REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG

CASE NO.: 2013/22057

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

……………………………… ………………………………………

DATE SIGNATURE

In the matter of:

MIRACLE MILE INVESTMENTS 67 (PROPRIETARY) LIMITED	**First Applicant**
PRESENT PERFECT INVESTMENTS 116 (PROPRIETARY) LIMITED	**Second Applicant**

And

THE STANDARD BANK OF SOUTH AFRICA LIMITED	**Respondent**

JUDGMENT

GAIBIE, AJ

[1] The principle debt in this matter arose from an agreement concluded between Mr N.C. Papachrysostomou ("Nicolas") and the respondent ("the Bank"). In terms of that agreement Nicolas was granted a "liberator facility", pursuant to which an account was opened for him in the books of the Bank and a line of credit was granted to him to the maximum amount of R13,984,600.00. In terms of the facility, the Bank undertook, during the currency of the agreement, to disperse and pay out or lend and

advance sums of money on behalf of Nicolas and it would for that purpose debit his account with such sums. It was a requirement of the facility that Nicolas' debt to the Bank be secured by collateral or suretyships. In the circumstances both applicants executed suretyships in favour of the Bank and they registered twelve (12) bonds as security pursuant to the suretyships signed by them.

[2] In turn, Nicolas: agreed to pay the principle debt with interest in 240 monthly instalments; accepted that the Bank would be entitled to levy its usual and customary charges and to debit his account with such charges; and accepted liability to pay for all legal costs and expenses which the Bank may incur in connection with the enforcement of its rights in terms of the agreement.

[3] For their part, the applicants bound themselves as sureties and co-principle debtors *in solidum* with Nicolas for the due and punctual payment of any sum then or thereafter owing by him to the Bank. In executing the deeds of suretyship, the applicants were represented by Nicolas and by his wife to whom he was married out of community of property.

[4] Following the conclusion of the agreement, the execution of the deeds of suretyship and the registration of the mortgage bonds, Nicolas overdrew the account and in consequence thereof he was indebted to the Bank in the amount of approximately R7.4million on 21 October 2008 ('the decisive date').

[5] It was common course that Nicolas did not draw on the liberator facility nor did he make any payments to the Bank in consequence of the facility after the decisive date. Because no payments were made after the decisive date and the Bank failed to take action against Nicolas for a period in excess of 3 years, the applicants contend that the debt owed by Nicolas to the Bank was extinguished by prescription. Consequently they submit, that the accessory debts owed by them as sureties for Nicolas' facility have also been extinguished by prescription. On the applicants version, Nicolas' debt to the Bank prescribed on 22 October 2011 by virtue of the provisions of section 11 of the Prescription Act, No. 68 of 1969 (the Act).

[6] In opposing this application, the Bank raised several arguments in relation to when prescription in such matters commence running; whether the debt is subject to a three year or thirty year prescription period; whether prescription was interrupted; and whether it would be more convenient to deal with these issues in its action

proceedings launched after this application. I deal with each of these arguments in the paragraphs below.

When does prescription begin to run?

[7] The Bank contends that the liberator facility granted to Nicolas was not a mere overdraft facility but was an enhanced facility payable in monthly instalments for 240 months commencing in August 2005. According to the Bank, repayments were not due on the date of any particular advance but in monthly instalments over the duration of the agreement. Consequently, it contends, that the failure to pay a particular monthly instalment did not automatically accelerate the balance of the debt or render it immediately due and payable. However, the facility granted to Nicolas entitled the Bank to convert the facility to one repayable on demand if he failed to pay any instalment due in terms of the agreement and if he did not remedy this failure within 7 days of written notice given to him by the Bank to do so. A failure to remedy the breach would also entitle the Bank to terminate the facility and claim immediate payment of the outstanding balance. It is the Bank's case that no such notice was given to Nicolas and therefore the amount due in terms of the facility did not become payable. In the circumstances, they submit that prescription did not commence running and could only commence once the notice was given.

