THE SUPREME COURT OF APPEAL OF SOUTH AFRICA
JUDGMENT

Reportable
Case No: 08/16

In the matters between:

PANTELIS KAKNIS **APPELLANT**

and

ABSA BANK LIMITED **RESPONDENT**

and

PANTELIS KAKNIS **APPELLANT**

and

MAN FINANCIAL SERVICES SA (PTY) LTD **RESPONDENT**

Neutral citation: *Kaknis v Absa Bank Limited & another* (08/16) [2016] ZASCA 206 (15 December 2016)

Coram: Shongwe, Willis, Mathopo and Van der Merwe JJA and Nicholls AJA

Heard: 11 November 2016

Delivered: 15 December 2016

Summary: Interpretation of statute: National Credit Act 34 of 2005: section 12B(1)*(b)* inserted by National Credit Amendment Act 19 of 2014: section has no retrospective application and did not invalidate the agreement relied upon by the respondents: summary judgment correctly granted.

ORDER

On appeal from: Eastern Cape Local Division of the High Court, Port Elizabeth (Msizi AJ) sitting as court of first instance.

The appeal is dismissed with costs.

JUDGMENT

Shongwe JA (Willis JA concurring) (dissenting judgment)

[1] This appeal is against the judgment and two orders of the Eastern Cape Local Division of the High Court (Msizi AJ) (the high court) granting summary judgments against the appellant Mr Pontelis Kaknis. The respondents, Absa Bank limited (Absa) and Man Financial Services SA (Pty) Ltd (MFS) are the two judgments creditors in whose favour these two orders were granted and are the respondents in this appeal. The high court dismissed the appellant's defence that the respondents' claims against him had prescribed. For this assertion, the appellant had relied on s 126B(1)*(b)*(ii) of the National Credit Act 34 of 2005 (the Act). The high court held that s 126B(1)*(b)*(ii) did not apply retrospectively. The appeal against this narrow point of law, is with leave of the high court.

[2] The crisp question in this appeal accordingly is the interpretation and application of the provisions of s 126B of the Act which came into operation with effect from 13 March 2015. Specifically it is whether or not s 126B(1)*(b)* of the Act applies retrospectively.

Background

[3] I turn to deal briefly with the background before delving into the relevant legal principles of interpretation. During the period March 2006 to March 2008 the appellant concluded ten instalment sale agreements with Absa, in terms of which Absa sold and delivered to the appellant various movable assets comprising, inter alia, motor vehicles and trailers. The appellant also concluded an instalment sale agreement with MFS, in terms of which it sold and delivered to the appellant a 2007 Man truck. The appellant honoured both transactions by paying regularly. However, after a few years of compliance the appellant got into financial difficulties, which resulted in his failure to pay.

[4] As a result of his financial woes, the appellant approached a debt counsellor to apply for a debt review as contemplated in s 86 of the Act. On 12 June 2010, he obtained an order from the Magistrate's court for the District of Port Elizabeth in terms of which his obligations to his various credit providers were re-arranged in accordance with the provisions of s 86(7)*(c)*(ii) *(aa)* and *(bb)* of the Act. The appellant faithfully complied with the court order, until 8 July 2011 when the last payment was made by the payment distribution agent. It is common cause that the claims against the appellant became prescribed on 8 July 2014 in terms of s 11*(d)* of the Prescription Act 68 of 1969 (the Prescription Act), due to the fact that more than three years had lapsed since the last payment was made by the appellant in reduction of his indebtedness under the sale agreements.

[5] In the meantime, the respondents continued attempts to recover the amounts owed to them, by demanding payment. The appellant however remained unable to repay the outstanding amounts. On 3 October 2014, after the respondents' claims had become prescribed, the appellant concluded an

acknowledgement of debt in favour of the respondents. In terms of this agreement, the appellant acknowledged his indebtness to Absa in an amount over R2.7 million, plus interest, and an amount of R702 496, plus interest, in respect of MFS. The appellant failed to pay in terms of the acknowledgement of debt, and he also did not surrender any of the assets as was agreed in the agreements. On 30 April 2015, the respondents issued summons against the appellant claiming confirmation of the cancellation of the sale agreements, return of the assets and leave to prove damages later. The appellant entered an appearance to defend but did not deliver a plea. Subsequently, the respondents brought separate applications for summary judgment, alleging that the appellant lacked a bona fide defence. The appellant opposed both applications. He averred that the claims had become prescribed. He also contended that by virtue of the provisions of s 126B(1)*(b)* of the Act, the respondents were precluded from continuing the collection of the debt by relying on the acknowledgement of debt which the respondents alleged revived the prescribed debt. The appellant further stated that he had not been aware that the respondents' claims against him had become prescribed, and that if he had been aware of the defence of prescription he would not have concluded the acknowledgment of debt. As mentioned, the two applications for summary judgment were considered together for purposes of judgment by the high court.

