REPUBLIC OF SOUTH AFRICA

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

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

25 May 2016
DATE

SIGNATURE

31/05/2016

CASE NO: 2517/2011

In the matter between:

INVESTEC BANK LTD	Plaintiff
and	
ERF 436 ELANDSPOORT (PTY) LTD	First Defendant
CECILIA JOUBERT *NO*	Second Defendant
ERF 1081 ARCADIA (PTY) LTD	Third Defendant
V AND J PROPERTIES (PTY) LTD	Fourth Defendant
REMAINING EXTENT 764 BROOKLYN (PTY) LTD	Fifth Defendant

ERF 22 HILLCREST (PTY) LTD Sixth Defendant

JUDGMENT

MOLOPA-SETHOSA J

[1] The plaintiff in this matter instituted an action against the first defendant for payment of an amount of R3 979 184. 50, based on a loan agreement which it concluded on 9 February 2000 with the first defendant; and against the second defendant as the executrix in the estate of the late Mr Pierre Joubert ("Joubert") who passed away on 16 September 2009, and against the third to sixth defendants as sureties, for various surety ships signed by Joubert personally and for and on behalf of the 3rd to 6th defendants on 4 February 2000. At the commencement of the proceedings the plaintiff formally withdrew its action against the 4th defendant as the 4th defendant was finally wound-up on 22 October 2002, prior to the action being instituted.

[2] The defendants raised a special plea and specially pleaded that the plaintiff's claim has become prescribed and that a 3 year prescription period applies.

[3] For this proposition the defendants rely on the following facts, most of which are set out in the defendant's amended special plea, that:

[3.1] On or about 16 March 1998 the South African Railway Commuter Corporation Ltd ("SARCC") concluded a notarial lease agreement ("the lease agreement") with the first defendant in terms of which SARCC let to the first defendant portion 436 (a portion of portion 212) of the farm Elandspoort for a period of 50 years, commencing on 1 November 1997. The notarial deed of lease was registered by the Registrar of Deeds on 9 April 1998 under number K1970/98S.

[3.2] The lease agreement made provision for the fact that the first defendant would be entitled to develop the property. On 9 February 2000 the plaintiff concluded a loan agreement with the first defendant for an amount of about R6 116 420.00. One of the conditions of the loan agreement was the registration of a mortgage bond over the notarial lease, in favour of the plaintiff.

[3.3] On 14 June 2000 a notarial covering mortgage bond ("the mortgage bond") was registered by the Registrar of Deeds, Pretoria, 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 or about January 2002 SARCC cancelled the lease agreement. The cancellation was confirmed by an order of this court dated 21 August 2002; and cancellation of the lease agreement extinguished the title of the first defendant and the real right of the plaintiff, as mortgagee in terms of the bond, in the lease agreement. The plaintiff admits that cancellation of the lease

agreement extinguished the title of the first defendant and the real right of the plaintiff, as mortgagee in terms of the bond, in the lease agreement

[3.5] On or about 10 September 2002 the plaintiff addressed a letter to the first defendant in terms of which it stated that the cancellation of the lease agreement by SARCC constituted a breach of contract between the plaintiff and the first defendant. It called upon the first defendant to pay the outstanding balance owed by it (by virtue of the loan agreement) within a period of 7 days of receipt of the demand, failing which summons would be issued. The plaintiff essentially relied on an acceleration clause in terms of the loan agreement.

[3.6] The first defendant failed to comply with the demand, as a result of which summons was issued on 18 November 2011 [about eleven (11) years from date demand for payment was made], claiming payment of the debt, and served on the first defendant and the other defendants on 21 January 2011.

[3.7] The debt was not secured by mortgage bond, within the meaning of s11(a) (i) of the Prescription Act ("the Act"), implying that the period of prescription of the debt was three years in terms of s11(d) of the Act.

[3.8] That therefore, prescription in respect of the debt commenced to run on 10 September 2002 (the date of the letter of demand) or on

17 September 2002 (the expiration of the period of seven days from date of demand), and that the debt was extinguished by prescription three years thereafter.

[3.9] It is common cause between the parties that prescription commenced to run on 18 September 2002.

[4] In essence the defendants contend that the debt in question herein was not secured by mortgage bond within the meaning of s 11(a) (i) of the Act, which implies that the period of prescription of the debt was three years in terms of s 11(d) of the Act.