[8] The Bank did however send a letter of demand, or a notice, to Nicolas to remedy his breach in August 2008. The demand was only in respect of the arrears outstanding at that point. Despite the fact that Nicolas failed to remedy the breach, the Bank did not terminate the facility or claim immediate payment of the outstanding balance. For its part, the Bank contends that the amount owing remained payable in monthly instalments and that prescription could only commence running at the point at which it exercised its rights in terms of clause 12.2 of the terms and conditions of the liberator facility.

[9] Clause 12 deals with issues of default and the circumstances of any termination of the facility. It provides as follows:

> "12 Default and termination
>
> 12.1 We will not be obliged to make any advance or re-advance under the facility and/or we may convert the facility into one repayable on

demand and/or we may revise any of the terms and conditions of the facility and/or increase the interest rate charged if any of the following events occur:

12.1.1 you breach any of the terms and conditions of this facility or any other agreement between us and you fail to remedy this breach within 7 days of a written notice having been given to you to do so;

12.1.2 you fail to pay any instalment due in terms of this agreement and you do not remedy this failure within 7 days of written notice having been given to you to do so;

…..........

12.1.5 a provisional or final order is passed placing you or any surety:

12.1.5.1 under sequestration;

12.1.5.2 in liquidation or under judicial management; or

12.1.5.3 any comprise or arrangement between you or your creditors or any surety and its creditors is sanctioned or otherwise becomes effective;

....

12.2 <u>In any of the events envisaged in 12.1, we shall have the right without prejudice to any other rights or remedies available to us, to terminate the facility and claim immediate repayment of the outstanding balance by giving written notice. It may be effective immediately or from a date stated in the notice</u> [my emphasis]. If the facility is cancelled any amounts owing to us become payable:

12.2.1 immediately, if stated in the notice, or

12.2.2 on the dates stated in the notice”.

[10] Based on the above clauses, and particularly clause 12.2, the Bank argues that the termination of the facility and a claim for immediate payment of the balance by notice in writing is a pre-requisite for the acceleration of the balance of the indebtedness. Given that no such notice in writing was given to Nicolas at any material time, the debt or its prescription could not commence running. According to the Bank, the debt remained payable in monthly instalments for the balance of the term of 240 months.

[11] In order to determine whether or when prescription in this matter began to run, if at all, it is necessary to examine various provisions of the Act, as well as the relevant principles that have emerged from our jurisprudence.

[12] Section 12(1) of the Prescription Act provides that:

> "Subject to the provisions of sub-sections 2 and 3, prescription shall commence to run as soon as the debt is due".

[13] Section 11 of the Act provides:

> "The periods of prescription of debts shall be the following:
>
> (a) Thirty years in respect of –
>
> (i) any debt secured by mortgage bond;
>
> ....
>
> (d) Save where an act of Parliament provides otherwise, three years in respect of any other debt".

[14] Whether the debt incurred by Nicolas in terms of the liberator facility became prescribed, depends on whether the debt became 'due' within the meaning of that word in section 12(1) of the Act. If the debt became due from the date of Nicolas' default on or about the decisive date, prescription would have commenced running from that date and the Bank's claim would have prescribed on 22 October 2011. In other words, the debt would have prescribed prior to the launch of this application by the sureties (on 21 May 2013), and prior to the Bank's institution of an action for the recovery of the debt against the sureties and Nicolas (on 27 August 2013).

[15] The words "debt is due" in section 12(1) is not defined in the Act. In the circumstances, it is necessary to examine the jurisprudence in relation to this issue. Dealing with the interpretation of that phrase, the court in *Deloitte Haskins and Sells Consultants (Pty) Limited v Bowthorpe Hellerman Deutsch (Pty) Limited*[1], held that for prescription to commence running "there has to be debt immediately claimable by the debtor 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............. It follows that prescription cannot begin to run against a creditor before his cause of action is fully accrued, ie before he is able to pursue his claim"[2].

