

IN THE HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION, PRETORIA)

Case Number: 2517/2011

DELETE WHICHEVER IS NOT APPLICABLE

(1) REPORTABLE: YES/NO. ☒ YES ☐ NO

(2) OF INTEREST TO OTHER JUDGES: YES/NO. ☒ YES ☐ NO

(3) REVISED. ☒

7/3/19 _____
DATE SIGNATURE

In the matter between:

INVESTEC BANK LTD

PLAINTIFF

AND

ERF 436 ELANDSPOORT (PTY) LTD

1ST DEFENDANT

CECILIA JOUBERT NO

2ND DEFENDANT

ERF 1081 ARCADIA (PTY) LTD

3RD DEFENDANT

V AND J PROPERTIES (PTY) LTD

4TH DEFENDANT

REMAINING EXTENT 764 BROOKLYN (PTY) LTD

5TH DEFENDANT

ERF 22 HILLCREST (PTY) LTD

6TH DEFENDANT

JUDGMENT

Fabricius J,

[1] Plaintiff claims payment in the sum of R3, 979,184.50 plus interest and costs from the First, Second, Third, Fifth and Sixth Defendants ("Defendants"), based on a loan agreement which it concluded on 9 February 2000 with the First Defendant ("the loan agreement"), and various suretyships signed by the remaining Defendants on 4 February 2000. Fourth Defendant is not before Court as it has been liquidated.

[2] The parties agreed that Defendants' special plea of prescription would be decided separately in accordance with the provisions of Rule 33 (4), and that the other issues would be postponed sine die. An order in this respect was granted.

[3] The following background facts are common cause:

- 3.1 On 16 March 1998, the South African Rail Commuter Corporation Ltd ("SARCC") and First Defendant, concluded a notarial lease agreement ("the lease agreement") in terms of which SARCC let to the First Defendant a certain immovable property ("the property") for a period of 50 years, as from 1 November 1997;
- 3.2 A tripartite agreement was concluded on 17 May 2000 between Plaintiff, First Defendant and SARCC, which provided for Plaintiff acquiring an option to leave the property from the Corporation under certain circumstances;
- 3.3 On 14 June 2000, a notarial covering bond ("the bond") was registered by the Registrar of Deeds over the First Defendant's right, title and interest in, and to the lease agreement, as security for the indebtedness from time to time of the First Defendant to the Plaintiff;

3.4 During January 2002, SARCC cancelled the lease agreement and this cancellation was confirmed by a Court order dated 21 August 2002;

3.5 The cancellation of the lease agreement extinguished the title of the First Defendant, and the real right of the Plaintiff, as mortgagor in terms of the bond, in the lease agreement;

3.6 On 10 September 2002, Plaintiff addressed a letter of demand to First Defendant in terms of which it stated that the cancellation of the lease agreement constituted a breach of contract and demanded payment of the outstanding balance in terms of the loan, failing which summons would be issued for the recovery of all amounts due;

3.7 First Defendant failed to comply with the demand and summons was issued and served on the Defendants on 21 January 2011 to claim payment of the debt;

3.8 Prescription commenced to run on 18 September 2002, which is seven days after the demand.

[4] The only issue which I am called upon to decide is whether the running of prescription was interrupted by an express or tacit acknowledgement of liability, as provided for in s. 14 (1) of the *Prescription Act 68 of 1969*, on the part of the First Defendant, on the basis that certain payments were effected and certain letters were addressed.

[5] The parties are in agreement that the effect of s. 14 (2) is that in the event that it is found that the debt has not been extinguished by prescription before 21 January 2008, the Plaintiff will have to prove interruption of prescription during the period of 21 January 2008 and 21 January 2001 ("the relevant period").

