THE SUPREME COURT OF APPEAL
REPUBLIC OF SOUTH AFRICA

JUDGMENT

Case No: 116/08

SILOUETTE INVESTMENTS LIMITED Appellant

and

VIRGIN HOTELS GROUP LIMITED Respondent

Neutral citation: *SILOUETTE INVESTMENTS LTD v VIRGIN HOTELS GROUP LTD* (116/08) [2009] ZASCA 40 (31 MARCH 2009)

Coram: FARLAM, NAVSA, MTHIYANE, MLAMBO et CACHALIA JJA

Heard: 17 FEBRUARY 2009

Delivered: 31 MARCH 2009

Summary: Extinctive Prescription – whether debtor 'outside the Republic' in terms of s 13(1)(b) of Prescription Act 68 of 1969 – whether interruption of prescription effected by service of summons lapsed in terms of s 15(2) of the Act when summons amended so as to substitute new plaintiff, after which summons re-amended so as to re-introduce original plaintiff.

ORDER

On appeal from: High Court Johannesburg (Joffe J sitting as a court of first instance).

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

JUDGMENT

FARLAM JA (NAVSA, MTHIYANE, MLAMBO et CACHALIA JJA concurring)

INTRODUCTION

[1] This is an appeal from a judgment of Joffe J, sitting in the Johannesburg High Court, in which he upheld a special plea of prescription raised by the respondent, Virgin Hotels Group Limited, against a claim for R561 308-41 brought against it by the appellant, Silouette Investments Limited.

FACTS

[2] In 2001, the appellant, together with its co-plaintiff, Ajubatis Properties (Pty) Ltd, instituted action against the respondent for amounts owing under a written agreement for the sale of shares in a company, Investment Facility Company Forty (Pty) Ltd. Separate amounts were claimed by the appellant and Ajubatis Properties (Pty) Ltd.

[3] On 16 November 2004 the appellant and its co-plaintiff gave notice of

their intention to amend the particulars of claim by (a) substituting one John Brook Dyer as the plaintiff and (b) alleging that Mr Dyer during 2003 had acquired, by cession, their claims against the respondent. The amendments sought were effected on 15 April 2005.

[4] The respondent pleaded to the amended particulars of claim. One of the defences raised in the plea was that in terms of the sale agreement the sellers, ie, the appellant and its erstwhile co-plaintiff, were not entitled to cede any of their rights.

[5] This defence led to a further amendment to the particulars of claim in terms of which the appellant was substituted for Mr Dyer as the plaintiff in the action and the appellant claimed its share of the amount outstanding (its claim for which it had purported to cede to Mr Dyer). Notice of this amendment was given in October 2006 and the amendment was effected on 10 November 2006.

[6] The respondent then pleaded to the re-amended particulars of claim, raising a special plea of prescription as well as pleading defences on the merits (with which it is unnecessary to deal in this judgment).

[7] The special plea of prescription was based on s 11(d) of the Prescription Act 68 of 1969. The averments pleaded in support thereof may be summarised as follows:

(a) the debt was due on or before 30 September 2001;
(b) during April 2006 the appellant and its co-plaintiff were replaced by Mr Dyer as the plaintiff;
(c) during November 2006 Mr Dyer was replaced by the appellant as the plaintiff;
(d) the question as to whether the appellant's claim has prescribed must be determined by reference to the amendment which most recently made it a party to the proceedings, ie, the amendment effected on 10 November 2006.

[8] At the commencement of the trial Joffe J ruled *mero motu,* in terms of rule 33(4), that the special plea be determined before any other issues.

[9] After argument, the learned judge gave judgment upholding the special plea. Before his judgment is summarised it will be convenient if the relevant provisions of Act 68 of 1969 are set out.

RELEVANT STATUTORY PROVISIONS

[10] Section 11(d) provides that the period of prescription in respect of a debt such as the one presently under consideration shall be three years.