[5] On the other hand the plaintiff contends that the debt was secured by mortgage bond, which implies that the period of prescription of the debt was thirty years in terms of s11 (a) of the Act. In its replication to the defendants' special plea the plaintiff contends that in the event the court were to find that the period of prescription of the debt was three (3) years then the first defendant acknowledged liability on numerous occasions in writing and by conduct, and that the running of prescription was accordingly interrupted as envisaged in s14 (1) of the Act.

[6] During two (2) pre-trials held between the parties [on 14 August 2014 and 24 July 2015 respectively], it was agreed between the parties that the special plea of prescription ought to be decided separately from the remaining issues in the matter in terms of the provisions of Rule 33(4) of

the uniform rules of court ("rule 33 (4)"), i.e. firstly, the issue whether the period of prescription of the debt was thirty (30) years or three (3) years, and if found to be three (3) years, whether the first defendant acknowledged liability on numerous occasions in writing and by conduct, thus interrupting the running of prescription as envisaged in terms of s14 (1) of the Act.

[7] About a week prior to the trial, more specifically on 7 August 2015 [this date is not in dispute between the parties], the defendants suggested to the plaintiff that the trial court should be requested, in terms of rule 33 (4), to first decide the relevant question of law, i.e. whether prescription of the debt was thirty (30) years or three (3) years, before any evidence is led in respect of the special plea. The plaintiff did not agree with the suggestion, hence, on the day of the trial the defendants brought a substantive application for separation in terms whereof they sought an order as follows:-

1. That the question of law whether the period of prescription of the debt was thirty (30) years or three (3) years be decided before any evidence is led;

2. that the plaintiff be ordered to pay the costs of this application;

3. Further and/or alternative relief.

[8] Basically the defendants were of the view that this question of whether the period of prescription of the debt was thirty (30) years or three (3)

years should be decided before any evidence is led as this is a question of law and no evidence has to be led in that regard.

[9] The plaintiff was opposed to this application, preferring to have this question of law, as well as the question whether there was interruption of prescription, in the event the court were to find that prescription of the debt was three (3) years, being both adjudicated upon simultaneously, after evidence had been led, i.e. that the court should first hear all the evidence on prescription, and at the end thereof the court should only then decide on the issue of prescription raised by the defendant.

[10] After hearing argument on behalf of both parties I granted separation as requested by the defendants, and reserved the costs of the application in terms of rule 33(4) for separation.

[11] It is trite that the question whether the period of prescription of the debt was thirty (30) years or three (3) years is a question of law; it does not need evidence to be led in that regard. Further, in my considered view it was more convenient for all parties involved, as well as for the court, that this question of law whether the period of prescription of the debt was thirty (30) years or three (3) years be decided first, before any evidence is led.

[12] Rule 33(4) of the Uniform Rules of Court provides as follows:

> *"If, in any pending action, it appears to the court mero motu that there is a question of law or fact which may conveniently be*

decided either before any evidence is led or separately from any other question, the court may make an order directing the disposal of such question in such manner as it may deem fit and may order that all further proceedings be stayed until such question has been disposed of, and the court ***shall*** *on the application of any party make such order [my underlining]unless it appears that the question cannot conveniently be decided separately*".

[13] From the reading of the rule it is clear that on an application by one of the parties for separation of a specified issue, the court must [**shall**] grant such order, unless it would not be convenient to do so. It was argued on behalf of the plaintiff that plaintiff's witnesses were at court and were ready to testify and that it would not be convenient for the plaintiff to have only the question of law being adjudicated upon as this might result in delays and a problem for the plaintiff to get its witnesses again in future. In *Lapperman Diamond Cutting Works v MIB Group(NO2)* 1997 (4) SA 921 (WLD) Joffe J, with whom I concur, agreed with the *dictum* of King J in *Braaf v Fedgen Insurance Ltd* 1995(3) SA 938 (C) at 939G that

"the rule as presently formulated,

'enjoins the court to accede to the application and make the necessary order "unless it appears that the question cannot conveniently be decided separately". Thus it is incumbent on the plaintiff to satisfy the court that the application should not be granted"

[14] It "is incumbent upon the plaintiff to show that the disadvantages of

further separation of the issues contended by the defendant outweigh the advantages", see *Lapperman supra*. As already mentioned, more than a week prior to the date of the trial, defendants suggested to the plaintiff that the trial court should be requested to first decide the relevant question of law before any evidence is led. The plaintiff could have timeously stopped its witnesses from coming to court had it acceded to the defendants' suggestion. I could not find any disadvantages in the submissions for the plaintiff. In my considered view it was more convenient for all parties involved, as well as for the court, that this question of law whether the period of prescription of the debt was thirty (30) years or three (3) years be decided first, before any evidence is led.