[6] As prefaced earlier, the court a quo granted the respondents' applications and concluded that the claims had not prescribed. The court reasoned that the legislature would have expressly stipulated that the provisions of s 126B of the Act apply retrospectively, if it intended it to be applied retrospectively. Unhappy with the court's findings, the appellant sought leave to appeal, which leave was granted.

[7] Before us, the appellant persisted that the claims had become prescribed and contended that 126B of the Act must be read in conjunction with Schedule 3 of the Act, in particular item 4(2), all falling under Chapter 6 of the Act which deals with collection, repayments, surrender and debt enforcement (ss 124 – 133). In essence, Schedule 3 deals with transitional provisions which relate to pre-existing credit agreements – meaning agreements that were made before the effective date of the Act, and to which this Act applies. The appellant further contended that in the absence of an amendment of Schedule 3 of the Act, the entire Chapter 6 had retrospective effect, which includes s 126B of the Act. The respondents' case on appeal was that the appellant, by concluding the acknowledgement of debt, had renounced his right to rely on prescription. They further contended that s 126B did not apply retrospectively, as its language and context did not support such on interpretation. The respondents went on to contend that because s 126B of the Act takes away rights which accrued to them upon the conclusion of the acknowledgement of debt, the section cannot be construed to apply retrospectively.

[8] As mentioned earlier, the nub of this appeal is whether the court a quo was correct in interpreting the provisions of s 126B to apply retroactively as opposed to retrospectively.

Interpretation of s 126B of the Act

[9] Section 126B came into operation on 13 March 2015 being introduced by the National Credit Amendment Act 19 of 2014. It reads as follows:

'**126B Application of prescription on debt**

(1)*(a)* No person may sell a debt under a credit agreement to which this Act applies and that has been extinguished by prescription under the Prescription Act, 1969 (Act 68 of 1969).

(b) No person may continue the collection of, or re-activate a debt under a credit agreement to which this Act applies-

(i) which debt has been extinguished by prescription under the Prescription Act, 1969 (Act 68 of 1969); and

(ii) where the consumer raises the defence of prescription, or would reasonably have raised the defence of prescription had the consumer been aware of such a defence, in response to a demand, whether as part of legal proceedings or otherwise.'

[10] I must mention from the outset that I am alive to the existence of a strong presumption that legislation is not intended to be retroactive, – nor retrospective (see *S v Mhlungu & others* 1995 (3) SA 867 (CC) paras 65 – 67), where Kentridge AJ observed that:

'[65] First, there is a strong presumption that new legislation is not intended to be retroactive. By retroactive legislation is meant legislation which invalidates what was previously valid, or *vice versa*, ie which affects transactions completed before the new statute came into operation …. It is legislation which enacts that "as at a past date the law shall be taken to have been that which it was not". See *Shewan Tomes & Co Ltd v Commissioner of Customs and Excise* 1955 (4) SA 305 (A) at 311H, *per* Schreiner ACJ. There is also a presumption against reading legislation as being retrospective in the sense that, while it takes effect only from its date of commencement, it impairs existing rights and obligations, eg by invalidating current contracts or impairing existing property rights. See *Cape Town Municipality v F Robb & Co Ltd* 1966 (4) SA 345 (C) at 351, *per* Corbett J. The general rule therefore is that a statute is as far as possible to be construed as operating only on facts which come into existence after its passing.

[66] There is a different presumption where a new law effects changes in procedure. It is presumed that such a law will apply to every case subsequently tried "no matter when such case began or when the cause of action arose" - *Curtis v Johannesburg Municipality* 1906 TS 308 at 312. It is, however, not always easy to decide whether a new statutory provision is purely procedural or whether it also affects substantive rights. Rather than categorising new provisions in this way, it has been suggested, one should simply ask whether or not they would affect vested rights if applied retrospectively. See *Yew Bon Tew v Kenderaan Bas Mara (supra* at 563 (AC)); *Industrial Council for Furniture Manufacturing Industry, Natal v Minister of Manpower and Another (supra* at 242).

