IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

CASE NO: 54753/16

In the matter between:

STANDARD BANK OF SOUTH AFRICA LIMITED Plaintiff

7/3/18

(1)	REPORTABLE:	YES / ~~NO~~
(2)	OF INTEREST TO OTHER JUDGES:	~~YES~~ / NO

07/03/18 DATE

SIGNATURE

and

ANTOINETTE BOTHA Defendant

JUDGMENT

Tuchten J:

1 The plaintiff claims against the defendant as surety for the shortfall of a claim arising from a loan secured by a mortgage bond. The plaintiff's claim against the defendant became due when it proved its claim against the principal debtor in the principal debtor's insolvency.

2 The only defence in which the defendant persists is that the plaintiff's claim against her has prescribed. The defence of prescription is before me for determination pursuant to a statement of agreed facts submitted by the parties under rule 33(1).

3 First, a brief outline of the facts. Three bonds were registered against a property as security for the plaintiff's claim against the principal debtor; on 18 July 2003, 7 April 2006 and 12 December 2008 respectively. The home loan and the suretyship were concluded on 20 November 2008. The principal debtor was sequestrated on 28 September 2011. The trustees in the principal debtor's insolvency sold the bonded property to Titantrade 225 CC on 30 March 2012. Titantrade sold the bonded property to Mr and Mrs van Rooyen on 28 May 2012. The plaintiff proved its claim in the principal debtor's insolvency on 27 September 2012.

4 On 8 November 2012, the property was transferred first to Titantrade and then to Mr and Mrs van Rooyen. On the same date, the three bonds were cancelled.

5 On 22 November 2012, the trustees made a provisional payment of R1 million to the plaintiff. On 9 June 2014, the trustees paid a final dividend of R74 374,43 to the plaintiff.

6 On 26 January 2015, the trustees' first and final liquidation, distribution and contribution account in the insolvency of the principal debtor was accepted by the Master.

7 On 26 July 2016, the plaintiff served its summons in the present action on the defendant.

8 The periods of prescription of debts are set out in s 11 of the Prescription Act, 68 of 1969. The period of prescription of "any debt secured by mortgage bond" is 30 years. Counsel for the defendant contend that the 30 year period is not any longer applicable to the debt owed by the defendant to the plaintiff. That is so, counsel say, because the bonds were cancelled and the debt therefore ceased to be one secured by mortgage bond. If that is correct, then the prescriptive period is three years. The plaintiff's summons was served after the lapse of the three year period and therefore (thus the argument) the claim has prescribed.

9 Counsel for the plaintiff argue that the prescriptive period applicable to a specific debt is fixed when the debt in question becomes due and does not change. Therefore (reason counsel for the plaintiff) irrespective of the fate of the bonds, the debt due under the home

loan remained, for purposes of the Prescription Act, one secured by mortgage bond.

10 Alternatively, say counsel for the plaintiff, if the prescriptive period transmuted to three years, prescription was interrupted by the payments made by the trustees. This is because, they say, s 14(1) of the Prescription Act provides that the running of prescription shall be interrupted by an express or a tacit acknowledgement of liability by a debtor. Both sides accept the triteness of the propositions that a payment on account is such an acknowledgement of liability and that such an acknowledgement of liability by the principal debtor will interrupt prescription against the surety. Under s 14(2), prescription "shall commence to run afresh from the day on which the interruption takes place".

11 But, say counsel for the defendant, the principal debtor did not acknowledge liability: the trustees in his insolvent estate did so. The trustees are not the agents of the insolvent and the Prescription Act contemplates only the acknowledgement of the debtor or, possibly, his agent. In this regard, counsel for the defendant pray in aid the decision in *Consolidated Textile Mills Ltd v Weiniger*.[1]

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1 1961 3 SA 335 O

12 To resolve this issue, one must interpret the statute. As was so trenchantly observed in *Potgieter v Olivier and Another*,[2] the Supreme Court of Appeal provided in *Natal Joint Municipal Pension Fund v Endumeni Municipality*[3] an exposition of the principles of interpretation. It is a unitary exercise that requires the consideration of text, context and purpose.