[15] Even if the defendants had not made this application as set out in their application for separation, I'm of a view that I would have *mero motu* raised the issue, that the relevant question raised by the defendants be dealt with prior to any evidence being led as this is purely a question of law, and in my considered view it would be more convenient to decide the issue before any evidence is led. I thus granted the order for separation as requested by the defendants.

[16] Pertaining to the issue of costs which were reserved, I am of a considered view that in the interests of justice the costs should be costs in the cause of the whole argument on this issue. The parties in any event proceeded to address the court on the issue of whether the period of prescription of the debt in question herein was three (3) years as contended by the defendants or thirty (30) years as contended by the plaintiff.

[17] Having ordered separation of the prescription issues the only issue for determination before this court is whether the period of prescription of the debt in question herein is three (3) years as contended by the defendants, or thirty (30) years as contended by the plaintiff.

[18] The defendants contend that the debt was not secured by a mortgage bond within meaning of s11 (a) of the Act; that based on facts set out in par [3(3.1 to 3.8)] here above, therefore, the period of prescription was 3 years in terms of s11 (d) of the Act, and not thirty (30) years as contended by the plaintiff.

[19] The crisp question before this court is whether the debt claimed by the plaintiff is secured by mortgage bond, if it is then the prescription period applicable would be thirty (30) years, s11 (a) of the Act would apply; if not secured by mortgage bond then the period of prescription would be 3 years, s11 (d) of the Act would apply.

[20] The defendant contends that the debt which the plaintiff claims from the first defendant is the repayment of the loan which became due at a stage when the real right of the plaintiff, as mortgagee in terms of the bond, had already been extinguished (i.e. at a time when the bond had effectively terminated. It was submitted on behalf of the defendant that, based on the common facts between the parties, as at the time the debt was due, when demand to pay was made and prescription commenced to run, i.e. 18 September 2002, there was no mortgage any longer. That the mortgage bond at that stage had effectively terminated, that therefore the period of prescription applicable was 3 years in terms of s11 (d) of the Act.

[21] Where a right of mortgage is established with regard to a registered long-term lease, the right of security does not affect the land: it is the limited interest of the mortgagor that is encumbered. For this reason, and because the mortgagor cannot grant a stronger right that he himself has, the existence of the mortgage is dependent upon the continuance of the mortgagor's interest in the land. The extinction of the mortgagor's title therefore involves the extinction of the mortgagee's real right; see LAWSA volume 17(2) para 332.

[22] The following are the relevant provisions of the Act:

> **"10 Extinction of debts by prescription**
>
> *(1) Subject to the provisions of this Chapter and of Chapter IV, a debt shall be extinguished by prescription after the lapse of the period which in terms of the relevant law applies in respect of the prescription of such debt...*
>
> **11 Periods of prescription of debts**
>
> 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.*

12 When prescription begins to run

(1) Subject to the provisions of subsections (2), (3), and (4), prescription shall commence to run as soon as the debt is due.

16 Application of this Chapter

(1) Subject to the provisions of subsection (2) (b), the provisions of this chapter shall, save in so far as they are inconsistent with the provisions of any Act of Parliament which prescribes a specified period within which a claim is to be made or an action is to be instituted in respect of a debt or imposes conditions on the institution of an action for the recovery of a debt, apply to any debt arising after the *commencement of this Act.*"

