REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

(GAUTENG DIVISION, PRETORIA)

CASE NO: 55320/2011

DATE: 29 MAY 2014

FIRST RAND BANK LTD **PLAINTIFF**

and

HENDRIK WILLENM AUSTIN **1ST DEFENDANT**

LORRAINE AUSTIN **2ND DEFENDANT**

JUDGMENT

KHUMALO J

INTRODUCTION

[1] The Plaintiff instituted an action against the Defendants for the payment of a debt that arose from monies that were advanced to the Defendants in terms of two loan agreements they concluded with Saambou National Building Society on 3 November 2001 and July 2005. The Society subsequently on 28 August 2008 changed its name to First Rand Finance Company Limited and eventually on 1 March 2009 to FirstRand Bank Limited, that took over all the assets with the consent of the Minister of Finance in terms of s 54 (1) of the Banks Act 94 of 1990.

[2] It is common cause between the parties that the amounts of the first and second loans were R221 000.00 and R600 000.00 respectively and in December 2001 and July 2005 the Defendants registered a Bond, in that order, in respect of the loans, over the property described as Erf [...] R[...] Extension 10 Township,

Registration Division J.R. Province of Gauteng ("the property"), in acknowledgement and as security of their indebtedness to the Plaintiff. The second Bond was a continuing covering security for all and any sums of money which may now or in future be owing to or claimable by the Plaintiff from the Defendants.

[3] The terms of the loans provided for the amounts owing in the Bonds to be payable in 240 monthly instalments and had an acceleration clause that in the event of a failure by the Defendants to timeously make payment or perform any obligation in terms of the second bond or should the Defendants breach any condition in respect of the second bond, or should the Defendants breach the condition of any other agreement with the Plaintiff, all amounts owing to the Plaintiff by the Defendants shall forthwith be payable in full and the Plaintiff may institute proceedings for the recovery thereof and for an order declaring the property executable.

[4] It is also common cause that on 15 February 2007 the Defendants were in arrears and Plaintiff proceeded to issue and serve a summons upon the Defendants under case number 4428/2007, claiming the whole amount that was owing on the two bonds at the time and invoking the acceleration clauses as provided for in the two agreements. The Plaintiff also alleged the Defendants to have been in arrears for 60.52 months. The Defendant filed a Notice to defend and on 28 February 2008. Plaintiff withdrew the summons.

[5] On 27 September 2011, the Plaintiff again issued a summons against the Defendant for the total debt outstanding from the two bonds (consolidating the amounts).

[6] The Defendants raised a Special Plea that the Plaintiff's full claim has prescribed. The parties have agreed to deal with the Special Plea before getting into the principal case. Defendants pleaded and argued that when Plaintiff exercised its option in the 2007 summons to call upon the full amount as per the acceleration clause, the full unpaid amount on the bonds became due and payable. The Prescription period then started to run from that date **when the bond became due and payable,** which prescription period, according to Mr Coetzee appearing on behalf of the Defendants, became now of a shorter period of three years. The Defendants therefore allege that Plaintiff's claim under the bond prescribed on February 2010. Mr Coetzee also conceded that the last payment was made on 28 October 2006.

[7] Plaintiff contends that the prescription period applicable on the debt is 30 years as it is secured by a mortgage bond as provided in s 11 of the Prescription Act 68 of 1969 ("the Act"). It is argued on its behalf that the issuing of the summons in 2007 calling upon the whole debt might have made the whole amount owing in the bonds due and payable but the period of prescription applicable remained calculable at 30 years.

APPLICABLE LAW

[8] The periods of prescription applicable to debts are set out in the relevant sections of the Act as follows:

"s 11. Periods of prescription of debts

The periods of prescription of the debts shall be the following:

(a)

30 years in respect of

(i) Any debt secured by a mortgage bond

(ii) Any judgment debt

(iii) .....

(iv) .....

save where an Act of Parliament provides otherwise, three years in respect of any other debt."

[9] s 12 When prescription begins to run-

subject to the provisions subsections (2), (3), prescription shall commence to run as soon as the debt is due.

sl5 provides for Judicial interruption of prescription 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) Any interruption in terms of subsection (1) shall lapse, and the running of prescription shall not be deemed to have been interrupted, if the person claiming ownership in the thing in question 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.

(3) If the running of prescription is interrupted as contemplated in subsection (1), a new period of prescription shall commence to run, if at all, only on the day on which final judgment is given.

[10] The security of a bond is intended that it must be able to support a claim arising therefrom for a period of 30 years excluding such a claim from the operation of a shorter period of prescription as the documents are of public record and are easily proved and not exposed to loss as writings in private custody. See *Oliffv Minni*

1953 (1) SA 1 (A.D).

[11] In *Oliffit* was also concluded that a mortgage bond which had become valueless as security did not cease to be a mortgage bond within the meaning of the section; that section (s 2 of Chapter 23 of the Orange Free State Law Book, the equivalent of s 11 (a) (i) of the Act) was not concerned with the security. It was held that as the action was brought on a mortgage bond, according to the common law it was not prescribed.