13 In *Oliff v Minnie*,[4] a bonded property was sold in execution but did not realise enough to discharge the indebtedness of the debtor. The property was then sold free of the bonds. The bonds therefore became valueless as security. The creditor then sued the debtor on the debt underlying the erstwhile bonds. That debt had become due on 1 September 1931, many years before the plaintiff served his summons on the defendant. The defendant raised a defence of prescription under the applicable provisions of the statute governing prescription in the situation considered by the court,[5] contending that the debt had changed its character as from the date of the sale in

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[2] 2016 6 SA 272 GP para 30

[3] 2012 4 SA 593 SCA

[4] 1953 1 SA 1 A

[5] Section 2 of Chapter 23 of the Wetboek of the Oranje Vrij Staat (the Law Book of the Orange Free State)

execution because the bond had "ceased to be a mortgage bond and became merely an acknowledgment of debt".[6]

14 The Appellate Division explained that the purposes of prescription were twofold and had been so since antiquity: to punish the supinity of a plaintiff who does not enforce his rights and to mitigate the difficulty felt by defendants who have to repel ancient claims.[7]

15 The court in *Oliff* held that the critical date for the purposes of identifying the prescriptive period was the date upon which the debt became due:[8]

> For the purposes of this inquiry it seems to me significant that these classes of actions are determined in sec. 2 not according to the nature or economic content of an action but entirely according to the class of written instrument upon which an action is brought. So, for example, a judgment is a judgment whether it orders the payment of money, the delivery of property or one or other in the alternative. I cannot see any indication in the section or any reason in legal theory why its classification for the purposes of the section should alter in mid-currency if by chance or otherwise, say if the substance matter which is *in obligatione* perishes or is destroyed, specific performance becomes impossible leaving

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6 Page 3

7 Page 4

8 Referred to as the *actio nata*, ie the birth of the action (p3).

> the person entitled only with that which is *in solutione*. Nor can I see why a mortgage bond which has become valueless as security should cease to be a mortgage bond within the meaning of the section; that section is not concerned with security. For reasons best known to the Legislature it laid down different periods of prescription in terms of the written instruments upon which actions are based. Since the present action was brought on a mortgage bond it is not affected by the eight years period of prescription and according to the Common Law (whether the Theodosian prescription of 30 years or the third of a century is applicable) it is not prescribed.

16 Counsel for the defendant relied on *Investec Bank Ltd v Erf Elandspoort (Pty) Limited and Others.*[9] In that case, the debt had become due on 18 September 2002.[10] But by then, a notarial bond which had been registered as security for the debt owed by the defendant under a lease had been cancelled.[11] So when the debt became due, the debt was no longer one secured by a mortgage bond.

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9 [2017] ZASCA 128

10 Para 12

11 Para 4

17 The court in *Investec* referred to academic criticism of *Oliff*,[12] observing that the weight of academic authority supported the view that once the security ceased to exist, "the debt is no longer secured and the prescriptive period then becomes three years as it is with any other debt ... ."[13]

18 But the court in *Investec* did not overrule *Oliff*, by which I therefore remain bound. In my view the conclusion in *Investec* is consistent with *Oliff*. When the debt under scrutiny in *Investec* fell due, it was not a debt secured by a mortgage bond; in *Oliff* it was.

19 In the present case, when the debt fell due it was secured by mortgage bonds and, on the authority of *Oliff*, what thereafter befell the bonds is of no legal relevance. I therefore hold that the prescriptive period applicable was thirty years and that the defence of prescription must therefore fail.

20 I turn to the question whether the payments on account of the claim submitted by the plaintiff in the insolvency of the principal debtor interrupted prescription.

