The appellant, in turn, delivered a replication in terms of which it alleged that the claim had not prescribed as it was secured by a mortgage bond as contemplated in s 11*(a)* of the Prescription Act 68 of 1969 (the Prescription Act). In the alternative, it pleaded that the running of prescription was interrupted between the period 7 May 2003 and 21 May 2007.

[7] At the trial, and despite resistance by the appellant, the High Court directed that the trial be limited to the respondents' special plea of prescription only. And more particularly, to the question whether the period of prescription of the debt in issue was 30 years or three years as provided in s 11*(a)* or s 11*(d)* of the Prescription Act respectively. Accordingly, it ordered a separation of the issues in terms of Uniform Rule 33(4).[1] After hearing argument, the High Court upheld the special plea with costs. It subsequently granted the appellant leave to appeal to this Court.

[8] The crisp issue is whether, in these circumstances, the 30 year prescription period provided for in s 11(a)*(i)* of the Prescription Act in respect of any debt secured by mortgage bond is applicable to the debt. If not, the debt would have become prescribed 3 years after the due date for payment (unless the running of prescription was interrupted in terms of s 14(1)) in terms of s 11*(d)*.

[9] Thus the only issue debated at the hearing of this appeal was prescription. Consequently, an analysis of the relevant statutory framework is now apposite. Section 10(1) of the Prescription Act reads:

'10(1) . . . a debt shall be extinguished by prescription after the lapse of the period which in terms of the relevant law applies in respect of prescription of such debt.'

Section 11, in turn provides for periods of prescription of debts which, in material terms, reads:

'11 The period of prescription of debts shall be the following:

(a) thirty years in respect of –

(i) any debt secured by mortgage bond;

(b) . . .

[1] In terms of rule 33(1) of the Uniform Rules of Court, parties to a dispute may agree upon a written statement of facts in the form of a special case for the adjudication of points of law. This statement sets out the facts agreed upon and the questions of law in dispute between the parties, as well as their contentions. Rule 33(3) gives the court the discretion to draw any inference of fact or law from the facts and documents as if proved at trial. See in this regard: *Mighty Solutions t/a Orlando Service Station v Engen Petroleum Ltd & another* [2015] ZACC 34; 2016 (1) SA 621 (CC) para 61, and *Bane & others v D'Ambrosi* [2009] ZASCA 98; 2010 (2) SA 539 (SCA) para 7 where this court said that rule 33(1) and (2) made it clear that the resolution of a stated case proceeds on the basis of a statement of agreed facts, and is, after all, seen as a means of disposing of a case without the necessity of leading evidence.

(c) . . .

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

[10] Section 12(1) provides:

'. . . prescription shall commence to run as soon as the debt is due.'

As already mentioned, it is common cause that the debt in issue in this appeal fell due on 18 September 2002.[2] What is contested is whether the relevant period is 30 years (s 11(a)*(i)* of the Prescription Act) or three years (s 11(a)*(d)* of the Prescription Act). If the period is 30 years, prescription will not avail the respondents, but it will if the period is three years. One of the philosophical justifications for prescription is that 'society is intolerant of stale claims. The consequence is that a creditor is required to be vigilant in enforcing his rights. If he fails to enforce them timeously, he may not enforce them at all.'[3] This consideration assumes significance in this case where the appellant waited for over eight years before it enforced its right against the respondents.

[11] The resolution of the dispute between the protagonists in this appeal lies in the proper interpretation of the relevant provisions of the Act set out above (paras 9-10) in accordance with the well-established canons of construction of documents. This exercise entails that the following must be considered, namely: the language used; the context in which the relevant provisions appear; the apparent purpose to which it is directed; and the material known to those responsible for the production of the document under consideration.[4]

[12] Whilst accepting that the debt in issue became due on 18 September 2002, counsel for the appellant nevertheless contended that the debt had not become prescribed by the time the appellant's summons was served on the respondents on

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[2] See *List v Jungers* 1979 (3) SA 106 (A) at 121C-D where this Court held that there is a difference between when a debt comes into existence on the one hand and when it becomes recoverable on the other hand, although these dates may coincide.