[6] Defendants pleaded prescription of the claim on the basis that the applicable period of prescription of the debt was three years, which has already been decided by this Court and the Supreme Court of Appeal, Plaintiff pleaded in the replication that subsequent to 21 August 2002: (I quote):

“6.1 Plaintiff on or about 27 September 2002 exercised its option in terms of the tripartite agreement;

6.2 Plaintiff became the lessee of the property effective from 1 October 2002 by virtue of a notarial lease agreement (“second lease agreement”) executed at Pretoria on or about 29 September 2005, a copy of which is annexed hereto as Annexure “R1”. In concluding the second lease agreement Plaintiff was represented by John Witter and Elizabeth van der Walt and SARCC by Jack Prentis;

6.3 during or about the latter half of 2002 and at Pretoria, Plaintiff (represented by Pierre Els and/or Anneli Maritz and/or Wessel Oosthuizen) and First Defendant (represented by Pierre Joubert) concluded an oral agreement with

the following material explicit alternatively tacit further alternatively implied terms:

6.3.1 the parties would endeavour to dispose of the rights flowing from the second lease agreement to a potential purchaser and in the event of such sale materialising, the proceeds thereof would be utilised in fulfilling First Defendant's loan obligations;

6.3.2 First Defendant would continue collecting rental from sub-tenants of the property and servicing its obligations in terms of the loan.

6.4 during or about mid-2003 and at Pretoria, Plaintiff (represented by Pierre Els and/or Wessel Oosthuizen and First Defendant (represented by Pierre Joubert) substituted the oral agreement aforesaid with a further oral agreement with the following material explicit alternatively tacit further alternatively implied terms:

6.4.1 Plaintiff would assist First Defendant in fulfilling its loan obligations by collecting and appropriating rentals received from sub-tenants of the property (whether in terms of existing subleases with First Defendant

or subleases to be concluded in future by Plaintiff) in reduction of First Defendant's loan obligations;

6.4.2 should Plaintiff dispose of its rights flowing from the second lease agreement, the net compensation received would also be utilised in reduction of First Defendant's loan obligations.

- 7.1 Rentals were collected from sub-tenants – subsequent to conclusion of the oral agreements with First Defendant (as set out in paragraphs 6.3 and 6.4 above) – First Defendant having done so until about June 2003 and Plaintiff thereafter until May 2008.
- 7.2 First Defendant continued paying monthly instalments on the loan until about June 2003;
- 7.3 Plaintiff on a monthly basis allocated the net proceeds of rentals collected to the loan in reduction thereof and for the benefit of First Defendant."

[7] Plaintiff also pleaded that it received certain amounts, pursuant to the disposal of its rights arising from the second lease agreement to Johnny Prop

(Pty) Ltd and allocated those amounts to the First Defendant's loan on 29 June 2009 and 1 July 2009. It also pleaded that the facts relied upon that I have quoted from the replication constitute the execution of the oral agreements as alleged in par. 6.3 and 6.4. Furthermore, First Defendant as represented by Mr Pierre Joubert, participated in the execution of the oral agreements and supported Plaintiff in performing its obligations.

[8] It was furthermore pleaded that First Defendant, again represented by Pierre Joubert, admitted liability for the debt on various occasions by way of letters dated between 7 May 2003 and 21 May 2007. Seven of these letters were annexed to the application.

[9] It was accordingly pleaded that the First Defendant's conduct as set out, constituted acknowledgements of liability as envisaged in terms of s. 14 (1) of the *Act*, and insofar as prescription may have commenced during September 2002, it was interrupted by express or tacit acknowledgements

of liability on the part of the First Defendant, on the dates that each of the payments referred to above effected, and on the dates when each of the letters referred to, was addressed.

[10] Defendants' argument was to the following effect:

10.1 None of the letters on which Plaintiff relied and which were annexed to the replication, were written during the relevant period;

10.2 The only pleaded payments which were effected during the relevant period were rental payments by subtenants to the Plaintiff during May 2008 and two payments on 29 June 2009 and 1 July 2009 by Johnny Prop (Pty) Ltd to the Plaintiff, pursuant to the disposal of the Plaintiff's rights arising from the second lease agreement with SARCC.

