THE SUPREME COURT OF APPEAL OF SOUTH AFRICA
JUDGMENT

Reportable

Case No: 445/2018

In the matter between:

ANTOINETTE BOTHA **APPELLANT**

and

STANDARD BANK OF SOUTH AFRICA LTD **RESPONDENT**

Neutral citation: *Botha v Standard Bank of South Africa Ltd* (445/2018) [2019] ZASCA 108 (6 September 2019)

Coram: Cachalia, Saldulker, Plasket and Dlodlo JJA and Weiner AJA

Heard: 20 August 2019

Delivered: 6 September 2019

Summary: Prescription – cancellation of mortgage bond after mortgage debt is due and prescription has begun to run – whether cancellation changes prescription period of debt from 30 years to three years.

ORDER

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

The appeal is dismissed with costs including the costs occasioned by the employment of two counsel.

JUDGMENT

Cachalia JA (Saldulker, Plasket and Dlodlo JJA and Weiner AJA concurring)

Introduction

[1] The legal question raised in this appeal is whether the cancellation of a mortgage bond after a mortgage debt is due and prescription has begun to run against it has the effect of changing the prescription period of the debt from 30 years to three years. The Gauteng Division of the High Court (Tuchten J) held that the cancellation of the bond had no bearing on the prescription period. The consequence of this finding is that the appellant, Ms Antoinette Botha, was ordered to pay the respondent, Standard Bank of South Africa Ltd, an amount of R1 265 871 plus interest. The claim against her as surety was for the shortfall of a debt secured by mortgage bonds over her husband's immoveable property. His estate was subsequently sequestrated, the bonds cancelled and the property sold to a third party.

[2] When the bank sought to recover this shortfall from her, she attempted to avoid liability on the ground that the principal debt had become prescribed after three years

in accordance with s 11*(d)* of the Prescription Act 68 of 1969 (the Act).[1] She contended that once the bonds were cancelled the debt was no longer secured by a mortgage bond, and the bank could therefore not rely on the 30-year period of prescription applicable to such debts in terms of s 11*(a)*(i) of the Act. The bank, on the other hand, maintained that the cancellation of the bonds did not change the character of the debt, since it remained a debt secured by a mortgage bond as contemplated in s 11*(a)*(i). The court a quo upheld the bank's contention, but granted the appellant leave to appeal to this court. There is a further issue concerning the interruption of prescription, which was also decided in the bank's favour. In this appeal, the parties maintain their respective stances.

Facts

[3] It will be helpful to set out the facts in more detail so that the issues in this appeal are better understood. The appellant's husband, Mr Christoffel Theunis Botha, to whom I shall refer as the principal debtor, concluded a home loan agreement with the bank on 20 November 2008. Clause 14.1 contained one of several suspensive conditions for the use of the loan. It required him to register a mortgage bond over the property for an amount of R450 000 in the bank's favour and also to obtain a suretyship from the appellant. Clause 18 contained two 'special conditions' relevant to this appeal. The first was that the loan would be consolidated with the existing loan(s) secured by the property offered as mortgage security for repayment over the period of the loan. The second was that the mortgage bond would stipulate that the bank

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[1] Section 11 of the Prescription Act 68 of 1969 provides for the periods of prescription of debts according their classification. It reads as follows:
'**Periods of prescription of debts**
11. The periods of prescription of debts shall be the following:
(a) 30 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.'

secures an additional sum, equivalent to 25 per cent of the bond amount. This would represent further security (cover) for situations where the bank would be obliged to pay amounts on the principal debtor's behalf for which he would be liable, such as for the preservation of the property, rates and taxes, and legal costs.

[4] Pursuant thereto, the principal debtor registered three mortgage bonds over the property in favour of the bank to secure the loan and his indebtedness to the bank arising from the home loan agreement. And the appellant bound herself in favour of the bank as surety and co-principal debtor. In terms of the suretyship, her liability would not be affected by any 'delay or omission in the enforcement of the bank's rights'. It is not clear whether this clause has any bearing on the appellant's right to rely on prescription to resist the claim, but this was not an issue in the appeal and need not be considered. In addition, the appellant accepted that any acknowledgment of indebtedness by the principal debtor of proof of a claim against his insolvent estate would be binding upon her.