[3] *Cape Town Municipality v Allie NO* 1981 (2) SA 1 (CPD) at 5G-H; *Murray & Roberts Construction (Cape) (Pty) Ltd v Upington Municipality* 1984 (1) SA 571 (A) at 578F-H.

[4] See: *Natal Joint Municipal Pension Fund v Endumeni Municipality* 2012 (4) SA 593 (SCA) para 18.

21 January 2011 (some eight years after due date). This was so, so went the argument, because the debt was secured by a mortgage bond in which event the period of prescription was 30 years in terms of s 11*(a)(i)* of the Prescription Act. It was further argued that the fact that the notarial lease which served as the appellant's real right under the mortgage bond was cancelled did not matter. Counsel placed heavy reliance on *Oliff v Minnie* 1953 (1) SA 1 (A) in support of his contentions. I shall return to *Oliff* later. Suffice to state at this stage that the facts in *Oliff* are distinguishable from the facts of this case. *Oliff* was concerned with the provisions of a statute that were materially different from those under consideration in this appeal.

[13] In support of the special plea of prescription, counsel for the respondents argued that the question whether the debt in issue was secured by mortgage bond must be determined in relation to the time of the service of the summons enforcing the claim. Consequently, as the cancellation of the lease agreement had the effect of extinguishing the first respondent's rights under the lease and terminating the appellant's real right under the mortgage bond, the object of the mortgage bond, ie the first respondent's rights deriving from the lease agreement, ceased to exist with effect from 21 August 2002 at the latest. Thus, when prescription commenced to run from the due date (ie 18 September 2002) the appellant's debt was not secured by mortgage bond and s 11*(d)* of the Prescription Act meant that the debt became prescribed after a period of three years reckoned from 18 September 2002.

[14] I return to *Oliff* whose facts are conveniently set out in the headnote of the judgment as follows. In 1930 the respondent had passed a second mortgage bond in favour of the appellant as security of a debt payable on 1 September 1931. During December 1933 the holder of the first mortgage bond caused the mortgaged property to be sold in execution. The sale did not realise enough to reduce the indebtedness on the second bond. The property was transferred to the purchaser and without the encumbrances of the bonds. On 12 February 1931, the appellant gave the respondent notice to pay the amount due under the bond within three months and upon liability being repudiated issued provisional sentence summons on 20 September 1951 based

on the bond. The court of first instance refused provisional sentence holding that when the mortgaged property was transferred free of the bonds the appellant's mortgage bond lost its security so that the shorter period of prescription of eight years applied and not 30 years as would have been the case if its security was still in place. On appeal this Court, accepting that the running of prescribed commenced only from the date when the appellant's right of action accrued, ie 1 September 1931, held that the mortgage bond did not cease to be such simply because it had become valueless as security. Provisional sentence was consequently granted. It must be emphasised that in *Oliff* the plaintiff sued for provisional sentence, solely relying on the mortgage bond passed by the mortgagor, ie the defendant in that case. In addition, the statutory provision under consideration in *Oliff* was materially different from that with which this case is concerned.

[15] The decision in *Oliff* has been commented upon by some academic writers. The learned authors of *The Law of Property*,[5] inter alia, point out that a mortgage bond will be extinguished by the mortgagee releasing the property which is the subject of his or her mortgage bond. And when this happens the security is released but the principal obligation remains. They go on to say that as the debt in *Oliff* was no longer secured by a mortgage bond, prima facie, *Oliff* is no longer authority for the interpretation of the [current] Prescription Act, unless a court is prepared to hold that s 11*(a)(i)* [of the Prescription Act] 'means any debt which was initially secured by a mortgage bond and justify such construction by reference to the ratio *decidendi* in *Oliff* '.[6]

[16] Professor Loubser[7] supports the views expressed in *Silberberg and Schoeman's The Law of Property* referred to in the preceding paragraph and in turn explains the position as follows:

'Where the bond is cancelled before payment or performance of the debt, the thirty-year prescription period will no longer be applicable and if more than the otherwise applicable shorter

[5] Badenhorst Pienaar Mostert Sibberberg and Schoeman's *The Law of Property*, 5ed (2006) at 378, para 16.4.9(c).
[6] Idem at page 379 para 16.4.9(f).
[7] M M Loubser: Extinctive Prescription (1996) at 38.

prescription period has elapsed since the due date of the debt, the debt will become prescribed upon cancellation of the bond when the operation of the thirty year period falls away.'