[11] As far as the "acknowledgement of liability" in s. 14 (1) of the *Act* was concerned, it was emphasized that s. 14 (1) refers to an actual "acknowledgement of liability", and not just of indebtedness. It is only the former that would suffice to interrupt prescription. To interrupt prescription on this basis, the acknowledgement must amount to an admission that the debt is in existence and that he or she is liable therefore. What was required was an admission of a present liability. A mere acknowledgement that a debtor incurred an obligation was not necessarily tantamount to an acknowledgement of liability.

See: *Agnew v Union and South West Africa Insurance Company Ltd* 1977

(1) SA 617 (A) at 623A, *Benson v Walters* 1984 (1) SA 73 (A) at 86H to

87B and *Road Accident Fund v Mothupi* 2000 (4) SA 38 (SCA) par. [38].

[12] In the light of these authorities, it was contended that an acknowledgement of a potential liability if certain conditions would be fulfilled, was similarly not sufficient to interrupt prescription.

[13] Although s. 14 (1) contemplated an acknowledgement of liability by the debtor, or his duly authorized agent to the creditor or his duly authorized agent, payments to the lessor by the supplier of goods leased to the lessee, will only amount to acknowledgement of liability for purposes of interruption of prescription if the lessor (creditor) is able to prove that the supplier of goods made the payments as agent on behalf of the lessee (debtor), and that it was not sufficient that payments were made in respect of the indebtedness of the lessee under the lease.

See: *First Consolidated Lease Incorporation (Pty) Ltd v Servic SA (Pty)*

Ltd 1981 (4) SA 381 (W) at 383F to 384E.

[14] It was contended that the party alleging an interruption of prescription by an acknowledgement of liability must be able to show when the acknowledgement was made, failing which it would not be possible to say when prescription would commence to run afresh pursuant to s. 14 (2).

See: *Cape Town Municipality v Allie N.O 1981 (2) SA 1 (C) at 7F to G.*

The enquiry to decide whether there has been acknowledgement of liability so as to effect interruption of prescription is a factual one with regard to the intention of the debtor. It needs to be established whether the debtor intended to admit that the debt was in existence and that he was liable therefor. This test however is objective, and a Court must be satisfied that the objective *indicia* justify the subjective intent which is imputed to the debtor.

- [15] With reference to the evidence given by Mr Oosthuizen, who was referred to in the replication, and the documentary evidence relied upon, it was submitted that an oral agreement between Plaintiff and the First Defendant was concluded between 13 June 2003 and 1 July 2003, in the following terms:

- 15.1 the First Defendant would not be obliged to continue to pay any monthly instalments as provided for in the loan agreement (as it had done until 9 June 2013)
- 15.2 the First Defendant would cease collecting rental from sub-tenants of the property;
- 15.3 the First Defendant would provide the Plaintiff with copies of all the existing sublease agreements and pay the deposits held in terms of the existing sublease agreements to the Plaintiff;
- 15.4 the Plaintiff would collect rental from all existing sub-tenants;
- 15.5 the Plaintiff would conclude sublease agreements in respect of the property as and when vacancies arise at market related rentals;
- 15.6 the Plaintiff would attempt to dispose of its rights arising from the second lease agreement (which was in the process of being concluded) at a market related purchase consideration;
- 15.7 the First Defendant would not be entitled to conclude any sublease or sale agreements on behalf of the Plaintiff;

15.8 the Plaintiff would credit the First Defendant's loan account from time-to-time with the net rental collected (after the deduction of expenses relating to the management of the property);

15.9 in the event that the Plaintiff is able to dispose of its rights arising from the second lease agreement, it would credit the First Defendant's loan account with the purchase consideration;

15.10 in the event of a surplus following the disposal of the Plaintiff's rights arising from the second lease agreement (i.e. the purchase consideration in terms of the envisaged sale / cession agreement exceeds the outstanding indebtedness in terms of the loan agreement), the Plaintiff would be entitled to such surplus;

15.11 in the event of a shortfall following the disposal of the Plaintiff's rights arising from the second lease agreement (i.e. the outstanding indebtedness in terms of the loan agreement exceeds the purchase consideration in terms of the envisaged sale / cession agreement),

the First Defendant would be liable to make payment of such shortfall to the Plaintiff.