[11] Section 12(1) provides that subject to subsections (2) and (3), which are not relevant in this case, prescription shall commence to run as soon as the debt is due.

[12] Section 13 deals with circumstances in which completion of prescription is delayed. Subsection (1) provides as follows:

'(1) If–

(a) the creditor is a minor or is insane or is a person under curatorship or is prevented by superior force including any law or any order of court from interrupting the running of prescription as contemplated in section 15(1); or

(b) the debtor is outside the Republic; or

(c) the creditor and debtor are married to each other; or

(d) the creditor and debtor are partners and the debt is a debt which arose out of the partnership relationship; or

(e) the creditor is a juristic person and the debtor is a member of the governing body of such juristic person; or

(f) the debt is the object of a dispute subjected to arbitration; or

(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

(h) the creditor or the debtor is deceased and an executor of the estate in question has not yet been appointed; and

(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).'*

[13] Section 15, as far as is material, provides as follows:

'(1) The running of prescription shall, subject to the provisions of subsection (2), be interrupted by the service on the debtor of any process whereby the creditor claims payment of the debt.

(2) Unless the debtor acknowledges liability, the interruption of prescription in terms of subsection (1) shall lapse, and the running of prescription shall not be deemed to have been interrupted, if the creditor does not successfully prosecute his claim under the process in question to final judgment or if he does so prosecute his claim but abandons the judgment or the judgment is set aside.

. . .

(6) For the purposes of this section, "process" includes a petition, a notice of motion, a rule *nisi,* a pleading in reconvention, a third party notice referred to in any rule of court, and any document whereby legal proceedings are commenced.'

JUDGMENT OF THE COURT *A QUO*

[14] The only point considered by the learned judge in the court *a quo* related to the question as to whether the service of the original summons in this matter, in terms of which the appellant together with Ajubatis Properties (Pty) Ltd claimed monies from the respondent, interrupted prescription. In his view it did not because, as he put it, they 'did not prosecute their claim until final judgment.' When the amendment introducing Mr Dyer as the plaintiff was effected, he held, the appellant and Ajubatis Properties (Pty) Ltd

'fell out the proceedings. Furthermore in terms of s 15(2) of the act, the summons issued by them did not have the effect of interrupting prescription.'

GROUNDS OF APPEAL

[15] In its application for leave to appeal (which Joffe J granted) the appellant sought leave to appeal on the ground that the proceedings which were commenced by way of summons at the instance of the appellant and Ajubatis Properties (Pty) Ltd were not terminated by the substitution of Mr Dyer as the plaintiff and that the re-introduction of the appellant as the plaintiff in the place of Mr Dyer did not constitute a fresh action which commenced only after the debt allegedly owing by the respondent to the appellant had

prescribed.

[16] In the heads of argument filed on behalf of the appellant by counsel (who had not appeared in the High Court) the judgment of the court *a quo* was attacked on two grounds: the ground on which leave was granted and a new ground to the effect that the prescription of the appellant's claim had been interrupted, in terms of s 13(1)(b) of the Act, because at all material times the respondent had been outside the Republic. This submission was based on the fact that the respondent is a foreign company, incorporated and registered in the United Kingdom, with its chosen *domicilium citandi et executandi* at an address in London. The appellant applied at the hearing of the appeal for leave to file a replication to the respondent's special plea in which this ground was specifically pleaded. The respondent not having opposed the application, the application was granted.

[17] The appellant's replication reads as follows:

'1.At all times material hereto:

1.1. The defendant's citation has been as pleaded in the particulars of claim, namely, the defendant has been incorporated and registered in accordance with the Laws of England and Wales under registration number 2857671, and with its chosen domicilium citandi et executandi at 120 Campden Hill Road, London, V87AR, United Kingdom.

1.2. The defendant has accordingly been outside the Republic, as contemplated by section 13(1)(b) of the Prescription Act, 68 of 1969 ("the Act").