[16] The Bank's contention is that prescription cannot commence running in respect of a loan repayable in instalments simply because one or more instalments are not paid. They submit that the enquiry is whether the failure to pay any particular instalment accelerates the debt, and renders the full balance due. That, in turn, they submit depends on the terms of the contract in issue. In that regard they rely on various academic articles which explain the merits of such an approach. By way of example, *Christie in the Law of Contract in South Africa 6th Edition* explains the position as follows at page 436:

> "If the contract contains an acceleration clause making the entire balance of the debt payable on the debtor's failure to pay any one instalment it will only be necessary to examine the clause carefully in order to see whether anything in addition to the debtor's fault, such as a written demand is required to bring it into operation.
>
> The normal acceleration clause does not itself make the balance of the debt payable but gives the creditor an option to demand it, so prescription runs from this demand, not from the debtor's failure to pay the instalment."

[17] Christie's approach is similar to that adopted in an article in the 1973 Annual Survey of SA Law at page 72 in relation to a survey of the decision in *Orton v Barhouch*[3]. The author of the article, McLennan, criticised that decision and took the view that each instalment gives rise to a separate cause of action as and when it falls due for payment and that prescription cannot begin to run until the particular instalment falls due for payment. He contended that there may be many good reasons why a

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[1] 1991 (1) SA 525 (A) at 532G-H

[2] This interpretation is supported in Western Bank Limited v SJJ Van Vuuren Transport (Pty) Limited & Others 1980 (2) SA 348 (T), and in Santam v Ethwar 1999 (2) SA 244 (SCA).

[3] 1973 (2) SA 565 (D) at 570.

creditor, who has an option, should decide not to enforce an acceleration clause. It might be to the advantage of the creditor not to interfere with the payment arrangements where, for example, the debt is secure and carries a high rate of interest. He also submits that it seemed anomalous that such a creditor should be held disentitled to recover later instalments. This article, and by implication Christie's approach, was considered by the Court in *Western Bank Limited v SJJ Van Vuuren Transport (Pty) Limited*[4]. In response to that argument the Court cited with approval the judgment of Van Den Heever J in *Hamilton Plase (Edms) BPK v Stadler*[5], who gave the judgment of the full Court in that matter with the other members of Court concurring and in resounding fashion responded to the issues raised by McLennan in the following terms:

> "...... By 'n transaksie soos die onderhawige is daar geen sprake van 'n keuse tussen onversoenbare moontlike vorderingsegte nie. Eiser het geen keuse om uit te oefen in die sin van besluit wat hy wil vorder nie. Hy het slegs die reg om betaling to vorder van die kapitale bedrag aan hom verskuldig. Sy 'keuse' is slegs aangaande wanneer om op te tree: by eerste kontrakbreuk of te wag tot 'n latere stadium; en dit is 'n 'keuse' wat aan iedere kontraktant beskikbaar is – waardeur hy dan ook sou hy te lank wag die risiko van verlies van sy vorderingsreg mettertyd loop tensy hy sorg dat verjaring gestuit word. *Lex subvenit vigilantibus non dormientibus*. Dit is na my mening ook die antwoord op die kritiek van McLennan in die 1973 Annual Survey te 72 op Orton v Barhouch 1973 (2) SA 565 (D) wat, met eerbied, korrek beslis is."[6]

[18] In support of Van Den Heever J's approach, Melamet J in *Western Bank* concluded that:

> "I'm in agreement with the reasoning of the learned Judge and am of the opinion that it is of application to the case under consideration herein. It is true that the plaintiff in the present case need not have taken any action when the breach first occurred but the question is not when did he decide to take action but when did the right to take action first accrue and it is clear that the right to claim the balance of the rentals owing under the lease accrued in September 1971 when the first default occurred. I'm of the opinion that the contract does not provide that the right to claim such balance of the rentals only arose when the lessor decided to claim but arose immediately on default when the payment of rental which was due".[7]

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[4] 1980 (2) SA 348 (T) at 352.
[5] 1977 (3) SA 361 (NC).
[6] Fn 4 at pg 353.
[7] Fn 4 at pg 353.

[19] While there is merit in the argument raised by academics such as McLennan and Christie, case law and jurisprudence point to a markedly different approach[8]. If the Bank was entitled to accelerate payments and claim the full amount but failed to do so, this does not, according to the jurisprudence prevent prescription from running. Prescription runs from the date that the Bank had the right to enforce payment of the full amount due to it even though it did not do so and was prepared to wait longer.