[23] The defendants contend that in terms of s11 (a) extinctive prescription applies to the **debt** and not to the mortgage bond, that therefore prescription begins to run in terms of s12 (1) of the Act when the debt is due, not when the bond is registered. When the debt became due before the bond to secure it was registered the ordinary prescription period of three years was applicable. Meaning that the time that has elapsed since the debt became due will be taken into account and the remaining balance of thirty years will run as from the date of registration of the bond. It was further submitted that the converse is also true, namely that where a bond was registered at the time when the debt became due (which implies that the thirty years prescription period was applicable) and the bond is thereafter cancelled, the ordinary prescription period of three years will

then become applicable. The operation of the thirty year period of prescription falls away. See *Loubser MM Extinctive Prescription p38.*

[24] The parties are *ad idem* that extinctive prescription applies to the debt and not to the mortgage bond itself. The Act does not give a definition of 'debt' and/or the meaning of 'debt is due'. In *Joint Liquidators of Glen Anil Development Corporation Ltd (in liquidation) v Hill Samuel (SA) Ltd* 1982 (1) SA 103 (A) at 110A-C it was held that:

The ordinary meaning of debt is

> 'that which is owed or due; anything (as money, goods or services) which one person is under obligation to pay or render to another'...

[25] In *The Master v I L Back and Co Ltd and Others* 1983 (1) SA 936 (A) at 1004 the following was said:

> The words 'debt is due' in ... s 12(1) must be given their ordinary meaning. It seems clear that this means that there must be a liquidated money obligation presently claimable by the creditor for which an action could presently be brought against the debtor. Stated another way, the debt must be one in respect of which the debtor is under an obligation to pay immediately.

[26] For its contentions the defendants rely, mostly, amongst others, on the *obiter dictum in Olief v Minnie* 1953 (1) SA 1 (A) where the debt in issue was secured by a second mortgage registered on 10 July 1930. The debt was payable on 1 September 1931. During December 1933 the holder of

first mortgage bond caused the mortgage property to be sold in execution. It did not realize enough to reduce the indebtedness under the second bond and the property was transferred to the purchaser free of both bonds. On September 1951 the holder of the second bond applied for the provisional sentence of the bond. the question was whether a thirty year prescription period applied in this case, as provided for in respect of mortgage bonds by Orange Free State legislation prior to the coming into effect of the *Prescription Act, 1943.*

[27] The court held that the point of time from which prescription ran was 1 September 1931, and that the prescription period applicable to that time was thirty years. That even if the mortgage bond in question became valueless as security in the course of that period of time, because the mortgaged property was sold in execution free of mortgage bonds, it did not cease to be a mortgage bond within the meaning of the applicable Orange Free State legislation on prescription and the thirty year prescription period was therefore still applicable when the action on the mortgage bond was instituted in September 1951.

[28] During the course of the judgement Van den Heever JA held as follows:

"In terms of the bond the right and action accrued, if no extension was granted, on the 1st September, 1931. Had the bond retained character and functions, the learned Judge [a quo] reasoned, the claim would not have been prescribed. After the sale in execution of the mortgaged property, however, it ceased to be a mortgage bond and became merely an acknowledgement of debt so that from that date the eight years period of

prescription applicable to acknowledgements of debt began to run against it afresh and the claim was in fact prescribed towards the end of 1941 or January, 1942 (the date of the endorsement does on appear).

I have some difficulty in seeing why the date of the sale in execution should be the commencement of the currency of a fresh period of prescription. The section makes provision for only one point of time from which prescription runs and that is from the time of actio nata, i.e. the 1st September, 1931.

A mortgage bond as we know is an acknowledgement of debt and at the same time an instrument hypothecating landed property or other goods. But even if this bond ceased to be mortgage bond within the contemplation of the section then the instrument could have had further existence only as an acknowledgement of debt and prescription should then have been completed eight years after due date", [my underlining].

[29] It was submitted on behalf of the defendants that the principle which the court in *Olief supra* accepted, is valid for the purpose of the act, namely that if a mortgage bond ceases to be such, then a shorter prescription period becomes applicable to the debt in question and that this period must be calculated from the due date of the debt. Which means, for example, that cancellation of a mortgage bond ten years after the debt secured by the bond becomes due will have the result that a shorter prescription period will become applicable (usually three years) and the debt will become prescribed upon cancellation of the bond.