[5] On 28 November 2011 the principal debtor's estate was finally sequestrated and trustees appointed to administer it. The bank sought to recover the full outstanding balance then owing to it by the principal debtor from the insolvent estate. On 27 September 2012 the bank proved its claim against the estate in an amount of R2 315 043. The principal debt, and thus the surety's debt, then became due, and prescription began to run against the debt as contemplated by s 12(1) of the Act.[2] But, since the principal debt was the object of the bank's claim in the principal debtor's insolvent estate, it constituted an impediment to the continued running of prescription in terms of s 13(1)*(g)*.[3] It is common cause that this impediment ceased to exist on 26 January 2015 when the Master accepted the trustees' final liquidation account. Consequently, prescription then began running again.

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[2] '**When prescription begins to run**
12.(1) Subject to the provisions of subsections (2), (3), and (4), prescription shall commence to run as soon as the debt is due.'

[3] '**Completion of prescription delayed in certain circumstances**
13.(1) If-
. . .
(g) the debt is the object of a claim filed against the estate of a debtor who is deceased or against the insolvent estate of the debtor or against a company in liquidation or against an applicant under the Agricultural Credit Act, 1966; or . . .'

[6] The appellant contends that prescription ran for one more year by operation of s 13(1)*(i)*[4] when the principal debt prescribed on 26 January 2016. The bank maintains that prescription continued to run beyond this date because the 30-year period, and not the three-year period, applies.

[7] In the meantime, the trustees sold the property to a third party who took transfer on 8 November 2012, and the bonds were cancelled. The trustees made a provisional payment of R1 million to the bank two weeks later. On 9 June 2014 the trustees paid a further R74 374 in terms of the first and final liquidation, distribution and contribution account, leaving a balance of R1 285 871 still owing by the principal debtor. These payments form the basis of the bank's alternative submission, which is that they constituted an acknowledgment of liability and therefore interrupted prescription in accordance with s 14(1) of the Act.[5] So that even if the three-year prescriptive period applies, summons was issued before its effluxion. As mentioned earlier, the court a quo determined this issue too in the bank's favour.

[8] On 26 January 2015 the Master confirmed the first and final liquidation, distribution and contribution account in the principal debtor's insolvent estate. As at 10 June 2016 the principal debt, as certified in terms of the home loan agreement, stood at R1 285 871(not R1 265 871 attributed in error by the court a quo). The bank issued summons claiming this shortfall from the appellant as surety for the principal debt, together with interest, more than a year later, on 26 July 2016.

[9] I turn to consider whether the cancellation of the bonds changed the prescription period applicable to the debt from 30 years to three years. I commence this analysis with this court's judgment in *Oliff v Minnie* in 1953.[6]

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[4] '**Completion of prescription delayed in certain circumstances**
(1) If-
. . .
(i) the relevant period of prescription would, but for the provisions of this subsection, be completed before or on, or within one year after, the day on which the relevant impediment referred to in paragraph *(a)*, *(b)*, *(c)*, *(d)*, *(e)*, *(f)*, *(g)* or *(h)* has ceased to exist,
the period of prescription shall not be completed before a year has elapsed after the day referred to in paragraph *(i)*.'

[5] '**Interruption of prescription by acknowledgement of liability**
14.(1) The running of prescription shall be interrupted by an express or tacit acknowledgement of liability by the debtor.'

[6] *Oliff v Minnie* 1953 (1) SA 1 (A) (hereafter referred to as *Oliff*).

Oliff v Minnie

[10] In dismissing the appellant's special plea of prescription the court a quo accepted the bank's reliance on this court's judgment in *Oliff*, which established that the prescription period applicable to a debt secured by a mortgage bond was fixed at the date on which the debt became due and did not alter its character merely because the bond was subsequently cancelled. The case has been applied several times in different contexts.[7]

[11] However, in *Investec Bank v Erf 436 Elandspoort (Pty) Limited & others*[8] this court recently observed that the weight of academic authority suggests that if the bond is cancelled before the debt is settled and the security ceases to exist, the debt is no longer secured and the prescription period then changes to three years, as it is with any unsecured debt.[9] And it accepted that the loss of security through the cancellation of the bond may have a bearing on the prescription period applicable to a debt that was initially secured by the bond.[10]

[12] In the court a quo the appellant relied on this case for its contention that the cancellation of the bonds and sale of the property on 8 November 2012 altered the prescription period from 30 years to three years. The learned judge rejected this contention on two grounds. First, he distinguished this case from *Oliff* on the facts, and secondly, he held that *Investec* did not overrule *Oliff.* He thus considered himself bound by it.