[20] To adopt the approach suggested by the Bank, would mean that the Bank could effectively delay prescription from running depending on whether or not it issued a written notice requiring the remedy of a breach or indeed confirmation of the termination of the facility and the immediate claim for repayment of the outstanding balance. In this way prescription would be dependent on the Bank's election and communication to Nicolas, rather than on an interpretation of the provisions of section 11 and section 12 of the Act[9].

Prescriptive period 30 year or 3 years?

[21] The Bank contends that the applicable period of prescription is 30 years because the period of prescription of a debt secured by a mortgage bond is 30 years in terms of section 11 of the Act. According to the Bank, Nicolas' debt was secured by both the suretyships and also the mortgage bonds passed or transferred in terms thereof. In terms of the suretyships, so the argument continues, the applicants are not only sureties for Nicolas debt but also co-principle debtors. Consequently, the mortgage bonds have been incorporated into the terms of the liberator facility agreement and are not severable therefrom. In substance, the Bank submits that the indebtedness of the applicants has therefore become merged with that of Nicolas under the facility and the liability of the applicants as sureties and mortgages has in that sense lost its accessory character. Consequently they argue that the prescriptive period is 30 years, and not 3 years.

[22] In light of this argument it is necessary to return to the terms of the liberator facility, and in particular to 'the letter of grant', which together with the agreement and the

[8] Hamilton Plase (Pty) Ltd. V Stadler 1977 (3) SA 361 (NC); Western Bank Limited v SJJ Van Vuuren Transport (Pty) Limited and Others 1980 (2) SA 348 (T); Bankorp Limited v Leipsig 1993 (1) SA 247 (ECD) at 252.
[9] Santam v Ethwar 1999 (2) SA 244 at 254.

terms and conditions governed the nature of the facility granted to Nicolas. Clause 3 of the letter of grant provided as follows:

> "3. **Using the facility**
>
> Use of the facility in full or any portion of the facility is subject to you having:
>
> 3.1 provided us with a collateral called for in 4 below; and
>
> 3.2 signed and returned the duplicate of this letter of grant and the attached terms and conditions of liberator facilities".

[23] In paragraph 4 of the letter of grant the collateral held in relation to the grant is set out in numerous and successive paragraphs but the distinction between the principal debt and the collateral in support of that debt is clear. Consider for example:

(a) Paragraph 5 of the letter of grant which is entitled – *"Disclosure of <u>principal debt</u> (in terms of the Usury Act No. 73 of 1968)".*

> "The maximum cash amount actually received or which will be received by you on your behalf is not known or determinable but will not at any given time exceed the amount of this facility.
>
> Initially the <u>principal debt</u> will be made up of the following:

The facility amount paid to you / on your behalf :	R13,984,600.00
Costs of registering the bond:	R 24,712.00
<u>Initial principal debt</u>:	<u>R14,009,312.00</u>
Other costs (inclusive of VAT):	R
Property assessment fees:	R 30,000.00

> Minimum monthly instalment
>
> The <u>principal debt</u> with interest is repayable in 240 monthly instalments. Your initial minimum monthly instalment is made up of the following:

Monthly instalment:	R119,157.97
Total initial monthly instalment:	<u>R119,157.97</u>

[my emphasis]

(b) In paragraph 9 of the letter of grant the primary obligation of Nicolas for the purposes of repayment is specifically stated in the following terms:

> "The interest payable by you is calculated on a daily basis on the outstanding balance, is charged monthly on the last day of the month and is due and payable immediately. Any interest which is unpaid on the due date, will be capitalised on that date."

