IN THE HIGH COURT OF SOUTH AFRICA
(CAPE OF GOOD HOPE PROVINCIAL DIVISION)

CASE NO:A63/2002

In the matter between:

MAURICE STOCKDALE **First Appellant**

MARIANNE STOCKDALE **Second Appellant**

and

RENE STOCKDALE **Respondent**

JUDGMENT DELIVERED ON THE 22 NOVEMBER 2002

TRAVERSO, AJP :

[1] The Appellants in this matter were the Plaintiffs in the Court *a quo*. The Respondent was the Defendant. For the sake of convenience I will refer to the parties as in the Court *a quo*.

[2] The Plaintiffs' claims in the Magistrates' Court were based on two acknowledgements of debt that were both signed by the Defendant on 1 February 1991. In both acknowledgements of debt the Defendant acknowledged herself indebted to the Plaintiffs in the sum of R41 397,07.

Against this claim the Defendant raised a special plea of prescription.

[3] The only issue in this appeal is whether the Magistrate was correct to dismiss the Plaintiffs' claims on the basis that their claims against the Defendant had prescribed.

[4] To decide this issue regard must be had, *inter alia*, to the background circumstances and the wording of the two acknowledgements of debt. The relevant background circumstances are the following:

4.1 In 1986 the Plaintffs' son, Michael John Stockdale, and the Defendant were married to each other and were living at their family home at 7 Dorp Street, Malmesbury. At that stage the house was owned by Mr. Stockdale.

4.2 In 1987, Mr. Stockdale and the Defendant agreed that the house should be transferred into Defendant's name on account of the fact that by doing so Mr. Stockdale would qualify for favourable financing arrangements from a finance house, Syfrets Bank.

4.3 In 1987 or 1988 the house was transferred to the Defendant.

4.4 Mr. Michael Stockdale was at that stage employed at Atlantis Diesel Engines ("ADE"), an enterprise based in Atlantis near Malmesbury. He was employed there until 15 September 1990, when he and the Defendant were still living in the house at 7 Dorp Street, Malmesbury.

4.5 When Mr. Stockdale left the employ of ADE, he lost the entitlement to preferential arrangements in respect of the bond registered over the property. While working for ADE he received a 100% bond, and also a subsidy in respect of the bond repayments. To this he was no longer entitled.

4.6 Mr. Stockdale and the Defendant could not afford a bond from another financial institution on the open market.

4.7 As a result of this the Plaintiffs offered to lend the money to settle the existing bond with Syfrets Bank. Mr de Haan, who appeared for Defendant submitted that – "in reality no money was lent by the Plaintiff's to the Defendant– it was lent to their son the witness". While that may be so, Plaintiffs treated Defendant as a debtor(she was after all the owner and mortgagor) and she signed Acknowledgements of Debt.

4.8 Mr. Stockdale, after leaving the employ of ADE, took up employment with the Plaintiffs' company.

4.9 In these circumstances, the Plaintiffs agreed to lend to their son and his wife a sum equivalent to the amount necessary to settle the indebtedness on the bond over the house at Dorp Street, Malmesbury. The Plaintiffs each lent half of the sum necessary, i.e. R41 397,07.

4.10 In addition Mr. Stockdale described the understanding regarding the loan from his parents as follows:

> ***"There was an understanding that while I lived in the house or worked for them or was married that the money was available."***

> ***"Well the money was loaned for while I was living at Malmesbury and employed in the company basically. And my relationship with my parents was good. I mean, if my***

relationship fell flat with them, yes they would be entitled to ask the money back."

4.11 The two acknowledgements of debt are in similar terms describing the debt as in respect of "monies advanced by the creditor to me on 31 January 1991(to enable me to repay my bond with Syfrets Bank)". Two further clauses in particular are relevant:

4.11.1 In terms of clause 2:

"I undertake to repay the capital amount outstanding and interest (refer clause 3) within 30 days from the date notice is given by the creditors."

4.11.2 In terms of clause 4:

"I will at any time be entitled to repay the balance outstanding, together with interest thereon, in one amount without being obliged to give the creditor prior notice of such repayment."

[5] It was common cause that neither Mr. Stockdale nor the Defendant could afford to repay the loan immediately or within 30 days of an immediate demand.

[6] In my view the only reasonable inference to be drawn from the evidence is that nobody regarded the loan as immediately repayable. Repayment would only become due if certain changes in the living arrangements, marriage status, or employment situation occurred. Notice to repay the loan would then be have to be made before recovery could take place.