[67] There is still another well-established rule of construction namely, that even if a new statute is intended to be retrospective insofar as it affects vested rights and obligations, it

is nonetheless presumed not to affect matters which are the subject of pending legal proceedings. See *Bell v Voorsitter van die Rasklassifikasieraad en Andere (supra*); *Bellairs v Hodnett and Another (supra* at 1148).'

[11] It is clear from the above exposition in *Mhlungu* that the legal position relating to the retrospective application of any statute is settled in our law and also in most foreign jurisdictions. In the case of *Yew Bon Tew v Kenderaan Bas Mara* [1982] 3 All ER 833 at 836 Lord Brightman said in this regard that:

'A statute is retrospective if it takes away or impairs a vested right acquired under existing laws, or creates a new obligation, or imposes a new duty, or attaches a new disability, in regard to events already past. There is however said to be an exception in the case of a statute which is purely procedural, because no person has a vested right in any particular course of procedure, but only a right to prosecute or defend a suit according to the rules for the conduct of an action for the time being prescribed.

But these expressions 'retrospective' and 'procedural', though useful in a particular context, are equivocal and therefore can be misleading. A statute is retrospective if it takes away or impairs a vested right acquired under existing laws, or creates a new obligation, or imposes a new duty, or attaches a new disability, in regard to events already passed. There is, however, said to be an exception in the case of a statute which is purely procedural, because no person has a vested right in any particular course of procedure, but only a right to prosecute or defend a suit according to the rules for the conduct of an action for the time being prescribed.

But these expressions "retrospective" and "procedural", though useful in a particular context, are equivocal and therefore can be misleading. A statute which is retrospective in relation to one aspect of a case (eg because it applies to a pre-statute cause of action) may at the same time be prospective in relation to another aspect of the same case (eg because it applies only to the post-statute commencement of proceedings to enforce that cause of action); and an Act which is procedural in one sense may in particular circumstances do far more than regulate the course of proceedings, because it may, on one interpretation, revive or destroy the cause of action itself.'

The learned judge accordingly further stated that:

'Whether a statute is to be construed in a retrospective sense, and if so to what extent, depends on the intention of the legislature as expressed in the wording of the statute, having

regard to the normal canons of construction and to the relevant provisions of any interpretation statute.'

And (at 839):

> 'Their Lordships consider that the proper approach to the construction of the 1974 Act is not to decide what label to apply to it, procedural or otherwise, but to see whether the statute, if applied retrospectively to a particular type of case, would impair existing rights and obligations.'

(*Yew Bon Tew v Kenderaan Bas Mara* , as approved in our courts by Marais JA in *Minister of Public Works v Haffejee NO* 1996 (3) SA 745 (A) at 752C-G; *Euromarine International of Mauren v The Ship Berg & others* 1986 (2) SA 700 (A) at 710E-I, and *Transnet Ltd v Ngcezula* 1995 (3) SA 538 (A) at 549G- I.)

[12] The reasoning behind the presumption against the retrospective application of legislation is premised upon the unwillingness of the courts to inhibit vested rights. In the pivotal authority in this respect Innes CJ stated in the case of *Curtis v Johannesburg Municipality* 1906 TS 308:

> 'The general rule is that, in the absence of express provision to the contrary, statutes should be considered as affecting future matters only; and more especially that they should if possible be so interpreted so as not to take away rights actually vested at the time of their promulgation.'

A further reason for its existence is that the creation of new obligation or an imposition of new duties by the Legislature is not lightly assumed. (See Lourens du Plessis *Re-interpretation of statutes* eds (2002) at 182, and the cases cited therein.)

[13] Thus a statute is presumed not to apply retrospectively, unless it is expressly or by necessary implication provided otherwise in the relevant legislation. It is for that reason presumed that the legislature only intends to regulate future matters. See *Mhlungu* above para 64. Unless a contrary intention appears from new legislation which repeals previous legislation, it is presumed

that no repeal of an existing statute has been enacted in relation to transactions completed prior to such existing statute being repealed. *Transnet Ltd v Ngcezula* above. See also G E Devenish *Interpretation of Statutes* eds (1992) at 189.