[13] In *Oliff* the defendant had passed a second mortgage bond in favour of the plaintiff to secure a debt payable on 1 September 1931. In December 1933, the holder of the first bond sold the bonded property in execution, but the proceeds from the sale were insufficient to reduce the indebtedness on the second bond. The property was transferred to the purchaser without any encumbrances. The plaintiff, however, issued summons on the second bond claiming the shortfall, only in September 1951, 20 years

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[7] *Lief NO v Dettman* 1964 (2) SA 252 (A) at 264; *Thienhaus NO v Metje & Ziegler Ltd & another* 1965 (3) SA 25 (A) at 38; *Miracle Mile Investments (Pty) Ltd & another v Standard Bank* 2016 (2) SA 153 (GJ) para 30; *Reichin v Efthimiou* 1979 (2) SA 445 (W).
[8] *Investec Bank v Erf 436 Elandspoort (Pty) Limited & others* [2017] ZASCA 128 (hereafter referred to as *Investec*).
[9] Ibid paras 15-17.
[10] Ibid para 19.

later. The defendant claimed that the debt had become prescribed, under the statute then applicable, eight years after the debt became due.[11]

[14] In upholding this defence the Provincial Division accepted that in terms of the bond the plaintiff's right of action had accrued on 1 September 1931. And also, that at common law, the claim would have prescribed only after 30 years had the bond retained its original character and function. But, it reasoned, once the mortgaged property had been sold in execution it was released from the operation of the bond, which then mutated into a mere acknowledgment of debt and prescription began to run afresh. The claim would therefore have become prescribed eight years later, many years before summons was issued.

[15] The decision was reversed on appeal. Starting from the premise that prescription began running when the right of action on the mortgage bond accrued on 1 September 1931, this court held that the bond did not cease to be one just because it had become valueless as security. It reasoned that the class of written instrument upon which the action was founded determines the prescription period that is applicable to it. And further that there was no warrant for suggesting that its classification should alter in mid-stream if the subject matter of the obligation perishes. A mortgage bond that had become valueless as security therefore retained its classification and character despite its demise because the prescription law was not concerned with security.[12]

United Kingdom

[16] The comparable legislation in the United Kingdom, s 20(1) of the Limitations Act of 1980, dealing with the prescription of debts secured by mortgage bonds, has been interpreted in a manner consonant with *Oliff.*[13] In this regard the bank drew our

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[11] Section 2 of Chapter 23 of the O V S Wetboek, which then applied in the Orange Free State. It read: 'Geene aanspraak in rechten of actie op eenig geschrift of liquide document waarop men provisioneel vonnis kan erlangen, of voortspruitende uit eenige schriftelijke schulderkentenis, schriftelijke overeenkomst of schriftelijke verbintenis van welken aard ook, kan ingesteld worden voor enig hof in dezen Staat na verloop van acht jaren, gerekend vanaf het tydstip waarop het recht tot aanspraak en actie daarop ontstond, met dien verstande nochtans, dat niets hierin vervat beschouwd zal worden betrekking te hebben op eenige schepenkennis, generaal of speciaal verband, of eenig vonnis van een hof.' (This provision was quoted in *Oliff* at 2F-G.)

[12] *Oliff* at 3C-4A.

[13] Section 20(1) of the Limitation Act, similar to s 11*(a)*(i) of the Prescription Act says that 'No action shall be brought to recover any principal sum of money secured by a mortgage or other charge on

attention to *Bristol & West plc v Bartlett & another; Paragon Finance plc v Banks and Halifax plc v Grant*,[14] in which the Court of Appeal, Civil Division was confronted by three appeals brought in order to obtain a determination of the legal question whether a claim for a shortfall of a mortgagor's debt lies under the mortgage bond and was governed by the 12-year limitation period applicable to mortgage bonds instead of the shorter six year period, which applies generally, after the bond is cancelled following the mortgagee's sale of the property to recover the secured debt. The court held that claims for a mortgage debt may be instituted up to 12 years from the date the cause of action of accrues, under s 20(1) of the Limitation Act, even if the mortgagee has exercised its power of sale before commencing proceedings.[15]

