



IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

Case No: 37737/2020

Delete whichever is not applicable	
(1) Reportable: No.	
(2) Of interest to other Judges: No	
(3) Revised.	
<u>18 January 2022</u>	
Date	Signature

In the matter between:

ABSA BANK LIMITED

Applicant

AND

MOSEDI JAFTALINA MOSOMANE

First Respondent

STANLEY KGAAPU MPHAHLELE

Second Respondent

**THE PRUDENTIAL AUTHORITY OF THE
SOUTH AFRICAN RESERVE BANK**

Third Respondent

JOHANNES KRUGER N. O

Fourth Respondent

REGISTRAR OF DEEDS, PRETORIA

Fifth Respondent

The judgment is uploaded on case lines by the Judge's secretary. It has also been submitted electronically to the parties' legal representatives by email. The date of this judgment is deemed to be 18 January 2022.

JUDGMENT

Introduction

[1] The applicant launched an application in terms of section 84 (1A) (b) (ii) of the Banks Act 94 of 1990 seeking leave from the Court to institute proceedings against the first and second respondents. The first respondent opposed the application and raised the prescription defence. However, the respondents filed their answering affidavit out of time which also led to the applicant filing its replying affidavit out of time. However, all the parties agreed to the filing of such affidavits, which were out of time.

Facts of the case

[2] The case's background is extracted from the heads of argument by the applicant. The facts are thus; an amount of R1, 6 million was advanced as a loan to the second respondent. The second respondent secured the debt by a registered mortgage bond. At the time of the loan, the second respondent was still married to the first respondent. However, in 2013 the said marriage was dissolved. A decree of divorce was granted with the settlement agreement stipulating that the transfer of the immovable property Erf 1027 Kosmosdal Gauteng will be on the names of the first respondent. In March 2014, the first respondent was required to repay all the monies she illicitly obtained while conducting an unlawful bank.

[3] On 18 March 2014, a repayment administrator was appointed to launch an application in order to obtain interim order for ABSA to recover and to take possession of all assets belonging to the first respondent, including the immovable property described as Erf 1027 Kosmosdal, which is in the province of Gauteng. The final order was granted on 8 October 2019 by Justice Tuchten. The first and second respondents were indebted to ABSA in the amount of two million one hundred and ninety-eight thousand four hundred and forty-eight rand and forty-one cents (R 2 198 448, 41). It was then agreed by the administrator at the request of the applicant that they may sell the property at a reasonable market value. The applicant then launched this

application to seek leave from the Court to institute proceedings against the first and second respondents.

The legal issue to be decided

[4] The only issue in dispute between the parties is regarding the prescription of the debt.

Submissions by the parties

[5] The applicant submits that in order to consider whether a debt has prescribed, it is necessary to consider the genesis of such debt in terms of the Prescription Act. They rely on section 11 of the Prescription Act 68 of 1969, which provides that the prescription period of any debt secured by a mortgage bond is 30 years. The applicant contends that the debt has not prescribed as yet. They argued that the respondents did not dispute that the applicant approved the loan during 2005, and a mortgage bond secured the debt. Further that, the applicant approved a loan to the second respondent, who was married to the first respondent, in the sum of R1, 6 million. Accordingly, the parties are *ad idem* as to the identity of the debt. The applicant submits that the debt fits neatly into section 11 (a) (i) of the Prescription Act. Accordingly, and on this basis alone, the applicant submits that the first and second respondents' point *in limine* regarding prescription must fail because the debt owed only prescribes after 30 years, which has not lapsed. Further, they argued that the debt has not prescribed because section 14 of the Prescription Act prescribes that prescription shall be interrupted by the debtor's express or tacit acknowledgement of liability.

[6] On the other hand, the respondents submit that the debt has become prescribed, and as such, the applicant should not be permitted to launch an action based on a prescribed claim. They further submit that this claim was due in 2005 or 2012, or 2016 and three years on, all those years had already expired. The respondents denied that the prescription of this claim or debt is thirty (30) years, as provided in section 11 of the Prescription Act 68 of 1969. The respondents submit that this was a loan debt, and as such, the form of the debt does not change because of

the mortgage bond registered as security for the debt; as a result, the debt prescribed within three years. I find this argument flawed in law because section 11 of the Prescription Act 68 of 1969 provides that a claim secured through a registered bond prescribes after 30 years.