[14] It has been held that the crux of the matter is not the prospectivity or retrospecitivity of legislation as such, but the fair treatment befalling those subject to the legislation should the legislation be held to apply in that manner. Nevertheless, where the statutory provision confirms the existing law, it is not a case of true retrospectivity, since true retrospectivity means that at a past date, the law shall be taken to have been that which it is not. Thus, if the legal position is A, and enactment X is designed merely to confirm A, then it cannot be said that, subsequent to the promulgation of X, the legal position has become A. Accordingly, true retrospectivity can only become an issue once X replaces, amends of supplements A. (See du Plessis above at 183. See also *Unitrans Passengers (Pty) Ltd t/a Greyhound Coach Lines v Chairman, National Transport Commission & others: Transnet Ltd (Autonet Division) v Chairman, National Transport Commission & others* 1999 (4) SA 1 (SCA) para 13 and *Manyeka v Marine and Trade Insurance Co Ltd* 1979 (1) SA 844 (SE) 847H-848A. See also *Nkabinde & another v Judicial Service Commission & others* [2016] ZASCA 12; 2016 (4) SA 1 (SCA paras 59-84.)

[15] However, one must not lose sight of the fact that presumptions, however strong, are merely an aid to interpretation and must therefore yield to the intention of the legislature as it emerges from any particular statute. Thus, the answer to the question whether a particular statute has retrospective operation cannot be found by simply determining whether the statute deals with substantive law or matters of procedure. One has always to ascertain the intention of the legislature. (See *Kruger v President Insurance Co Ltd* 1994 (2) SA 495 (D) at 503E-G.)

[16] It is common cause that s126B does not expressly provide that it is intended to apply with retrospective effect. Thus, the question that requires analysis is whether it provides for retrospective application by necessary implication. In *Lek v Estate Agents Board* 1978 (3) SA 160 (C) at 169F-G, Friedman J observed that 'such an inference can be drawn when the consequences of holding an Act to be non-retrospective would lead to an absurdity or practical injustice. In the case of *Bartman v Dempers* 1952 (2) SA 577 (A) at 582A-B, Centlivres CJ concurred with the view of Evershed MR in *Hutchinson v Jauncel* 1950 (1) K.B. 574 at 579, who observed that 'it seems to me that, if the necessary intendment of the Act is to affect pending causes of action, then this Court will give effect to the intention of the Legislature even though there is no express reference to pending actions.'

[17] Returning to s 126B(1)*(b)* of the Act, it is trite that in the process of interpreting a statute the inquiry includes a consideration of the language of the enactment and the purpose and intent of the legislature which emerges therefrom. No obvious absurdity, repugnance or inconsistency should be produced. (See *Euromarine International of Mauren v The Ship Berg & others* 1986 (2) SA 700 (A) at 709I – 710E).

[18] In my view s 126B of the Act intended to cure a situation where a debt which had become prescribed, the credit provider should not benefit from a debt which had become prescribed because the 'poor' consumer is unaware of the defence of prescription. If the consumer would reasonably have raised the defence of prescription had he or she been aware of such a defence, s 126B would come to the consumer's rescue in order to prevent unfairness or injustice, which would have befell the 'poor' consumer. Although it was said in *Landgraf v USI Film Products et al* 511 US 244 (1994) 244 at 265 that 'elementary considerations of fairness dictates that individuals should have an opportunity to

know what the law is and to conform their conduct accordingly', in support of the basis of the presumption against retrospectivity, the corollary thereof is that the presumption is not inflexible, it should operate only if there is no contrary intention. (See *S v Mhlungu* supra para 38). The intention of the legislature in introducing s 126B of the Act is clear in that it sought to protect consumers in general, but more particularly the naive and vulnerable ones. It must be accepted that it was included in the Act with good reason, presumably because consumers, unaware of the law regarding prescription, were held liable for old debts enforced by buyers and cessionaries. (See J M Otto 'National Credit Act. Vanwaar Gehási? Quo vadit lex? And some reflections on the National Credit Amendment Act 2014 (part 2)' (2015) *TSAR* 756 at 769.) In doing so, s 126B gives effect to the purposes set out in s 3 of the Act which includes the protection of consumers through inter alia, the advancement of a fair and transparent credit industry. And one of the ways to protect consumers is by balancing the respective rights and responsibilities of credit providers on one hand, and the consumer on the other. Section 126B of the Act, is clearly a means of achieving the objective and demonstrates the intention of the legislature to eradicate the injustice inherent in credit providers being able to benefit from transactions which had become prescribed.

[19] It is well known that the Act has brought about implementation challenges. In turn these challenges have created uncertainty in the credit market place. In order to ensure proper and better implementation and interpretation of the Act, the National Credit Act Amendment became necessary to address implementation challenges that have materialised and also to ameliorate the implementation. For us to understand the import of the provisions of s 126B of the Act, it is of paramount importance to unpack the jurisdictional factors of the section. This process of unpacking will enable us to determine whether or not the jurisdictional factors have been complied with

before applying the principles of interpretation. The prohibition of collection or re-activation of debt is not absolute, certain requirements have to be present for instance.