[24] It is accordingly apparent from the terms of the letter of grant and from Nicolas' obligations articulated in that letter that the suretyships and the mortgage bonds were collateral for the principal debt offered to Nicolas by the Bank. In the circumstances, and in the absence of the principal debt, neither the suretyships nor the mortgage bonds would have existed. The applicants registered the bonds of security for their obligations as sureties and co-principal debtors. They clearly therefore did not undertake a separate independent liability as a principal debtor and their debt remained accessory to the principal debt. The bonds that were passed, were essentially passed to secure their liability and to secure the liability of Nicolas as the principal debtor. In the circumstances, the prescriptive period of Nicolas' debt therefore remains three years in terms of section 11 of the Act.

[25] In *Kilroe-Daley v Barclays National Bank Ltd*[10], the Appellate Division as it then was, dealt with similar facts as exist in this matter with regard to the position of sureties. In that matter Kilroe-Daley signed a document in terms of which she bound herself as surety *in solidum* and co-principal debtor for all debts or other obligations of whatever nature both present and in future from whatever cause arising which may be or become due, owing or payable by the relevant company. In order to secure her indebtedness to the bank arising out of the suretyship agreement, she hypothecated immovable property that was registered in terms of a deed of transfer to the bank under a mortgage bond. In relation to her liability to the bank, the Appellate Division, said the following:

> "The liability which she undertook is set out in para 8 of the declaration. She bound herself as surety and co-principal debtor. It is correct that a contract of suretyship is a separate contract from that of the principal debtor and his creditor. It is, however, accessory to the main contract"[11]

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[10] 1984 (4) SA 609 (A).
[11] Fn 10 at page 622.

[26] The Appellate Division also cited with approval the following dicta in *Union Government v Van Der Merwe 1921 TPD 318 at 321* where Wessels JP said:

> "The legal scope of the surety's contract is identical with that of the principal debtor – *accessorium sui principalis naturam sequitur*. The surety undertakes the same obligation as the debtor, and undertakes to perform the same obligation so soon as the debtor, when called upon, fails to perform it… It is true there are two contracts, the one between the creditor and the debtor and the other between the creditor and the surety. But the contract between the creditor and the surety is not an independent contract with an obligation of its own but an accessory contract with the very same obligation that exists between the principal debtor and the creditor. Although it is true that the surety contract may be entered into by an agreement different to that of the principal contract, yet immediately the surety agrees to become such, whether by a written or a verbal agreement, then his contract with the creditor is of the same nature as that of the principal debtor, because it becomes accessory to it, or is, as it were, absorbed by it.[12]"

[27] In the circumstances, the Appellate Division in *Kilroe-Daly* concluded that a surety and co-principal debtor does not undertake a separate independent liability as a principal debtor and that the addition of the words, "co-principal debtor" does not transform his contract into any contract other than one of suretyship[13]. The consequences of this approach means that if the principal debt became prescribed or for any other reason ceased to exist, then the surety's debt also became prescribed and ceased to exist[14]. In the circumstances, the prescriptive period of Nicolas' debt therefore remained 3 years.

Another bond

[28] The Bank contends that the prescriptive period was thirty years because it granted a further loan to Nicolas for the acquisition of a property known as section 88 Avignon Lonehill, Ext. 88 which was purchased on a sectional title basis and measured 78 square metres in area. The purchase price of the home was R639,000.00 and the Bank registered a bond by Nicolas in the amount of R575,100.00 to finance the acquisition of the property during November 2005. The Bank submitted that the bond not only secured the home loan but had in its terms also served a continuing

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[12] See also the approval of this approach in Mahomed v Lockhat Bros. and Company Limited 1944 AD 230 at 238

[13] At page 623

[14] See Kilroe Daly at page 623; and see Leipsig v Bankorp Ltd 1994 V2 SA 128(a) at page 132

covering security "…*in respect of existing and future debts arising from any cause*" including "*money lent and advanced in the utilisation of any other banking facilities or otherwise*". In light of the broad description of the obligations so secured, the Bank contended that it was wide enough to cover Nicolas' indebtedness under the liberator facility. Consequently they argued that the debt due to the Bank in terms of the liberator facility was not only secured by the bonds which formed the subject of the application before this Court, but also the another bond which secured it as well as the home loan. The consequence of this other bond they suggest, is that the prescriptive period in respect of Nicolas' debt to the Bank is 30 years, and not 3 years.