[7] The respondents further submitted that the Court should deal with when the debt became due to find the date when this debt became prescribed. The respondent maintained that this debt was due in 2005; as such, the debt has prescribed. Alternatively, the respondents argue that the dueness was triggered by ABSA in 2012 when a letter of demand was served to the respondent, and as such, the debt has already prescribed. The respondents again argued that the dueness could also have been triggered in 2016 when section 129 of the National Credit Act 34 of 2005 was issued by the applicant together with a demand for the money, and again on that basis, the debt has already prescribed.

[8] It is convenient to set out at this stage particular relevant statutory provision. The relevant provision of the Prescription Act 68 of 1969 is section 11, which reads thus:

"Section 11. Periods of prescription of debts.

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

(a) thirty years in respect of

(i) any debt secured by mortgage bond;."

The respondent was correct in this argument that the prescription date depends on when the debt became due. In this case, the prescription in respect of the ABSA's right of action to claim the entire outstanding amount of the debt began to run immediately upon the debtor's default; that's when the creditor's right of action had accrued. However, in this ABSA case, the type of debt described by the Prescription Act determines the period the prescription will run. Now, as above stated, while quoting section 11 of the Prescription Act, it provides that the debt secured by mortgage bond prescribes in thirty years. Therefore, the ABSA's claim will prescribe in 30 years. Whether the claim was due in 2005, or 2012 or 2016, this will not have an effect because either way, the claim has not as yet prescribed.

[9] On the respondent's heads of argument, it was argued that the *Kilroe-Daley v Burclays National Bank Ltd* 1984 (4) SA 609 (A) page 617H, dismissed Burclay's claim because of prescription. Similarly, this Court should dismiss the applicant's application. I find the respondents reasoning flawed in that they misinterpreted the case of Kilroe-Daley regarding this issue of prescription. I find that the submission by the respondents' counsel cannot be sustained because the issue in Kilroe-Daley was regarding the appellant, who was a surety and co-principal debtor who had secured his surety liability by registering the mortgage bond. The Appellate Court in Kilroe-Daley found that a contract of suretyship is a separate contract from that of the principal debtor and his creditor. The surety's indebtedness was found to be accessory to that of the principal debtor. Surety had secured her debt with a mortgage bond security. That accessory and dependent debt was secured by the bond, not the principal debt. If the principal debt became prescribed, even the surety's debt became prescribed. Hence, the Appeal Court found that it was wrong for the bank to invoke section 11 in order to find the surety liable to pay the debt which the principal debtor has found prescribed within a year and said that because the surety has secured the debt with a bond, then the prescription will be within 30 years.

[10] This was never the issue in the ABSA's case. The respondents were never declared insolvent, and there were not sureties to the respondents for their debt. The respondents in ABSA's case secured their debt by the mortgage bond. The second respondent is the one who registered a mortgage bond to secure his debt, and this secured mortgage bond falls under section 11 of the Prescription Act. The judgment in Kilroe-Daley cannot assist in deciding prescription in this present case and does not take the respondent's case any further.

[11] The respondents further relied on *Trinity Asset Management (Pty) Ltd v Grindstone Investments* [2017] ZACC 32 at para. 40. They contend that where a loan has been advanced, it cannot later change to be a mortgage bond. On that basis, their focal point on their arguments was on the debt and not on debt secured by a mortgage bond which I find to be wrong because ABSA is basing its claim on a debt secured by a mortgage bond because the second respondent secured the debt with a mortgage bond. The Prescription Act binds the respondents if they raise the defence of prescription. The Prescription Act should guide them. The Act provides that any debt

secured by a mortgage bond its period of prescription is thirty years. This includes the loan agreement if a mortgage bond secures it. Secondly, Trinity's case is distinguishable from the case at hand because, in Trinity, the debt was not secured by a mortgage bond.