[20] The defence of prescription ought to be raised in response to a demand by the credit provider; it can be raised during the proceedings, as in the present case, when it was raised in opposition to a summary judgment application. If the consumer was aware of the defence of prescription, he should raise it, but if he or she was not aware the consumer must show that he or she would reasonably have raised it. The prescription period must have lapsed and the consumer must not have been responsible for preventing the credit provider from knowing of the debt. And also that the consumer has not acknowledged liability for the debt during the running of the prescription period as contemplated in s 14 of the Prescription Act, thereby interrupting the running of prescription and that s 13(2) of the Prescription Act is not applicable (dealing with a reciprocal non-prescribed contractual debt). Lastly, that the consumer did not waive the defence of prescription. Section 126B(1)(b)(ii) in essence extends the protection of the defence of prescription to consumers who are not aware of the existence of the defence. If the consumer was made aware, for instance by the credit provider, this protection falls away, as they would have waived the defence.

[21] I concede, though that, somewhere somehow, in promoting protection and equity in the credit market, the rights and responsibilities of credit providers and consumers must be balanced to achieve sustainability. (See *Kubyana v Standard Bank* of SA Ltd [2014] ZACC 1; 2014 (3) SA 56 (CC) para 20.)

[22] In *Nkata v Firstrand Bank Limited* [2016] ZACC 12; 2016 (4) SA 257, Moseneke DCJ, had this to say:

'[95] This court has before expressed itself on the purposes of the Act. In Sebola, in the context of section 129(1)*(a)* of the Act, Cameron J observed that at the core of the Act is the objective to protect consumers. This protection, however, must be balanced against the interests of credit providers and should not stifle a "competitive, sustainable, responsible, efficient [and] effective . . . credit market and industry". The Act, the court noted, replaces the apartheid-era legislation that regulated the credit market, and infuses constitutional considerations into the culture of borrowing and lending between consumers and credit providers.

[96] The purposes of the Act are directly attributable to the constitutional values of fairness and equality. *Sebola* recognised that the Act is at pains to create a credit marketplace that agrees with our constitutional democracy, both through its purpose – to promote "a fair . . . marketplace for access to consumer credit" – as well as through the means that ought to be adopted to achieve these goals. The tools for achieving the Act's purposes include the promotion of "equity in the credit market by balancing the respective rights and responsibilities of credit providers and consumers", and the development of "a consistent and accessible system of consensual resolution of disputes arising from credit agreements". In sum, the Act is "a clean break from the past" and encourages dialogue between consumers and credit providers.' (Footnotes omitted.)

[23] The court a quo in my view over-emphasised the protection and undue compromise of certainty in commercial transactions as opposed to the protection of the consumer which is clearly demonstrated in the wording of s 126B of the Act. Therefore by concluding the acknowledgement of debt the appellant did not renounce his defence of prescription as he would reasonably have raised it had he been aware of this defence. It was the intention of the legislature and the purpose of amending the law by introducing the safety valve in s 126B of the Act. To construe s 126B of the Act as not applying retrospectively would be at odds with the trend set by the Constitutional Court where it emphasised the protection of the consumer. For instance it interpreted s 129 of the Act to require a notice to be dispatched to the consumer, prior to taking legal action. (See *Sebola & another v Standard Bank of South Africa &*

another [2012] ZACC 11; 2012 (5) SA 142 (CC) and *Kubyana v Standard Bank* (supra).) It would also create an odd situation where certain consumers whose agreements were entered into before the amendment Act was effected are afforded less protection than those who did so after, thus creating a differentiation between classes of consumers.

Schedule 3 of the Act

[24] The appellant has also relied on the transitioning provisions in Schedule 3 of the Act, in support of his proposition that s 126B applies retrospectively. Item 4 of Schedule 3 regulates the applicability of the Act to pre-existing agreements. These are agreements which are made before the effective date, ie 1 June 2007. The respondents rebuffed this submission, stating that Schedule 3 of the Act has run its course in that it relates to pre-existing credit agreements which were concluded prior to the effective date. They contended that Schedule 3 was enacted to apply the provisions of the Act to credit agreements complying with the definition in the Act, but which were concluded before it came into effect. Accordingly, as soon as the whole Act came into effect, Schedule 3 ceased to be relevant. Therefore it has no application in this case, and even though it has not been repealed, it must be ignored, so the argument went. Their view was that the mere fact that Schedule 3 was enacted to apply the provisions of the Act to credit with respect to certain categories of credit agreements at the time that the Act came into effect did not justify the conclusion that it would continue to have such effect with respect to future amendments of the Act.