[30] It was submitted on behalf of the defendants, in the alternative, that the period of prescription must be determined at the time when the debt becomes due and prescription commences to run. That if the debt in question is at that stage not secured by mortgage bond, there is no reason why a longer period of prescription should be applicable. Further that although the act acknowledges the difference between the concept of a debt arising (in s16(1) of the act) and the concept of a debt becoming due, the act is generally not concerned with anything that occurs prior to the commencement of the running of prescription.

[31] As already mentioned the plaintiff *inter alia* contends that the period of prescription which applies to the debt in issue herein is thirty (30) years. That therefore by the time the summons was issued and served on the defendants by it on 21 January 2011, first defendant's debt had not prescribed.

[32] It was submitted on behalf of the plaintiff that prescription does not depend on the nature or economic content but entirely on the class of debt upon which an action is brought i.e. that once a particular period applies to a debt that period dictates the vicissitudes of that debt once it is due. The plaintiff relies for this contention on *Sentrachem Ltd v Prinsloo* 1997 (2) SA 1 (AD) at 15G-H, which case dealt with prescription raised on the basis that the amended particulars of claim disclosed a new cause of action. The issue in this case was whether the debt as set out in the amended process was recognisable from the original process. The case had to do more with the nature of the cause of action in the amended

process *vis-a-vis* the original process, not whether the debt is or is not a debt secured by mortgage bond for purposes of prescription.

[33] The plaintiff contends that the Act does not expressly or impliedly stipulate that in a situation where once a debt can be said to no longer have attributes of a particular species or class of a particular genus [because e.g. the mortgage bond loses its value because the security has disappeared or it has been cancelled]; it is bound to migrate from one genus to another causing the prescriptive period to change from thirty (30) years to three (3) years.

[34] It was submitted on behalf of the plaintiff that what is of importance is that when a debt arises is the date on which one determines what category that debt resides. That the debt occurred in 2000 [February 2000], the mortgage bond was then registered [on 14 June 200], that therefore the debt is a debt within a debt secured by a mortgage bond and that it remains a debt secured by a mortgage bond throughout, that therefore, the prescriptive period applicable is 30 years. That it has to be determined from the day that the debt arises and that it retains its character.

[35] The plaintiff contends that registration of a mortgage bond remains operative *inter partes* after cancellation. That if the legislature had intended that migration between the periods applicable to classes of debts should occur when for some reason or another such class or debt would be relegated to a lesser period then that would specifically have been

provided for. That therefore although the lease had been cancelled in January 2002, at the latest August 2002, before the debt became due on 18 September 2002, such cancellation could not have affected the existence of the recorded main obligation and the terms of the debt.

[36] It was further submitted that the registration of the bond as security for an existing debt would constitute acknowledgement of liability within the meaning of s14 (1) of the Act thereby interrupting the running of the three year period of prescription. That therefore at all times and in particular when the summons was issued and served the debt was secured by a mortgage bond within the meaning/contemplation of s11 (a) (i) of the Act, to which 30 years prescriptive period applies. That therefore the court should find that the prescriptive period is in fact 30 years, and that therefore it follows that action was timeously instituted.

[37] It was submitted on behalf of the plaintiff that the authors Loubser and Saner are wrong in their contention, stating that without referring to authority or giving reasons for their contention they state that where the bond is cancelled before payment or performance of the debt the 30 year prescription period will no longer be applicable. That they state that if more than the otherwise applicable shorter period of prescription has elapsed since the due date of the debt i.e. three years, the debt will become prescribed upon cancellation of the bond because operation of the 30 year period then falls away.

[38] On a proper reading of section 11(a) of the Act, the section does not refer to a debt that was initially [my underlining] secured by a mortgage bond; and in my considered view it cannot have been the intention of the legislature that s11 (a) (i) covers debts initially secured by mortgage bonds.

[39] Both parties (it is common cause), were aware of the cancellation of the mortgage bond; this is exactly the basis upon which the letter of demand was sent. It cannot be that one should look at and/or have regard to the time that the debt actually originally originated. This court was not referred to any authority in this regard; it cannot have been the intention of the legislature if one looks at the meaning of debt, and debt is due in the *Joint Liquidators of Glen* and *The Master v I L Back* cases referred to above.