[7] In addition there are two subsequent events which, in my view corroborate the events described by Mr. Stockdale.

7.1 In 2001 Mr. Stockdale and the Defendant were divorced. As part of the divorce settlement, Mr. Stockdale indemnified the Defendant in respect of one-half of the claim that is the subject of this appeal. The existence of this clause corroborates the version of events described by Mr. Stockdale in his evidence.

7.2 Later, when the house was sold, the proceeds were divided equally between Mr. Stockdale and the Defendant. The Defendant has thus received, indirectly, her share of the financial benefit of the loans that were made in 1991 by the Plaintiffs, as well as being indemnified by Mr. Stockdale in respect of one half of the present claim against her.

[8] The question on appeal is accordingly whether, in the light of these terms, and the relevant background circumstances, prescription began running on the debts immediately (i.e. with effect from 1 February 1991) or not. It is common cause that if prescription did so begin running from that date, the debts became prescribed prior to the institution of action. Conversely, if "notice"had to be given before the running of prescription would commence then such "notice" was given only by way of the letter dated 24 October 2000.

[9] Section 12(1) of the Prescription Act, 68 of 1969 ('the Act"), provides:

> "***Subject to the provisions of subsection (2) and (3), prescription shall commence to run as soon as the debt is due."***

[10] Did the debt created by the acknowledgements become due upon signature or was notice to repay necessary to render it due?

[11] There has been much controversy on this issue in our jurisprudence.

[12] Section 12(1) of the Act expressly requires that a debt be "*due*" before prescription begins to run. When a debt becomes due should, on the one hand be determined by the intention of the parties. There are dicta, referred to by <u>Mohamed, CJ in Uitenhage Municipality v. Molloy,</u> 1998(2) SA 735 (SCA)at 741A which suggests that a debt becomes "due" when the creditor acquires the right to institute action or when the creditor has a "complete cause of action" in respect of such debt.

On the other hand there is a policy consideration underlying the Act that a creditor should not be able to rely on its own inaction in order to delay the running of prescription against him. <u>Uitenhage Municipality v. Molloy</u>,supra, at 742A-D, but see the later remarks of the same Court in <u>Santam v. Ethwar</u> 1999(2) SA 244(SCA) at 252A – 256H.

[13] It is clear that in determining when a debt arises and when it becomes due ("*opeisbaar*") different concepts are concerned. A distinction needs to be made between "*the coming into existence of the debt on the one hand and recoverability thereof on the other*" (<u>List v.</u>

Jungers,1979(3) SA 106 (A) at 121 C-D.) The stage when a debt become recoverable, and therefore due in the sense in which the Act speaks of it, has been described as follows in Deloitte Haskins & Sells Consultants (Pty) Ltd v. Bowthorpe Hellerman Deutsch (Pty) Ltd., 1991(1) SA 525 (A) at 532 H:

> "There has to be a debt immediately claimable by the creditor or stated in another way, that there has to be a debt in respect of which the debtor is under an obligation to perform immediately."

Clearly then it is essential to determine the intention of the parties as regards "*immediate*" payment of the debt.

[14] The facts of this case and the wording and structure of the acknowledgements of debt reveal that there was no immediate expectation or obligation placed upon the Defendant by the Plaintiffs in respect of payment of the loan. It is clear that no specific date for demand was fixed in the document and no condition was linked to the demand. It is however also abundantly clear that it was never contemplated that the "*notice*" to repay could or would be given within 30 days of the date of the acknowledgements.

[15] It is a general rule of law that in all obligations in which a time for payment has not been agreed the debt is due forthwith. However, it is also clear that this may be qualified in the light of the particular circumstances of the case. Voet 12.1.19 says that in the case of a loan for consumption, where no time for repayment has been fixed, the money must be repaid,

> ***"not forthwith, but after the passage of a moderate time, so that in the meantime the borrower will have been able to enjoy at least some advantages out of the loan and the use of the money."***

This sentiment was echoed by Mason, J. in the case of Mackay v. Naylor, 1917 TPD 533 at 538, where the Court held that a reasonable time must be allowed to the borrower to enable him to have some "*real benefit from the transaction*." The Court found that "*the same rule is applied in the case of a loan whether of money or articles of consumption*."