[25] It has correctly been pointed out that the transitional provisions are not easy to apply and that they often lead to confusion. (See J M Otto *The National Credit Act Explained* eds (2006) at 106.) It is indeed accepted that schedules may in certain instances be used as an aid to construction, and I accept that not all schedules carry equal value in the construction of provisions of a statute. The

weight to be attached to its interpretive value depends on a range of factors such as the content of the schedule, its relationship to the rest of the statute and the weight indicated in the statute itself to be attached to the schedule. (See G E Devenish *Interpretation of Statutes* eds (1992) at 112.)

[26] The extent to which the provisions apply to pre-existing agreements has been indicated through a column, under item 4(2) of Schedule 3. On one hand, it provides the relevant provisions of the Act. On the other, it sets out the extent to which the provisions apply to pre-existing agreement, and Chapter 6, under which s126B falls is indicated as 'applying fully' to pre-existing agreements. Certain provisions, such as sections 60 to 66 and 91, apply to existing agreements only with respect to acts or omissions occurring after the coming into operation of the Act. These sections regulate inter alia, the right to apply for credit and contain the non-discrimination provisions in respect of credit. There are further examples where the legislature sought to determine the extent to which the Act would apply to pre-existing agreements, and how far back or into the past the act would apply. The point I make is that it is clear that where the legislature saw fit to restrict the content of the Act's ambit to pre-existing agreements, it did so in express terms. However, I agree with the appellants that Schedule 3 had retrospective effect in certain respects till the time when the Act came into effect but I do not agree that it is no longer applicable, and that it does not apply to future amendments in the Act. Firstly, it continues to regulate the position of pre-existing agreements. Second, the amendment made in the Act pertain, at its highest, to 'all agreements', which may include pre-existing contracts (and according to my interpretation, does). Further, the legislature, which is presumed to know the law, chose not to amend item 4(3) of the Schedule, nor to repeal the schedule in its entirety. (See *Road Accident Fund v Monjane* [2007] ZASCA 57; 2010 (3) SA 641 (SCA) para 12). It is a well-established principle of statutory interpretation that the legislature must be taken

to be aware of the nature and state of the law existing at the time when legislation is passed. (See *Boost Sports Africa (Pty) Ltd v South African Breweries (Pty) Ltd* [2015] ZASCA 93; 2015 (5) SA 38 (SCA) para 13.

[27] For the reasons above, I would have allowed the appeal.

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J B Z Shongwe
Judge of Appeal

WILLIS JA:

[28] I have had the benefit of reading the judgments prepared by Shongwe and Van der Merwe JJA. I agree with Shongwe JA but consider that it may be helpful if I add a few additional remarks in support thereof. It is indeed correct as Van der Merwe JA has emphasised that, generally speaking, there is a presumption against the retrospective operation of law. The principle is an ancient one alluded to by J Voet in *Commentarius Ad Pandedas* (1723) 1.3.17). It is intrinsic to the rule of law. I understand the principle to derive from the fact that in freedom-loving and enlightened societies that human beings are free to do as they please, except as is either proscribed or prescribed by law.

[29] The principle against the retrospective operation of the law is not, however, an absolute one. For example, another principle that in favour of freedom has the consequence that new penal provisions that operate in favour of the persons thereby affected do indeed have a retrospective effect but those that work against them do not. It was made clear in *R v Mazibuko* 1958 (4) SA 353 (A) at 357E, that it is indeed also an ancient, well-established principle of our

common law that an increase in penalty will ordinarily not operate retrospectively in circumstances where that additional burden did not apply at the time when the offence was committed. This principle was reaffirmed in *R v Sillas* 1959 (4) SA 305 (A) at 311E-G and *S v Mpetha* 1985 (3) SA 702 (A) at 707H-708A and 717I-718B. Care must obviously be taken not to stretch the analogy too far or inappropriately.

[30] Sight must not, however, be lost of the fact that among the reasons we have the law of prescription is to set persons free from the burden of debt. The question we have to ask ourselves is whether, under our constitutional dispensation, it is better, in the transitional period, to set consumers forever free from debt that has prescribed or to allow credit providers the freedom to revive debt that has prescribed through the mechanism of 'acknowledgement'. The question is a hard one, especially in the circumstances of this case.