[17] In *Bartlett*, the first of the three matters under consideration, the court reasoned that the right to sue for the mortgage debt arose when the borrower failed to pay the monthly instalment and the debt was outstanding on the security of the mortgage.[16] And the fact that, at some later time, the 'power of sale' was exercised by the lender and the mortgage discharged, did not mean that the mortgage debt ceased to be payable. For if this were the case, it continued, 'the logical result would be that the covenant to pay ceased to be operative and the borrower had no obligation to pay the shortfall after the sale'.[17]

[18] In *Banks*, the second of the three cases, the court was faced with an interesting argument for the mortgagor based on the construction of the mortgage deed. This was that there was an underlying contract of loan, which was distinct from the contract contained in the formal mortgage deed. The loan agreement contemplated only that the initial amount of the loan would be secured. The deed secured future advances. The obligation to repay the indebtedness under the underlying contract, it was argued,

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property . . . after the expiry of twelve years from the date on which the right to receive the money accrued.'

[14] *Bristol & West plc v Bartlett & another; Paragon Finance plc v Banks and Halifax plc v Grant* [2002] 4 All ER 544 (CA) (hereafter referred to generally as *Bristol & West*. Where I refer to any of the three separate cases that were dealt with, I shall do so with reference to the names of the respondents – *Bartlett*, *Banks* and *Grant*.)

[15] Ibid paras 6, 7 and 35.

[16] Ibid para 14.

[17] Ibid para 17.

was subject to the shorter limitation period of six years whilst that under the deed was 12 years.[18]

[19] The court rejected this argument for three reasons. First, it was satisfied that if there was an antecedent loan agreement, it merged with the formal mortgage deed at least to the extent of the indebtedness, which existed at the date of the initial loan. It was thus pointless to have two contracts.[19] Second, the court considered, there was no real antecedent loan agreement. It accepted that there was a contract for a loan once the borrower accepted the lender's offer to make a loan, but this, it said, was something different from an antecedent loan agreement. Since the borrower's receipt of the funds was conditional upon the execution of a mortgage deed, once that was done, the deed was the contract.[20] Finally, it reasoned that even if there were two separate coexisting contracts, there was no reason why the lender could not choose which to enforce.[21]

[20] I shall return to the Court of Appeal's reasoning later in this judgment when I consider the terms of the loan and mortgage agreements in the instant case. Suffice to say at this stage that in *West Bromwich Building Society v Wilkinson & another*[22] the House of Lords was asked to answer the general question of law which was whether s 20 applies in a case in which a loan is originally secured by a mortgage but the security is realised (or released) before the proceedings are commenced. It was, therefore, called upon to consider whether *Bristol & West* had been correctly decided.[23]

[21] To this end, in para 8 Lord Hoffman[24] referred with approval to the following statement from *Grant*, the third of the cases:

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[18] Ibid para 21.
[19] Ibid para 22.
[20] Ibid para 23.
[21] Ibid para 24.
[22] *West Bromwich Building Society v Wilkinson & another* [2005] UKHL 44; [2005] 1 WLR 2302 (HL) (hereafter referred to as *West Bromwich Building Society*).
[23] Above para 18.
[24] In concurrence: Lord Scott of Foscote, Lord Walker of Gestingthorpe, Baroness Hale of Richmond and Lord Carswell.

'Since the subsection refers to "the date on which the right to receive the money accrued" it is much more natural to read the subsection as applying to mortgages existing on the date on which such right accrued.' [25]

[22] English law, he observed, attributes periods of limitation by reference to the classification of the cause of action which the claimant seeks to enforce.[26] He continued:

'This method of classification suggests that ordinarily time will run from the moment when the cause of action designated by the appropriate rule has arisen. It would be strange if the lender could then stop time running by his own act in exercising the power of sale. If, therefore, the cause of action when it arose was a claim to a debt secured on a mortgage, I do not think section 20 ceases to apply when the security is subsequently realised.'[27]

Importantly, because the Limitation Act categorised different limitation periods based on the particular cause of action, and that these periods ran from the date on which the cause of action arose, it followed logically that they would be determined with reference to the cause of action. The House of Lords thus endorsed the key finding in *Bristol & West*.