[16] It was therefore submitted that all the further conduct of the First Defendant after the conclusion of their second oral agreement, must be interpreted in light of the terms of the second lease agreement. Until the disposal of the Plaintiff's rights arising from the second lease agreement occurred, it would be unclear whether there would in fact be a surplus or shortfall. Also, all possible acknowledgements by the First Defendant after the conclusion of the second oral agreement were acknowledgements of a potential liability if certain conditions would be fulfilled. It was however also conceded that all payments by the First Defendant to the Plaintiff between 18 September 2002 and 9 June 2003 amounted to express acknowledgements of liability which interrupted the running of prescription. It was also conceded that two of the letters attached to the replication, namely those dated 7 May 2003 and 13 June 2003 amounted to express acknowledgements of liability which

interrupted the running of prescription. The submission therefore was that prescription commenced to run afresh on 13 June 2003 pursuant to the provisions of s. 14 (2) of the *Act*.

[17] Mr Oosthuizen, who gave evidence, conceded that there was no contractual nexus between the First Defendant and the sub-tenants after 1 July 2003, when Plaintiff was substituted for the First Defendant as sub-lessor. The tenants of the property during the relevant period had in any event concluded sublease agreements with the Plaintiff. There was no evidence whatsoever that any sub-tenants acted as agents on behalf of the First Defendant when complying with their contractual obligations in terms of the various sublease agreements. This was the contention on behalf of the Defendants and I agree therewith. Also, Johnny Prop (Pty) Ltd similarly did not act as an agent on behalf of First Defendant when complying with its contractual obligations in terms of the cession and assignment agreement.

[18] The other letters that the Plaintiff relied upon, either referred to a potential liability if certain facts were realized, or did in any event not amount to an acknowledgement of debt. In addition, there was no indication whatsoever that anyone acted on behalf of the First Defendant in any particular context referred to in those letters. I agree that this submission is justified by the evidence and the wording of those particular letters.

[19] I do not agree with Plaintiff's contention that every payment of rental collected and paid into the loan account, which payments were made in agreement with First Defendant, constituted an admission of liability and therefore interrupted prescription. It was contended that it was irrelevant whether the sub-tenants were "agents" of First Defendant or not. I do not agree with this contention, nor with the submission that this followed merely upon the fact that the parties devised a mechanism for settlement of the debt after First Defendant had admitted liability.

[20] Quite apart from anything else, it is clear that none of the letters relied upon by Plaintiff, and which were attached to the replication, were addressed during the relevant period. The implication was that Plaintiff had to prove an acknowledgement of liability in the form of a payment by – or on behalf of the First Defendant, which it had failed to do for the reasons that I have mentioned and upon which the Defendants relied.

[21] **The result is that Plaintiff has failed to prove an acknowledgement of liability which interrupted the running of prescription after 13 June 2003. It follows that the special plea of prescription must be upheld and that the Plaintiff's claim be dismissed with costs.**



JUDGE H.J FABRICIUS

JUDGE OF THE HIGH COURT GAUTENG DIVISION, PRETORIA

Case number: 2517/2011

Counsel for the Plaintiff:

Adv F. J. Erasmus SC

Adv C van Eetveldt

Instructed by: VDT Attorneys Inc

Counsel for the Defendants:

Adv H. F. Oosthuizen SC

Instructed by: Nöthling Attorneys

Date of Hearing: 18 – 22 February 2019

Date of Judgment: 7 March 2019 at 10:00