[16] In a contract in which no date of fulfilment has been fixed, the creditor can sue for fulfilment without having "to show that a reasonable time had elapsed when he issued summons" (Fluxman v. Brittain, 1941

AD 273 at 274.) But when was “fulfilment” due? A debt is due “when it is payable, when it is immediately claimable, when payment of it can be compelled by legal action[“per Nicholas, J in Big Rock (Pty) Ltd v. Hoffman, 1983(1) S.A. 534 (T) at 539, quoting several earlier authorities]. Clearly the parties in this case intended repayment to be made within 30 days of notice by the Plaintiffs. If, as the Defendant alleges, the prescription period began to run upon her signing the acknowledgements of debt, then the Plaintiffs could properly have demanded payment on 4 March 1991 but it is quite clear that the Defendant would have been unable to perform. The Plaintiffs, cognizant of the circumstances in which the Defendant found herself obviously afforded her a reasonable time, in the circumstances, to make the repayment of the loan. The intention of the parties that the loan would not be immediately repayable is further reinforced by clause 4 of the acknowledgements of debt which provides that the Defendant would:

> “***<u>at any time</u> be entitled to repay the balance outstanding, together with the interest thereon, in one amount without being obliged to give the creditor prior notice of such repayment.***” (Emphasis supplied)

[17] It is evident that considerations of policy require that a creditor is not by his or her own conduct able to postpone the commencement of prescription, (Benson & Another v. Walters & Others, 1981(4) SA 42 at 49 G). This is expanded upon by the Court in Uitenhage Municipality v. Molloy, *(supra)* at 742E - 743A. Mahomed, CJ stated that one of the main purposes of the Act is to protect a debtor from old claims against which it cannot effectively defend itself, because of loss of old records or witnesses, caused by the lapse of time:

> "***If creditors are allowed by their deliberate or negligent acts to delay the pursuit of their claims without incurring the consequences of prescription, that purpose would be subverted***."

In this instance it is difficult to see how the lapse of time could in any way hinder the Defendant in the manner described. Nor would it be appropriate to classify the Plaintiffs' delay in requesting payment as a "*deliberate or negligent act*". The parties entered an arrangement based on a certain set of circumstances. For as long as those circumstances prevailed, it was understood that notice would not be given. These circumstances changed with the Defendant's divorce from the Plaintiffs' son, and the consequent sale of the property for which the loan was originally extended. In other words:

"What may and should be considered a reasonable time for performance ... can only be decided by reference to the nature of the contract entered into by the parties and the interrelationship of the obligations undertaken by both of them." (Phasha v. Southern Metropolitan Local Council of the Greater Johannesburg Metropolitan Council, 2000(2) SA 455 (W) at 466 B-C).

[18] This was certainly not a situation where the day on which the debt became due could be unilaterally determined by the creditor(ie.Plaintiffs) The personal factors relevant to the Plaintiffs' failure to enforce their right in what may be considered a timeous manner and the clear intention of the parties as manifested in the acknowledgements of debt must be taken into account. In the words of Pothier, which were referred to in the case of Fluxman v. Brittain, (*supra*) at 294, when dealing with a loan in which no term is mentioned for repayment:

"***The lender ought to grant a time more or less according to the circumstances."***

[19] To adopt a different approach would in my view turn prescription into a "*blunt instrument for achieving finality in the relationship between parties to an obligation*." (MM Loubser: "*Towards a theory of extinctive prescription*" (1988) 105 SALJ 34 at 53.) The peculiar circumstances of this matter are such that notice was in fact necessary for the running of prescription to commence; this was made only by way of letter dated 24 October 2000.

[20] Accordingly, I am of the view that the Magistrate's findings that the Plaintiffs' claims had prescribed was wrong and that the appeal should succeed.

[21] I accordingly make the following order.

The appeal succeeds with costs and the Magistrate's order is set aside and substituted by the following:

1) <u>First Plaintiff:</u>

(a) Defendant is ordered to pay the First Plaintiff the sum of R41 397,07;

(b) Interest on the aforementioned sum is to be calculated at the rate of the prime overdraft rate of First National Bank from time to time;

(c) Defendant is ordered to pay First Plaintiff's costs of suit.

(2) <u>Second Plaintiff:</u>

(a) Defendant is ordered to pay the Second Plaintiff the sum of

R41 397,07;

(b) Interest on the aforementioned sum is to be calculated at the rate of the prime overdraft rate of First National Bank from time to time;

(c) Defendant is ordered to pay Second Plaintiff's costs of suit.

TRAVERSO, AJP

I agree:

FOXCROFT, J