2. At no stage has the above impediment ceased to exist, for the purposes of section 13(1)(i) of the Act.

3. In the premises, any period of prescription relied upon by the defendant has not been completed.

WHEREFORE the plaintiff prays that the defendant's special plea be dismissed with costs.'

SUBMISSIONS ON BEHALF OF THE APPELLANT

[18] In argument before this court counsel for the appellant contended that the court *a quo* erred in two respects. Its first error was the result, so it was

contended, of its failure to have regard to the fact that the respondent debtor is a British company and accordingly that s 13(1)(b) of the Act applied so as to delay the completion of the period of prescription. It was contended further that the respondent, being a peregrine company, was *ex facie* the admitted facts on the pleadings at all relevant times absent from the Republic. It was pointed out that the respondent is not an external company with its memorandum registered in this country as was the case in *Dithaba Platinum (Pty) Ltd v Erconovaal Ltd* 1985 (4) SA 615 (T).

[19] Counsel also contended that the fact that the respondent was amenable to the jurisdiction of the South African court, either by owning property in this country or by consenting to the jurisdiction of the High Court, does not detract from the fact that the respondent remained absent from the Republic: in support of this submission counsel referred to *Grinaker Mechanicals (Pty) Ltd v Societé Francaise Industriale et D'Equipment* 1976 (4) SA 98(C), esp at 102A-H.

[20] Since the respondent has at all material times been absent from the Republic, the argument proceeded, and the respondent itself led no evidence nor suggested that that was not the case, the running of prescription could not be completed before one year had elapsed after the respondent ceased to be absent from the Republic – 'if that were ever to occur.' It was accordingly submitted that as the relevant impediment never ceased the period of prescription provided in s 13 has never been completed.

[21] The court *a quo's* second error, according to the argument of counsel for the appellant, consisted in holding that s 15(2) of the Act applied. Counsel submitted that it was not in dispute on the common cause facts that by the institution of the original proceedings in 2001 the running of prescription in respect of the claim against the respondent was interrupted. They contended that, despite the substitution of Mr Dyer as the plaintiff in 2005 and the subsequent re-substitution of the appellant in 2006 as the plaintiff in respect of part of the original claim, 'the process that commenced with the institution of action [in 2001] is in substance the same process that was being conducted at

the instance of the appellant when the matter came before Joffe J' and 'section 15(2) of the . . . Act could have had no application.'

[22] They went on to submit that the significance of the phrase 'the process in question' is apparent if regard is had to the memorandum on the draft bill prepared for the South African Law Commission by the late Professor JC de Wet in which the mischief at which s 15(2) is directed is set out. The memorandum in question is published in JC de Wet: *Opuscula Miscellanea: Regsgeleerde Lesings en Adviese* (1979) at pp 77 *et seq.* In the passage on which counsel relied (at p 128) Professor De Wet said that the service of a summons ought

'sy stuitende werking te verloor indien die skuldeiser *die proses nie aan die gang hou nie,* anders kan dit gebeur dat die skuldeiser telkens deur dagvaarding die loop van verjaring stuit en daardeur die toestand van onsekerheid verleng. Indien my voorstel aanvaar word sal die diening van dagvaarding sy stuitende werking verloor *indien die skuldeiser die dagvaarding intrek,* aliter *Djaperides v Federal Insurance Corporation of SA Ltd* 1955 (2) SA 396 (W) of the hof die gedaagde van die instansie absolveer, aliter *Pistorius & Kie v Steyn* 1958 (3) SA 440 (T).'

[23] Counsel argued that the appellant had acted diligently in instituting the proceedings in 2001, that the substitution of Mr Dyer as plaintiff and its resubstitution did not evince a subjective intention on the part of the appellant, which at all times remained the creditor, to release the respondent from the debt owed and that 'the same proceedings (as that expression is generally used) were still *in esse* before Joffe J.' Although there had been a substitution of plaintiff the same debt had throughout been pursued by way of the same litigation. The appellant, they submitted, had continued to prosecute its claim 'under the process in question' (viz the summons issued in 2001) and there had accordingly been no lapsing of the interruption of prescription.