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12 Paras 15-17

13 Para 17

21 The starting point is s 14 of the Prescription Act:

> (1) The running of prescription shall be interrupted by an express or tacit acknowledgement of liability by the debtor.
>
> (2) If the running of prescription is interrupted as contemplated in subsection (1), prescription shall commence to run afresh from the day on which the interruption takes place or, if at the time of the interruption or at any time thereafter the parties postpone the due date of the debt from the date upon which the debt again becomes due.

22 *Consolidated Textile Mills*, to which I referred earlier, is authority for the proposition that "debtor" in s 14 means only the debtor himself or possibly his agent appointed by him and excludes the debtor's trustee in insolvency. The factual situation considered in *Consolidated Textile Mills* concerned a company in liquidation. The court held[14] that "[o]nce a company has been placed in liquidation, it can no longer be sued for a debt owing by it" and that an action to enforce a claim proved against a company in liquidation would lie not against the company but against the liquidator himself.[15] That is not the law today. The position of an insolvent and his trustee in this context did not arise for

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14 Page 340H

15 Page 341A

consideration in *Consolidated Textile Mills* and the observation[16] that the equivalent provision in the predecessor to the Prescription Act, 18 of 1943, did not contemplate the position of an insolvent debtor was therefore *obiter*.

23 I have referred to the purposes of the institution of prescription. Section 13(1)(g) read together with s 13(1)(i) deal with the position of a claim against a debtor whose estate has been sequestrated. These provisions read:

> (1) If-
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> ...
>
> (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;
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> ... 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 ... (g)... has ceased to exist,
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> the period of prescription shall not be completed before a year has elapsed after the day referred to in paragraph (i).

16 Page 341C

24 Counsel for the plaintiff submitted that the restrictive interpretation of *debtor* in s 14 would subvert the purposes of the institution of prescription. Counsel referred to the trite propositions that the property belonging to an insolvent generally vests in his trustee and the trustee on his appointment as such is vested with the power to administer the insolvent estate and to conduct litigation on its behalf. If the acknowledgments of the trustee could not interrupt prescription under s 14, the creditor would be deprived of a right for no good reason. It would be absurd, argued counsel, if neither the insolvent nor his trustee could make such an acknowledgment.

25 Counsel for the defendant submitted that there was no need for the wide interpretation. Section 13(g) protected the creditor's rights in this regard.

26 While I agree that s 13(g) affords partial protection for a creditor, the provision does not cover the situation of a creditor who for one reason or another has not filed a claim; nor does the provision cover the situation of a creditor other than one whose claim in respect of which the period of prescription would be completed as described in s 13(i), ie be completed before or on, or within one year after, the day on which the impediment referred to in s 13(g) has ceased to exist,

27 There seems to me, moreover, no reason why a trustee should not be empowered to achieve the benefit in the context of prescription of an agreement to postpone the due date of the debt, a power conferred on debtors by the provisions of s 14(2).

28 I therefore respectfully decline to follow *Consolidated Textile Mills* and hold that the payments by the trustees in the insolvent estate of the principal debtor interrupted prescription against the principal debtor. Counsel were agreed that the interruption of prescription against the principal debtor operates as an interruption against the surety.

29 The defendant's only defence has accordingly failed. The plaintiff must therefore succeed in its claim. Counsel were agreed that the case warrants the costs of two counsel.

30 I make the following order: The defendant is ordered to pay the plaintiff:

1 the sum of R1 265 871,81;

2 interest on the sum of R1 265 871,81 at the rate of 10,5% per annum from 10 June 2016 to date of payment;

3 costs of suit, including the costs consequent upon the employment of both senior and junior counsel.

NB Tuchten
Judge of the High Court
7 March 2018

For the plaintiff:
Adv N Konstantinides SC and Adv R Raubenheimer
Instructed by:
Vesi & De Beer Attorneys
Pretoria

For the defendant:
Adv R Goslett and Adv J Scallan
Instructed by:
AC Nothnagel Attorneys
Pretoria

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