[31] Nevertheless, if the National Credit Act 34 of 2005 (NCA) is read *ex visceribus actus* (see, for example, *City Deep Limited V Silicosis Board* 1950 (1) SA 696 (A) at 702) (comprehensively, as a whole), I am persuaded that this court must come down in favour of the consumer, rather than the credit provider. I am fortified in this view by reference to a number of cases in which the Constitutional Court has expressed itself on the purposes of the NCA. I refer, in particular, to *Sebola & another v Standard Bank of South Africa Ltd & anothe*r [2012] ZACC 11; 2012 (5) SA 142 (CC) para 40; *Ferris & another v Firstrand Bank Ltd* [2013] ZACC 46;2014 (3) SA 39 (CC) paras 17-18; *Kubyana v Standard Bank of South Africa Ltd* [2014] ZACC 1; 2014 (3) SA 56

(CC) paras 36-37 and *Nkata v Firstrand Bank Ltd* [2016] ZACC 12; 2016 (4) SA 257 (CC) paras 92-100.

NP Willis
Judge of Appeal

Van der Merwe JA (Mathopo JA and Nicholls AJA concurring):

[32] I have had the benefit of reading the judgment prepared by my colleague Shongwe JA. I gratefully adopt his exposition of the facts of the matter and will only refer to those facts that I consider necessary for a proper understanding of this judgment. I regret, however, that I am unable to agree with the conclusion that he reached. For the reasons that follow, I am of the view that s 126B(1)*(b)* of the National Credit Act 34 of 2005 (the NCA) has no retrospective effect.

[33] The written agreement entered into between the parties on 3 October 2014 (the agreement), was a comprehensive agreement. In terms thereof the appellant inter alia acknowledged indebtedness towards Absa Bank Limited (Absa) in respect of ten existing accounts. These accounts related to instalment sale agreements entered into between the appellant and Absa in respect of two Mercedes Benz motor vehicles, an Actros motor vehicle, three trailers, a jetski, four ‘quad bikes’, an Isuzu motor vehicle and a Scania truck. The total indebtedness acknowledged to Absa amounted to more than R2,7 million. The appellant also acknowledged indebtedness to MAN Financial Services (Pty) Ltd (MFS) in the amount of R707 496, in respect of an instalment sale agreement entered into in respect of a MAN truck. The appellant undertook to reduce its

indebtedness by making monthly payments to Absa in the amount of R42 000 and monthly payments to MFS in the amount of R15 000.

[34] In his opposing affidavits to the applications for summary judgment, the appellant stated that all of these debts had become prescribed before the agreement was entered into. He said that he was unaware at the time that he could rely on prescription and that had he been aware thereof, he would not have entered into the agreement. These averments had to be accepted for purposes of summary judgment and counsel for the respondents argued the matter on this basis.

[35] Thus, the appellant's case was that the agreement constituted the re-activation of debts under credit agreements to which the NCA applied, which debts had been extinguished by prescription and that he would reasonably have raised the defence of prescription at the time of the agreement had he been aware of that defence. It follows that the appellant's case was fully dependent on the proposition that s 126B(1)*(b)* of the NCA retrospectively invalidated the agreement and destroyed the rights of Absa and MFS in terms thereof.

[36] Absa and MFS essentially claimed delivery of the assets over which they had retained ownership. It is not at all clear to me that prescription of the debts and the invalidity of the agreement would constitute a defence to the claims for delivery of the assets. It does not follow from the prescription of the debts that the appellant was in law entitled to retain possession of the assets. However, the matter was not argued on this basis and I will confine myself to the issue of retrospectivity of s 126B(1)*(b)*.

[37] There are formidable obstacles in the way of the contention of the appellant that s 126B(1)*(b)* reached back to nullify the agreement. In *Unitrans Passenger (Pty) Ltd t/a Greyhound Couch Lines v Chairman, National*

Transport Commission, & others; Transnet Ltd (Autonet Division) v Chairman, National Transport Commission, & others 1999 (4) SA 1 (SCA) para 12, Olivier JA said:

'One may start the *conspectus* by stating the time-honoured principle formulated in *Peterson v Cuthbert & Co Ltd* 1945 AD 420 at 430, based upon the Roman-Dutch law, that no statute is to be construed as having retrospective operation (in the sense of taking away or impairing a vested right acquired under existing laws), unless the Legislature clearly intended the statute to have that effect (see also, *inter alia Bartman v Dempers* 1952 (2) SA 577 (A) at 580C).'