[29] The home loan bond was however cancelled post Nicolas' sequestration when the property was sold by the trustees on 13 January 2013. In the circumstances, and until that date, so the argument goes, the bond served to secure his indebtedness to the Bank and precluded the applicants from contending that the prescriptive period was 3 years, or that it falls to be measured on the so called decisive date.

[30] It seems to me that there are three fundamental problems with this submission. First, extinctive prescription applies to the principle debt and not to the mortgage bond itself and therefore prescription begins to run when the debt is due[15]. Where the bond is cancelled before payment or performance of the debt, the 30 year prescription period can no longer be applicable and if more than the otherwise shorter prescription period has elapsed since the due date of the debt, the debt will become prescribed upon cancellation of the bond when the operation of the 30 year period falls away[16]. Secondly, and perhaps more fundamentally, where the bond is registered in an amount which is insignificant compared to the principle debt, and in circumstances where it was intended to secure another debt, it can hardly be argued that the mortgage was intended for the much higher principle debt in respect of which specific bonds were secured.

Interruption of prescription

[31] The Bank contends that irrespective of its submissions set out above, prescription was interrupted by Nicolas' acknowledgment of the liberator debt in sequestration

[15] Loubser: extinctive prescription, page 38

[16] Loubser at page 38; Oliff v Minnie 1953 (1) SA 1 (AD) at 3 C – E; see also annexure 'H' of the pleadings which is the summons and particulars of claim launched by the Bank against the applicants in this matter and Nicolas which was issued on 27 August 2013, after cancellation of this further bond.

proceedings instituted against him by Firstrand Bank Ltd. Such acknowledgment they say was contained in an affidavit that Nicolas filed in those proceedings on 24 April 2012 in which he sought a discharge of the provisional order of sequestration against him. In annexure "C" to that affidavit he provided a list of properties owned by him and the companies in which he was a shareholder. The list of properties include all of those properties in respect of which bonds securing the liberator indebtedness had been registered. In particular, Nicolas identified the amount secured by each such bond and recorded his indebtedness to the Bank as secured by each such property. According to the Bank, the purpose of annexure "C" to his affidavit was intended to demonstrate that on his version, his total liabilities amounted to R13,450,000.00 and that his assets, and in particular his properties, could be sold for R21,000,000.00 and consequently that his assets exceeded his liabilities. In the body of his affidavit, Nicolas specifically confirmed the liability to his creditors in the amount of R13,450,000.00 and this liability, according to the Bank:

> "..... plainly includes the amount owed to the respondent in terms of the liberator facility i.e. as secured by the bonds referred to in …annexure C".

[32] This proposition is problematic for the following reasons. First, the Bank was not a party to the sequestration proceedings and any "acknowledgment" insofar as it may be contended was made by Nicolas in his affidavit, or in annexure "C" thereto, was not made to the Bank but to Firstrand Bank who launched the sequestration proceedings. Such an acknowledgment cannot interrupt prescription in relation to the debt that emanated from the liberator facility for the reasons advanced by Loubser:

> "The acknowledgement of liability must be made by the debtor himself or his authorised agent; it must be made to the creditor himself or his agent. The running of prescription is therefore not interrupted where the debtor acknowledges liability to a person whom he believes, through a mistake of law, to be the creditor. Likewise an undertaking to refund the amount of the debt to the creditor, where the undertaking is given to a third party who does not act as the creditor's agent does not interrupt prescription"[17].

[33] In terms of section 14(1) of the Act, "the running of prescription shall be interrupted by an express or tacit acknowledgement of liability by the debtor". The phrase

[17] Loubser: Extinctive Prescription, at page 139.

"acknowledgment of liability" is not defined in the Act and in the absence of any clear indications to the contrary, the section must be interpreted in light of the current jurisprudence. In *Pentz v Government of the Republic of South Africa*[18] and *Markham v South African Finance and Industrial Co Ltd*[19] *1962,* the Appellate Division indicated that the words "*acknowledgement by the debtor*" in section 14(1) should be construed as meaning an acknowledgment to the creditor or his agent.