[12] In the Trinity case, it was just a loan that prescribed within three (3) years. Secondly the contract between Trinity and Grindstone investments stipulates that the creditors should issue a demand first so that the debt can become due, however, the majority decision found that the claim has prescribed even if there was no demand issued yet by the creditors. So, it was of importance for the court in Trinity's case to first determine when the debt became due. Unlike the loan agreement which ABSA and the second respondent entered into, secured by the mortgage bond. Putting much reliance on Trinity's case is flawed in law especially in wanting it to assist the Court in deciding totally different facts of the case. In this ABSA case, a prescription will only run after 30 years, as stated in the Prescription Act section 11, but in Trinity, prescription run after three years because of the loan advanced, which is not secured by a mortgage.

[13] The respondents further argued citing the case of *Standard Bank v Miracle Mile Investments* [2016] ZASCA 91, 2017 (1) SA 185 (SCA), where he said that the Standard Bank's reliance on the thirty (30) years prescription period in respect of a debt which was secured by a mortgage bond was rejected on the basis that the Court should first check when is the debt due. Again, this is the misinterpretation of the facts on which the Supreme Court of Appeal decided. Even though there were other points which the Standard Bank has raised, including to rely on the 30-year prescription period in respect of a debt secured by a mortgage bond in terms of s 11 of the Act; the Supreme Court of Appeal on para 27 of the judgment of *Standard Bank v Miracle Mile Investments* [2016] ZASCA 91, 2017 (1) SA 185 (SCA), **Mbha JA** writing for the majority stated that:

'The balance owing on the facility, excluding the outstanding arrear payments, was not due as Standard Bank did not elect to terminate the facility and claim repayment of the outstanding balance. It, therefore, follows that prescription did not commence to run on the so-called 'critical date' or 'decisive date' of 21 October 2008. The finding of the Court a quo in this respect

was erroneous, falls to be set aside, and the appeal must succeed. Before us, it was agreed that the determination of this issue would be dispositive of the appeal. Accordingly, it will not be necessary to determine the additional issues raised by Standard Bank referred to in para 4 above (my underlining).'

[14] The point raised by Standard Bank of prescription of the claim within 30 years on para 4 of the judgment was never decided by the Supreme Court of Appeal because the majority decision found that the issue of the dueness of the claim will dispose of the appeal. The decisions in Standard Bank is distinguishable from this ABSA case on the basis that in ABSA, there was no term of the contract which states that ABSA should first give notice to the debtor to remedy a default and a failure by the debtor to comply with such notice the creditor will claim the entire payment owed. This was a condition precedent to the creditor's right to claim the entire balance owing under the contract at the Standard Bank case. This is the difference between the Standard Bank and this ABSA case.

[15] I found that the second respondent was obligated to perform immediately when the bank advanced the money. This also applies to the first respondent when Erf 1027 Kosmosdal was transferred to her; she was still obligated to continue with the payment to the applicant. In conclusion, this debt between ABSA and the respondents had become due in 2005.

[16] However, the loan secured by a registered mortgage bond as security would definitely give the parties at least thirty (30) years before the debt prescribes. There is no dispute that the bond was registered. The fact that they had such kind of security over their loan agreement means that they intended the Prescription Act 68 of 1969 to be the Act that would guide their prescription period.

[17] The only issue which the respondents wanted to contest was prescription; the other issues were the common cause.

The issue of costs

[18] I found no reason why the respondents should not pay costs in this application.

Order

[19] As a result, the following order is made:

1. The applicant is granted leave to institute legal proceedings against the first and the second respondent in terms of section 84(1A)(b)(ii) of the Bank Act 94 of 1990.
2. The 5th respondent is directed to uplift the interdict endorsed over the Tittle Deed relating to the property more fully described as Erf 1027 Kosmosdal, Extension 16, Tswane.
3. The second respondent is to pay the costs of this application.



M. Munzhelele

Judge of the High Court, Pretoria

Virtually Heard: 18 November 2021

Electronically Delivered: 18 January 2022

Appearances:

For the Applicant: Adv N Alli

Instructed by: Jay Mothobi Incorporated

For the Respondents: Adv Karabo Mbvubu

Instructed by: Mbuyisa Moleele INC