SUBMISSIONS ON BEHALF OF THE RESPONDENT

[24] Counsel for the respondent submitted that on a proper construction of s 13(1)(b) of the Act the respondent was not 'outside the Republic'. It was pointed out that the original summons in this matter was served in South Africa on the respondent in the following circumstances:

(a) the respondent agreed to accept service care of its South African attorneys; and

(b) the shareholders' agreement on which the appellant's cause of action is based provided that the parties thereto submitted themselves to the non-exclusive jurisdiction of the Johannesburg High Court for the purposes of any proceedings arising out of or in connection with the agreement.

[25] Pointing to the fact that the absence of a debtor from the Republic is described in s 13(1)(i) as an 'impediment', they submitted that at no stage was the registration of the respondent as a foreign company an impediment to the service of summons in South Africa.

[26] They contended further that the argument raised by the appellant leads, as they put it, to the 'absurd conclusion' that despite the respondent's having consented to be sued in South Africa, the appellant's claim against the respondent will never prescribe because the respondent will always be absent from the Republic.

[27] With regard to the contention raised by the appellant's counsel based on s 15(2) of the Act counsel for the respondent submitted that the appellant did not prosecute its claim under the original summons to final judgment and accordingly the interruption of prosecution by that process lapsed.

[28] Referring to the fact that the amendment of October 2006, in which notice was given that the appellant was to be substituted for Mr Dyer as the plaintiff, qualifies as process under s 15(6) (see *Mias de Klerk Boerdery (Edms) Bpk v Cole* 1986 (2) SA 284 (N) at 287I-288B), counsel for the respondent submitted that this is the process whereby it now claims the debt and under which, if it were to obtain judgment in its favour, it would successfully prosecute its claim to final judgment. Without the October 2006 notice of amendment the appellant could not have claimed payment of the debt.

[29] Counsel for the respondent contended further that if their argument on this point were to be upheld this would not be at variance with the mischief s 15(2) was designed to prevent. This was because the appellant had not kept its original process going.

[30] It followed, so they submitted, that the second point raised by the appellant also had to be rejected.

DISCUSSION

(i) Was the respondent 'outside the Republic' in terms of s 13(1)(b)?

[31] As appears from s 13 read as a whole the fact that a debtor is outside the Republic (as a result of which the completion of prescription is delayed) is regarded by the legislature as an 'impediment'. The various impediments listed in s 13(1) are circumstances which, as Professor M M Loubser puts it in his work *Extinctive Prescription* at p 117, 'have in common some legal or practical problem which makes it difficult or undesirable for a creditor to institute proceedings for the enforcement of his claim against the debtor.' See also *ABP 4x4 Motor Dealers (Pty) Ltd v IGI Insurance Co Ltd* 1999 (3) SA 924 (SCA) at 930I-931A, where it was said that '(t)he word impediment . . . covers a wide spectrum of situations ranging from those in which it would not be possible in law for the creditor to sue to those in which it might be difficult or awkward, but not impossible, to sue.' Where, as in the present case, the debtor has not only consented to the jurisdiction of the South African Court but also agreed to accept service of process care of its South African attorneys[1] there is no circumstance which gives rise to a problem which creates a difficult or undesirable situation for a creditor seeking to institute legal proceedings against the debtor in this country. Is it likely that Parliament would have intended the completion of prescription to be delayed in those circumstances? The only purpose that it would serve would be to prevent prescription from ever being completed against the respondent, which as the respondent's counsel submitted, would lead to an absurd conclusion. It

[1] On the face of the original summons the following appears after the name and address of the respondent: 'who has agreed to accept service care of its attorneys, Bowman Gilfillan Incorporated, 9th Floor, Twin Towers West, Sandton City, Sandton, Johannesburg.'

certainly would not advance the evident purpose of the provision, which is to assist a creditor which has a legal or practical problem in relation to the institution of legal proceedings in South Africa against its debtor.