[34] Secondly, it is not clear from Nicolas' affidavit in the sequestration proceedings that there is an explicit acknowledgement of his indebtedness to the Bank. At best, for the Bank, annexure "C" to his affidavit indicates that the Bank is the bond holder of the bonds held in relation to the properties identified therein. No mention is made of the liberator facility or of the amount of the debt owed to the Bank in respect thereof. Even if my interpretation is incorrect, and the Bank's interpretation that the reference to these properties must by implication mean his indebtedness in relation to the liberator facility, then the acknowledgment was made in 2012 after the debt had prescribed in 2011. I accordingly agree with the applicant's contention that the acknowledgment, if any, must refer to an existing liability and not to a liability which existed in the past. In other words, if the acknowledgment is made after the prescription period has elapsed, the acknowledgment has no effect and cannot interrupt the running of prescription in terms of section 14(1) of the Act. The acknowledgment, if any, by Nicolas which is relied upon by the Bank was made after the debt had already prescribed. This view is also supported by: *Loubser: Extinctive Prescription*[20]*; Lipshitz v Dechamps Textiles, GMBH & Another*[21]*; Mostert v Mostert*[22]*; Grey v Southern Insurance Association Limited*[23]*; Vilakazi v National Employers General Insurance Company Limited*[24]*.*

The launch of an action

[35] The final issue raised by the Bank, although it was not pursued in argument, was that it had now launched a summons or an action in relation to the outstanding debt which emanated from the liberator facility and that in the circumstances it would be convenient to hear the action and the application simultaneously as both will traverse

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[18] 1983 (3) SA 584 (A.)
[19] 1962 (3) SA 669 (A) at 676F.
[20] At 140 – 142.
[21] 1978(4) SA 427 (C) at 430D-G.
[22] 1913 TPD 255 at 260.
[23] 1982 (3) SA 688 at 691F – 692E.
[24] 1985 (4) SA 251 (C) at 256B – 257C.

the same factual and legal issues. However, the facts in this matter were not disputed and the only issue in dispute was in relation to the applicable law. In any event, the summons was issued after the application, and the law in my view is a matter that has been determined in terms of this judgment. If anything it is more convenient to dispose of this matter in the context of this application given that the facts are common cause.

Order

[36] In the circumstances, and after hearing the parties in this matter, the following is ordered:

1. The Respondent is ordered to consent in writing that the following mortgage bonds be cancelled:

For the first Applicant:

a. SB025500/05 ST22690/2005 196 SS LONEHILL VILLAGE ESTATE,116

b. SB055095/05 ST50794/2005 188 SS LONEHILL VILLAGE ESTATE,116

c. SB061707/06 ST48595/2006 96 SS TINZA LIFESTYLE ESTATE,317

d. SB099244/06 ST77777/2006 132 SS TINZA LIFESTYLE ESTATE,488

e. SB178920/06 ST142354/06 246 SS TINZA LIFESTYLE ESTATE,998

f. SB178942/06 ST142381/06 272 SS TINZA LIFESTYLE ESTATE,998

g. SB178961/06 ST142402/06 296 SS TINZA LIFESTYLE ESTATE,998

h. SB181185/06 ST144193/06 82 SS SIBITI PRIVATE ESTATE, 1013

i. SB107768/05 ST97533/05 80 SS LONEHILL VILLAGE ESTATE,116

For the second Applicant:

j. SB31249/04 ST046531/03 62 SS SHIMBALI SANDS, 274

k. SB31632/03

l. SB106279/03;

2. That the cancellation of the bonds listed in paragraph 1 above occur without demanding payment of any sum from the Applicants;

3. The required consent shall be given by the Respondent, within a period of 7 days from the date of this order, failing which the Sheriff of this court be authorised and directed to furnish the required consent;

4. That the Respondent pays the costs of this application including the cost of senior counsel.

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GAIBIE AJ

Date of Hearing: 28 October 2014
Date of Judgment: 11 December 2014

Appearances:

For the Applicants:	Adv. J.F. Roos SC
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