[23] Similarly, in South Africa, under the Prescription Act, different prescription periods are statutorily specified on the basis of the type of debt. This is also how the commencement and duration of prescription periods was treated in *Oliff*, under the provision applicable there.[28] For present purposes it is apparent that the manner in which the UK courts have treated claims brought under a mortgage bond is consistent with the approach in *Oliff*. Prescription periods applicable to debts secured by mortgage bonds in both jurisdictions run from the date the right of action accrues and the debt is due. Once fixed, the period is immutable and unaffected by the subsequent cancellation of the bond. Put differently, in the United Kingdom it is the classification of the cause of action, and in South Africa, the classification of the debt, which conclusively determines the period of prescription, not the fate of the security.

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[25] *Bristol & West* para 30.
[26] *West Bromwich Building Society* para 10.
[27] Ibid.
[28] *Oliff* at 3A-D.

The effect of Investec

[24] This brings me back to *Investec*, which the appellant heavily relies upon to support her case that the subsequent cancellation of the bond by the trustees of her husband's insolvent estate destroyed the security and altered the prescription period to three years. The basis for this argument is the following statement in *Investec*:

'The weight of academic authority . . . 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 . . . .'[29]

The critique of these academic writers is that *Oliff* may no longer be good law because it was based on a materially different legislative provision – a proposition that this court implicitly accepted[30] – and is no longer authority for the correct position under the current Prescription Act.

[25] Yet, a closer examination of the provision that applied in *Oliff* and the judgment itself reveals no fundamental difference between the two statutes and the common law for present purposes. Section 2 of the O V S Wetboek provided expressly that prescription ran from the date on which the cause of action arose while, the court held, the 30-year prescription period in terms of the common law began to run from the time of *actio nata* (the birth of the action). This was when the right of action accrued. Under the present Act different prescription periods are statutorily specified on the basis of the type of debt, under s 11. Prescription runs from the date on which the debt becomes due, in terms of s 12(1), which is simply another way of saying it runs when the right of action accrues. *Oliff* therefore cannot be distinguished from the present case, or *Investec*, on this basis.

[26] That being so, the question is whether *Oliff* is no longer good law having regard to the *ratio decidendi* in *Investec.* The following were the facts in *Investec*: Investec had lent money to the debtor. As security the debtor registered a notarial covering mortgage bond in favour of Investec over a notarial lease agreement it had concluded with a third party. During January 2002 the third party cancelled the lease agreement,

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[29] *Investec* para 17 and the preceding paras 15 and 16, where reference is made to Badenhorst, Pienaar & Mostert *Silberberg and Schoeman's The Law of Property*, 5 ed (2006) at 378 para 16.4.9 (c); M M Loubser: *Extinctive Prescription* 1 ed (1996) at 38; and J Saner *Prescription in South African Law* (1996) at 3-35.

[30] Ibid para 16.

which a court order confirmed in August 2002. On 10 September 2002, pursuant to the cancellation of the lease, Investec notified the debtor that it was in breach of the loan agreement. But it sued the debtor only eight years later for the outstanding balance.

[27] It was common cause that the debt had become due on 18 September 2002. It was also accepted that Investec's action was founded on the loan agreement, and not on the bond. The court accordingly held that the prescription period was three years calculated from the date the debt became claimable on the loan agreement.[31] It reasoned that Investec's argument was premised on the incorrect assumption that the period of prescription is to be determined, when the loan agreement secured by notarial lease agreement, was concluded, instead of when the debt under the loan agreement became due. The appellant makes the same error.

[28] So, the *obiter dictum* in *Investec*, underpinned by academic authority, that once the security ceases to exist, the debt is no longer secured, is with respect not an accurate exposition of the law and is against the tenor of authority. The true position is that it is only when the right of action accrues and the debt is due that the prescription period is determined. And once determined, the period is fixed and immutable; it is not alterable retroactively through the subsequent cancellation of the bond. *Investec* is therefore only authority for the proposition that where the security is cancelled before the debt becomes due, and prescription has not yet begun to run against it, the debt is not a mortgage debt contemplated by s 11*(a)*(i) of the Act. This is consistent with *Oliff.*

[29] If the appellant's submission that the cancellation of the security altered the prescription period were to be upheld, it would mean that the period applicable to the secured debt may be altered retroactively in mid-stream, after prescription has begun to run against the debt. The same debt would then be governed by two different prescription periods. The anomalous consequence would be that where three years have already run against a 30-year debt then, in the absence of any delay[32] or

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[31] *Investec* para 18.
[32] As envisaged in s 13 of the Act.

interruption,[33] the debt would become prescribed immediately, thus leaving the creditor remediless through no dilatoriness on its part. This undermines the purpose of the Act, which designates categories of debt according to classes of written instrument and ascribes particular prescription periods to them in order to ensure legal certainty.