[32] I think that to interpret the phrase 'outside the Republic' as covering a case where, although the debtor itself is physically outside the Republic, it has consented to the jurisdiction of the South African courts in respect of a claim and has a representative here whom it has authorised to receive service on its behalf of any process in which the claim in question is sought to be enforced would give a meaning to the provision under consideration which Parliament could never have intended.

[33] The first South African statute which provided for the completion of prescription to be delayed while the debtor was 'absent from the Colony' was s 6 of the Prescription Amendment Act 6 of 1861 (Cape), which was based on s 19 of the Act for the Amendment of the Law and the better Advancement of Justice, 4&5 Anne, c 16, passed by the English Parliament in 1705. Similar legislation to the Cape act was passed in Natal (s 10 of Law 14 of 1861), the Orange Free State (s 6 of Chapter XXIII of the Law Book) and the Transvaal (s 11(2) of Act 26 of 1908). The pre-Union statutes were repealed by the Prescription Act 18 of 1943, which provided in s 7(1)(c) for the suspension of prescription 'during the absence of the debtor from the Union for a period exceeding six months' and in s 10 that '(w)hen the debtor is absent from the Union extinctive prescription shall not begin to run until the date of his return' (which was interpreted as meaning the date when the debor ceased to be absent: see *Grinaker's* case, *supra,* at 100C to 102A, and the authorities there referred to).

[34] The provision in the statute from Queen Anne's reign on which s 6 of the Cape Act of 1861 was based was also copied, with various forms of wording, in the various states of the United States of America, where suspending or stopping the running of a statute of limitations is called 'tolling' ('it is analogous to a clock stopping then restarting', 51 *American Jurisprudence* 2d, para 169). A very informative annotation headed 'Absence

as Tolling Statute of Limitations' is to be found in 55 American Law Reports 3d at p 1158 *et seq.* It is an annotation on *Byrne v Ogle* (1971 Alaska) 55 ALR 3d 1151, a decision of the Supreme Court of Alaska. The annotation collects and discusses American cases considering whether and under what circumstances a provision 'tolling' the statute of limitations while a party is outside the jurisdiction applies where, notwithstanding such absence, the party remains amenable to service of process which subjects him to the personal jurisdiction of the state.[2] As is to be expected, the American courts have not spoken with one voice on the topic, nor have the statutory provisions considered been uniformly drafted. Many of the cases discussed have turned on the particular wording of the statutes under consideration. In others, however, general considerations apart from the construction of particular tolling provisions have been discussed and these cases raise points which have relevance in the present context. In particular at pp 1186-1187 Kenneth J Rampino, the author of the annotation, refers to a series of cases, the latest of which was *Byrne v Ogle, supra,* in which it was held that the purpose of the statute of limitations, that of eliminating stale claims, would be contravened if the running of the period were suspended during mere physical absence of a party who remained subject to personal jurisdiction by some form of substituted process.

[35] The present case is, of course, stronger than the American cases to which I have referred because here it was possible for the appellant to serve the original summons served on the respondent not by substituted service but by service on its own attorneys who were authorised to receive service on its behalf.

[36] As I have said the appellant's counsel relied strongly on the decision in *Grinaker Mechanicals Ltd, supra,* which was cited as authority for the proposition that

'(t)here is nothing in the wording of sec 10 [of the 1943 Prescription Act] to justify the

[2] After their attention had been drawn to the American authorities on the point, counsel on both sides submitted supplementary heads of argument dealing therewith, for which I wish to express my gratitude.

conclusion that the Legislature intended to confer the benefit of prescription upon a debtor who, despite his continued absence from the Republic, became amenable to be sued in respect of his debt in a Republican Court. If that was the intention of the Legislature it certainly has not been made apparent in the terms of sec 10.'