[17] Similarly, Saner in *Prescription in South African Law* says the following (at 3-35):
'In a situation where a mortgage bond is cancelled before payment or performance of the debt in question and the debt would, but for the registration of the mortgage bond, have prescribed in the meanwhile, the debt will immediately become prescribed upon cancellation of the bond due to the falling away of the 30 year period.'
The weight of academic authority therefore supports the view that once the security ceases to exist, the debt is no longer secured and the prescription period then becomes 3 years as it is with any other debt (s 11*(d)*).

[18] In this case counsel for the appellant accepted that the appellant's action was based, not on the mortgage bond as in *Oliff* but squarely on the loan agreement. As already mentioned, he also accepted that prescription commenced to run from 18 September 2002, this being the due date of the debt. In *Deloitte Haskins & Sells Consultants (Pty) Ltd v Bowthorpe Hellerman Deutsch (Pty) Ltd* [1990] ZASCA 136; 1991 (1) SA 525 (A) this Court said the following in relation to when prescription commences to run as intended in s 12(1) of the Prescription Act (at 532G-H):
'. . . This means that there has to be a debt immediately claimable by the creditor or, stated in another way, that there has to be a debt in respect of which the debtor is under the obligation to perform immediately.' [Citations omitted]

[19] Apparently emboldened by the rider to what the learned authors of *Silberberg and Schoeman's The Law of Property* say (in para 16.4.9(f) at 379 referred to in para 15 above), counsel for the appellant contended that the phrase 'any debt secured by mortgage bond' in s 11(a)*(i)* can be interpreted to mean 'any debt that was *at any time*' secured by mortgage bond. (My emphasis.) And that if this were done the period of prescription would be 30 years, meaning that the claim had not prescribed. In my view this argument is untenable. The language of s 11*(a)(i)* of the Prescription Act is clear. And it is hardly the sort of language that the legislature would have used if the intention was that the loss of the security or the cancellation of the mortgage bond would have no

effect on the period of prescription. In my view this interpretation accords with the tenets of purposive and contextualised statutory interpretation and does not result in an absurdity.[8]

[20] It was not the appellant's pleaded case, nor was any evidence adduced to establish such a case – given the approach adopted in the High Court – that there is a lacuna in s 11*(a)(i)* of the Prescription Act rendering it necessary to read in the words 'that was *at any time*' to cure such lacuna.[9] Consequently, if this Court were disposed to uphold the appellant's counsel's argument it would thereby 'cross the divide between interpretation and legislation'.[10] Counsel for the appellant was understandably constrained to concede as much.

[21] As already alluded to in para 8 above, the only issue adjudicated upon by the High Court was whether the period of prescription of the debt sought to be enforced by the appellant was 30 years or three years. The High Court held that the relevant period of prescription was three years. Since this was the only issue argued in this Court, and has been determined against the appellant, it follows that the appeal must fail.

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

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X M Petse
Judge of Appeal

[8] *Jaga v Dönges NO & another*; *Bhana v Dönges NO & another* 1950 (4) SA 653 (A) at 664E-H; *Dadoo Ltd & others v Krugersdorp Municipal Council* 1920 AD 530 at 543; *Dengetenge Holdings (Pty) Ltd v Southern Sphere Mining and Development Company Ltd & others* (CCT 39/2013) [2013] ZACC 48; 2014 (5) SA 138 (CC).
[9] *Phillips & others v National Director of Public Prosecutions* [2005] ZACC 15; 2006 (1) SA 505 (CC) paras 36-38.
[10] *Endumeni* footnote 4 above, para 18.

APPEARANCES:

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