[30] It follows that the court a quo correctly held that it was bound by *Oliff* and that *Investec* had not changed the well-established legal principle established there. Moreover, it is clear from *Investec* that ss 10, 11 and 12 of the Act are interconnected.[34] Section 10 says that the debt is extinguished by prescription after the lapse of the period that applies to it. Section 11 fixes the period of prescription for a debt secured by mortgage bond at 30 years and s 12(1) provides that prescription commences running as soon as the debt is due. Thus read, the Act requires a debt to be classified as a debt secured by a bond when it is due – not when the bond is registered – because that is when prescription begins to run. This was also the law applicable in *Oliff.*

The terms of the loan

[31] A further difficulty for the appellant lies in the terms of loan and mortgage agreements. Underlying the contention that once the security is cancelled only the principal obligation under the loan agreement remains is the assumption that there are two separate contracts: the loan agreement and the mortgage deed – with the former having a prescription period of three years whilst the latter has one of 30 years. This is the import of what the authors of *Silberberg and Schoeman's Law of Property* say.[35]

[32] However, the terms of the loan agreement, which include the suspensive and special conditions relating to the mortgage bond referred to earlier, make it artificial to separate the antecedent contract of loan from the bond agreement. Once the suspensive and special conditions under the loan agreement were fulfilled, there was in fact only one agreement and not two co-existing agreements. The debt secured

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[33] As envisaged in s 14 of the Act.

[34] *Investec* paras 9 and 10.

[35] Badenhorst, Pienaar & Mostert *Silberberg and Schoeman's The Law of Property* 5 ed (2006) at 378 para 16.4.9 (c). See also *Investec* para 15.

under this agreement was the mortgage debt, which became due and to which the 30-year period of prescription applied. This was also how the bank described the debt in its claim to the trustees of the insolvent estate, which counsel for the appellant properly accepted posed a difficulty for her.

[33] Put differently the home loan was conditional upon the execution of the bond. Once this was done and the loan was advanced, the bond – not the loan agreement – became the operable contract. This was the agreement from which the debt arose and which the bank relied upon to prove its claim against the insolvent estate. It was quite simply a unitary mortgage debt to which the 30-year period applied. This was the approach adopted by the Court of Appeal in *Bristol & West*[36] based on the deed of mortgage in issue in the *Banks* matter. That approach, with respect, commends itself in the instant case.

Conclusion

[34] For all these reasons I conclude that the court a quo correctly held that the cancellation of the security following the sale of the property by the trustees had no bearing on the period of prescription that was fixed at 30 years in terms of s 11*(a)*(i) of the Act at the time the debt became due. As a result of the conclusion to which I have come it is unnecessary to consider the second issue in this appeal, which is whether the payments the trustees of the insolvent estate made to the bank amounted to an acknowledgment of liability and therefore interrupted prescription in accordance with s 14(1) of the Act. [37] I leave this issue open.

[35] I pointed out earlier that the court a quo in error found that the certified amount owing to the bank was R1 265 871.81 instead of R1 285 871.81, a difference of R20 000. However, the bank asked only that the appeal be dismissed and not that the correct amount owing be reflected in the order. In the circumstances the following order is made:

[36] See *Investec* paras 18 and 20.

[37] '**Interruption of prescription by acknowledgement of liability**

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

'The appeal is dismissed with costs including the costs occasioned by the employment of two counsel.'

A Cachalia
Judge of Appeal

Appearances

For the Appellant:	R Goslett
Instructed by:	AC Notnagel Attorneys, c/o AB Lowe Attorneys, Pretoria
	Honey Attorneys, Bloemfontein
For the Respondent:	S Symon SC (with him N Konstantinides SC)
Instructed by:	Edward Nathan Sonnenbergs Inc, Sandton
	Symington & De Kok, Bloemfontein