This principle is not only time-honoured but also one of global application. See *National Director of Public Prosecutions v Carolus & others* 2000 (1) SA 1127 (SCA) para 32 and *National Director of Public Prosecutions v Basson* 2002 (1) SA 419 (SCA) para 11. It bears repeating what Kentridge AJ said in *S v Mhlungu & others* 1995 (3) SA 867 (CC) para 65:

'First, there is a strong presumption that new legislation is not intended to be retroactive. By retroactive legislation is meant legislation which invalidates what was previously valid, or vice versa ie which affects transactions completed before the new statute came into operation. See *Van Lear v Van Lear* [1979 (3) SA 1162 (W)]. It is legislation which enacts that "as at a past date the law shall be taken to have been that which it was not". See *Shewan Tomes & Co Ltd v Commissioner of Customs and Excise* 1955 (4) SA 305 (A) at 311H, per Schreiner ACJ. There is also a presumption against reading legislation as being retrospective in the sense that, while it takes effect only from its date of commencement, it impairs existing rights and obligations, eg by invalidating current contracts or impairing existing property rights. See *Cape Town Municipality v F Robb & Co Ltd* 1966 (4) SA 345 (C) at 351, per Corbett J. The general rule therefore is that a statute is as far as possible to be construed as operating only on facts which come into existence after its passing.'

And as Mokgoro J pointed out in *Veldman v Director of Public Prosecutions, Witwatersrand Local Division* 2007 (3) SA 210 (CC) para 26, the principle that legislation will affect only future matters and not take away existing rights, is founded on the rule of law. It also follows that if the court is left in doubt as to

the retrospective effect of a provision, the presumption against the retrospectivity would not be rebutted.

[38] It is trite that the legislature is presumed to know the law. Before the commencement of s 126B(1)*(b)* an agreement that revived a prescribed debt of this kind was perfectly valid. See *De Jager & others v Absa Bank Bpk* 2001 (3) SA 537 (SCA) para 12-15. The legislature must no doubt be taken to have been aware that retrospective application of s 126B(1)*(b)* would nullify agreements that had validly been entered into and would take away existing rights. There is no indication in s 126B(1)*(b)* of any intention to do so. I accept that the provision was intended to benefit consumers. But that is the reason why the provision was introduced. That in itself says nothing about retrospectivity. As the court a quo and Shongwe JA demonstrated, our courts have repeatedly said that although the main objective of the NCA is to protect consumers, this protection must be balanced against the rights of credit providers.

[39] In *Rossouw & another v Firstrand Bank Ltd* [2010] ZASCA 130; 2010 (6) SA 439 Maya JA referred to various provisions of the NCA and in para 19 continued to say:

'These provisions make it abundantly clear that the legislature recognised the need to express its intention where it sought to interfere with vested rights. Interestingly, s 90(2)*(c)* acknowledges the parties' common-law rights, and declares unlawful any provisions in a credit agreement which purport to waive such rights as may be applicable to the agreement. I find it inconceivable, therefore, that the legislature would, in the same act, indirectly do away with vested rights such as the mortgagee's right to claim the balance of the debt after execution against the mortgaged property.'

In accordance herewith the submission was that the retrospective application of s 126B(1)*(b)* was expressly stipulated for in Schedule 3 of the NCA. I am unable to agree. Schedule 3 is entitled 'TRANSITIONAL PROVISIONS'. Its provisions deal with precisely that. In this context the meaning of item 4 of Schedule 3 is plain. It simply makes specified provisions of the NCA applicable

to certain credit agreements that had been entered into before the commencement of the provisions. There is no basis for the startling proposition that flows from the appellant's argument, namely that unless Schedule 3 was amended, all amendments of the provisions of the NCA that applied to pre-existing agreements, would operate retrospectively. This demonstrates a further difficulty with the argument. On any interpretation of Schedule 3, it has no effect on credit agreements entered into after the commencement of the NCA. It follows that if Schedule 3 was to provide for retrospective operation, it would do so only in respect of pre-existing credit agreements and not in respect of credit agreements entered into after the commencement of the NCA. This is an absurd result that could not have been intended.

[40] I therefore agree with the conclusion of the court a quo that s 126B(1)*(b)* has no retrospective operation and provided no defence to the appellant. As no further defence had been put forward, the court a quo correctly granted summary judgment.

[41] In the result the appeal is dismissed with costs.

C H G van der Merwe
Judge of Appeal

Appearances

For the Appellant:	P W A Scott SC with him K D Williams Instructed by: Marston Attorneys, Port Elizabeth; Claude Reid Incorporated, Bloemfontein.
For the Respondent:	J G Richards Instructed by: McWilliams & Elliott Incorporated, Johannesburg; Phatshoane Henney Attorneys, Bloemfontein.