[40] I agree with the defendants that the principle which was accepted in the Appellate Division in *Olief supra* is valid for the purpose of the Act, namely, that if a mortgage bond ceases to be such, then a shorter prescription period becomes applicable to the debt in question and that this period must be calculated from the due date of the debt, in this case from 18 September 2002. Summons were issued on 18 January 2011, and served on the defendants on 21 January 2011 [about nine (9) years after the debt became due and/or prescription commenced to run]. It is common cause that prescription started to run on 18 September 2002.

[41] This date (18 September 2002), in terms of s12 (1) of the Act is the date when the debt became due. The plaintiff acknowledges that the debt became due on 18 September 2002. As at the time the debt became due and prescription commenced to run there was no mortgage any longer, the bond had effectively terminated. As already mentioned, it was submitted on behalf of the plaintiff that the authors Loubser and Saner are wrong in their contention, and that they did not refer to authority or did not give reasons for their contention set out above. Loubser and Saner rely on Olieff v Minnie *obiter* for their contention. It is trite that the *obiter* remarks by the Supreme Court of Appeal/Appellate Division should not be lightly ignored.

[42] Having regard to the totality of the facts before this court, including the common cause facts, whatever may have happened before 18 September 2002, when demand to pay was made and prescription started running, at that at stage the bond had been cancelled. The plaintiff admits in its amended replication that cancellation of the lease agreement in January 2002, or 21 August 2002, extinguished the title of the first defendant and the real right of the plaintiff, as mortgagee in terms of the bond, in the lease agreement. The legal effect of the cancellation of a notarial lease agreement is that the bond is also then automatically terminated because the mortgagor/the first defendant does not have real right in the property and therefore the mortgagee/the plaintiff does not have a real right that is also extended, see LAWSA volume 17(2) par 335.

[43] The plaintiff cannot now seek to hold that the debt is still a 'debt secured by mortgage bond' as envisaged in s11 (a) of the act. In my considered view, cancellation of the lease agreement therefore automatically put an end/terminated the bond. The right of mortgage was established with regard to a long term lease; therefore the right of security in this instance does not affect the land, it is only the first defendant/mortgagor's limited interest as lessee/mortgagor that is encumbered. Surely the first defendant cannot grant a stronger right than it had. The existence of the mortgage is dependent upon the continuance of the mortgagor's interest in the land, and the extinction of the lease agreement involves the extinction of the plaintiff/mortgagee's real right. I agree with the contention that as soon as the lease agreement is cancelled then the bond is then automatically terminated. The debt in question herein therefore cannot be said to be a debt secured by mortgage bond as envisaged in s11 (a) (i).

[44] The plaintiff's contention that the registration of the bond as security for an existing debt would constitute acknowledgement of liability within the meaning of s14 (1) of the Act thereby interrupting the running of the three year period of prescription cannot be correct. I do not think that s14 (1) could have envisaged a situation where registration of a bond *per se* interrupts prescription. This cannot accord with the wording of s11 (a) and s11 (d) read with s14 (1) of the Act. I am of a view that the plaintiff in bringing this submission is in a way bringing up the second leg of the prescription issue as raised in its amended replication. As at the time the debt became due the bond had terminated, it was no longer in existence, and this the plaintiff has admitted. There was no longer any security for

the plaintiff's debt, which is what s11 (a) deals with, i.e. a debt which is secured by a mortgage bond. On the Olief v Minnie principle it can at best be an acknowledgement of debt and the period of prescription applicable is three years in this case.

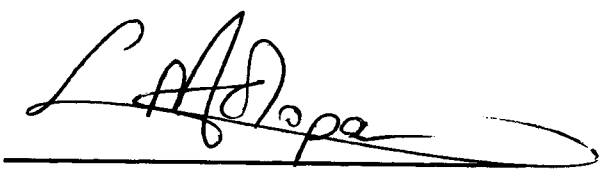
[45] After considering all the facts before me, the legal principles, the authorities and the arguments of both parties, I am satisfied that on the facts before me the prescription period applicable to the debt claimed by the plaintiff herein is three (3) years and **not** thirty (30) years.

In the result I make the following order:

1. It is declared that the period of prescription of the debt which is claimed by the plaintiff was three years.

2. The plaintiff is ordered to pay the costs pertaining to the hearing of the question of law, including the cost of the application for separation.

3. All other remaining issues are postponed *sine die*



L M MOLOPA-SETHOSA

JUDGE OF THE HIGH COURT