[37] The debtor in *Grinaker's* case was a company incorporated according to the laws of France and carrying on business in Paris. At all relevant times it was physically absent from the Republic. In an action brought against it for moneys due under a contract for work and labour it filed a special plea that the plaintiff's claim had prescribed as the cause of action arose prior to 1 October 1968 and the summons was served on 4 December 1974, although it had been issued on 13 January 1969. In response to a request for particulars by the plaintiff the defendant stated that it was a *peregrinus* and had never been present in the Republic of South Africa. The plaintiff took exception to the plea on the ground that as the defendant had at all material times been absent from the Republic within the meaning of s 10 of the 1943 Prescription Act the period of extinctive prescription had not begun to run against the plaintiff.

[38] The defendant then sought to amend its special plea by inserting an averment to the effect that on 18 December 1968 and by order of the Cape Provincial Division the plaintiff attached property of the defendant *ad fundandam jurisdiction,* from which date the plaintiff's right of action against the defendant became enforceable in the Cape Provincial Division.

[39] The application to amend the special plea was refused and the exception taken to it was upheld on the basis that the insertion of the averment summarised above would not save it from being excipiable. The reason for this conclusion is set out in the passage cited above.

[40] It is thus clear that the amenability to the court's jurisdiction which was held not to lead to the conclusion that the debtor was no longer 'absent' was based on the attachment *ad fundandam jurisdictionem* of its property. As is well known, an attachment of a debtor's property to found jurisdiction does not

render the debtor personally liable to the court's jurisdiction. A judgment obtained on the strength thereof only binds the property attached and has no extra-territorial force and obligation: *Jamieson v Sabingo* 2002 (4) SA 49 (SCA) at 58G-H. On the other hand a judgment founded on voluntary submission to jurisdiction by a debtor would bind the debtor personally and would be internationally enforceable: *ibid* at 58H. The amenability to jurisdiction discussed in the *Grinaker* case only concerned jurisdiction based on an attachment to found jurisdiction. Other considerations may well apply where the amenability to jurisdiction arises from a voluntary submission to the jurisdiction by the debtor. Indeed it has been decided in the United States 'by the great weight of authority' that the suspension of the running of the statute of limitations is not prevented by the fact that the absent defendant had property in the state which might have been subject to attachment before the expiration of the period of limitation, without the necessity of personal service on the defendant: see Annotation at 119 ALR 331 at 337 *et seq.*

[41] It is not necessary, however, in this case to decide whether amenability to jurisdiction over the debtor personally in circumstances where a judgment can be given which can be enforced against him internationally will lead to the conclusion that he is not to be regarded as 'outside the Republic' for the purposes of s 13(1)(b) of the Act. I say that because I am satisfied that the combined effect of the submission by the respondent to the court's jurisdiction and the authorisation to its attorneys to accept service of the summons clearly leads to the conclusion, for the reasons I have stated, that it would go beyond the purpose of s 13(1)(b) if it were held that the respondent in this matter, despite what it had done to remove any difficulty or awkwardness which the appellant might otherwise have encountered in an attempt to institute proceedings against it to claim the debt allegedly owing in this matter, was 'outside the Republic'. It follows that the first contention advanced by the appellant's counsel must fail.

(ii) Does s 15(2) apply?

[42] In regard to the second point raised by counsel for the appellant I agree with the argument of counsel for the respondent that if the appellant

were to obtain final judgment in its favour in this matter, the process under which it would obtain such judgment would be the notice of amendment of November 2006. It follows that s 15(2) of the Act applied and the interruption of prescription brought about by service of the original summons lapsed. In the circumstances the second point raised by the appellant's counsel must also fail.

ORDER

[43] The following order is made:

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

…….
IG FARLAM

APPEARANCES:

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