[12] It is important to set out the facts in *Oliff* to give a better perspective of the principle as aforementioned: 'During 1930 Respondent passed a second mortgage bond over his farm in favour of Appellant as security of a debt of $1 000 owing to Appellant and payable on 1 September 1931. The bond was duly registered on 10 July 1930. During December 1933, the owner of a first mortgage bond caused the mortgage property to be sold in execution, not realizing enough to reduce the indebtedness of the 2nd Bond as well. The property was transferred to the purchaser free of both bonds and respondent's title deeds were endorsed with "Sold in execution by Sheriff". On the 12 February 1951, Appellant gave respondent notice to pay the amount due under the bond within three months and upon liability being repudiated issued summons on 20th September 1951. Appellant's claim for provisional sentence, was found to have prescribed and dismissed on the basis that the action was not one on a mortgage bond within the contemplation of s 2 (sll), which excluded from the new period of prescription (which on this case would be three years) the mortgage bonds duly attested and registered against the title of the property hypothecated by it. The court a quo argued that had the bond retained its original character and functions, the claim would not have prescribed. That after the sale in execution of the mortgaged property, it ceased to be a mortgage bond and became merely an acknowledgement of debt so that the period of prescription applicable to acknowledgements of debts began to run against it afresh. On Appeal Van den Heever, JA (as he was) in overturning the dismissal held that the section makes provision for only one point of time from which prescription runs and that is from the time of *actio nata* and that in the present case, certain type of written instruments represent the genus and a species, mortgage bonds, receive a favoured treatment without any provision express or implied for its migration from one class to another. He concluded by saying on 5B that:

> "It seems, therefore, that this section excludes from the operation of the shorter period of prescription documents which, though they may relate to "transactions long gone by", are of public record, are easily proved and are not as much exposed to loss as writings in private custody. To these considerations it is quite irrelevant what a person entitled may hope to recover by suing on such instrument."

[13] On behalf of the Defendants, Mr Coetzee mentioned the decision in *Kilrce-Daley v Barclays National Bank Ltd* [1984] 2 All SA 551 (A) ("referred to hereafter as the Dodo case) to support the argument

that the debt became due in 2007, and that the prescription period that became applicable was three years from that date. In Dodo's case the principal debt secured by the bond registered by the surety (appellant) became due on a certain date and the surety argued that the claim against it was bound by that date as its due date and therefore the claim (as it is against the principal debtor) prescribed three years from that date, which was presumably a year after the liquidator's account was confirmed. **The argument was premised on a fact that her liability as surety and co-principal debtor was accessory to the principal debtor's liability.** The Plaintiff on the other hand argued that the prescriptive period applicable against the surety's liability as secured by the bond was 30 years, alternatively 30 years from the date when confirmation of the Liquidator's account (of debt by principal debtor) took place. It further argued that the suretyship contract was a separate contract from that of the principal creditor and that there was thus no reason to exclude the debt of a surety and co-principal debtor secured by a mortgage bond from the provisions of the wide terms of s 11.

[14] What separates the contentions in this matter and Dodos is the question that the court in Dodos had to first decide upon before adjudicating on the law and principles applicable, which is, what was the debt secured by the Appellant? Although the distinctiveness of the suretyship was recognized it was however found to be accessory to the main contract such that the surety undertakes the same obligation as the principal debtor which it undertakes to fulfill on failure by the principal debtor to do so. The words "co-principal debtor were expressly denoted to imply that the surety's obligations shall be coequal in extent, meaning of the same scope and nature as that of principal debtor, referring in that regard to the decision in *Mahomed v Lockhat Ros and Co Ltd* 1944 AD 230 at p238. Therefore the execution of a bond by the surety did not amount to entering into a contract separate from her contract of suretyship that is why her liability in terms of the debt owed by the principal debtor did not assume a new life of its own that extended to a period beyond that of the main debt. It did not assume a new liability independent from the principal debt. That is confirmed by the finding by the court that:

> "It was that accessory and dependent debt which was secured by the bond. It follows that if the principal debt, ie, Dodos debt, became prescribed or for any other reason ceased to exist, the appellant's debt became prescribed and ceased to exist. In the result the bank cannot invoke s 11 (a) (i)."

[15] In this matter we are dealing with a totally different situation where the claim itself that arose from the mortgage bond is the principal debt not an accessory to any debt. Both Defendants are main debtors with no sureties or secondary debtors. The existence of a mortgage bond was the only issue in the decision that had any slight relevance to this matter.

[16] The other matters mentioned by Mr Coetzee, specifically the recent decision of *Jans v Nedcor Bank Ltd* [2003] 2 All SA 11 (SCA), are grounded on the same factual and legal issues like Dodos. They all deal with

issues regarding suretyships and therefore fall under the same principle that the mortgage bond secures the ancillary debt which secures the accessory and dependent debt and as a result, the accessory's scope and nature (or extent) determines the scope, nature and extent of the ancillary debt.

[17] In *Bankorp Ltd v Leipsig* 1993 (1) SA 247 (WLD) it was dealt comprehensively with the difference between the security of the principal debtor's obligation by bond and a bond that secures the ancillary liability of the surety to the principal debt (principal debtor's obligation). On para 250A Flemming DJP (as he was then) came to a conclusion that:

> 'if a mortgage bond secured only the tie between the creditor and the surety, s 11 (a) (i) of the Act did not apply; if the obligation of the principal debtor was not secured by the mortgage bond, the principal debtor's liability ended (prescribed) after three years and the extinction of the claim against the principal debtor had the result of destroying the accessory claim against the surety. The conclusion reached in Kilroe-Daly... at 623 applies. The period of prescription was therefore three years and not 30 years.

[18] The reverse is therefore that if a mortgage bond secured the liability between the principal debtor and the creditor as in this action the debtor's liability would have ended after 30 years, including that of surety.

[19] Under the circumstances, the Plaintiffs claim against the Defendants under the bond has not been proven to have prescribed. The Special Plea has no merit. I therefore make the following order:

> [19.1] The Defendant's Special Plea of prescription is dismissed with costs.

N V KHUMALO J

JUDGE OF THE HIGH COURT

GAUTENG DIVISION: PRETORIA

Heard on: 28 May 2014

For the Plaintiff: Adv Denichaud C

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For the Respondent:Coetzee M

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