REPUBLIC OF SOUTH AFRICA

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

CASE NO: 15/11387

DELETE WHICHEVER IS NOT APPLICABLE	
(1) REPORTABLE: NO	
(2) OF INTEREST TO OTHER JUDGES: NO	
(3) REVISED	
22-09-2017	
DATE	SIGNATURE

In the matter between:

ARTHUR CHURCHILL FISHER Plaintiff

And

ROBERT SNYMAN Defendant

JUDGMENT

GRENFELL AJ:

INTRODUCTION

[1] The plaintiff and defendant are step-brothers and this action arises from an oral loan agreement concluded between them in May 2000, in terms of which the plaintiff loaned the defendant an amount accepted to be R900 000, which would

attract interest at the rate of 12% per annum and which was repayable in monthly instalments of R15 000.

[2] At the commencement of the trial, the parties agreed to seek to separate out the special plea of prescription for determination first on the grounds that it was convenient to do so.

[3] Rule 33(4) of the Uniform Rules of Court provides: "*If, in any pending action, it appears to the court* mero motu *that there is a question of law of 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 application of any party make such order unless it appears that the questions cannot conveniently be decided separately.*"

[4] As it is both convenient and expeditious for the disposal of litigation, I make such a separation order in terms of rule 33(4) that the special plea be determined first.

THE PLEADINGS

[5] The plaintiff issued summons on 25 March 2015, and the summons was served on the defendant on the same day.

[6] In its declaration, the plaintiff averred that during or about May 2000 and at Bedfordview, alternatively Germiston, plaintiff and the defendant, both acting personally concluded a verbal agreement which contained the following express, alternatively tacit, further alternatively implied terms of the loan agreement as defined, *inter alia* as follows:

1) The plaintiff and the defendant would each require 50% of the member's interest in a close corporation called Tetrafull 1071 CC;[1]

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[1] Plaintiff's declaration paragraph 4.1

2) During the course of the trial, the word "require" was amended to "acquire" by virtue of an amendment moved from the bar which was not opposed;

3) To enable the defendant to pay the purchase price for his 50% member's interest in the corporation, the plaintiff undertook to lend R900 000 to him;[2]

4) The defendant would repay the loan in monthly instalments of R15 000;[3]

5) Interest would accrue on the loan at a rate of 12% per annum.[4]

[7] It is then averred that pursuant to the loan agreement the plaintiff lent R900 000 to the defendant, that the plaintiff and defendant each acquired 50% of the member's interest in the corporation and that the defendant from time to time made payment to the plaintiff in partial repayment of the loan.[5]

[8] The plaintiff then avers that as at 30 June 2015 the balance of the loan due by the defendant to the plaintiff, including interest and taking into account payments made by the defendant is R1 995 000, which is made up and calculated as set out in the schedule annexed marked "D1".[6]

[9] Annexure "D1" is a table comprising a headed Fisher/Snyman loan and which contains then details in tabular format the Period, Capital, Interest, Interest balance, Total balance, Paid and Remarks.

[10] From the table, the years 2000 to 2015 are reflected, with payments being recorded in 2010, 2011 and 2012.

[11] The defendant pleads in its special plea that:

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2 Plaintiff's declaration paragraph 4.2
3 Plaintiff's declaration paragraph 4.3
4 Plaintiff's declaration paragraph 4.4
5 Plaintiff's declaration paragraphs 5.1 to 5.3
6 Plaintiff's declaration paragraph 6

1) The plaintiff pleads that a loan agreement was concluded during May 2000, for an amount of R900 000, which the defendant allegedly undertook to repay by way of R15 000 per month instalments;

2) The plaintiff, however, only issued summons during March 2015;

3) Section 12 of the Prescription Act 68 of 1969 provides extinctive prescription commences to run as soon as the debt is due;

4) In the premises, extinctive prescription periods commenced after each instalment payment, referred to above, became due;

5) Accordingly, the plaintiff's entire claim would have prescribed on or about August 2009 in terms of section 11(d) of the Act.[7]

[12] In response to the special plea, the plaintiff delivered a replication couched in the following terms:

1) On 26 March 2012, the defendant caused the corporation referred to in paragraph 4.1 of the declaration ("the corporation") to pay the plaintiff an instalment of R15 000 in terms of the loan agreement;

2) On 24 April 2012, the defendant caused the corporation to pay the plaintiff an instalment of R15 000 in terms of the loan agreement; alternatively the defendant caused the corporation to make a payment of R15 000 to a third party and recorded in the corporation's books of account that such payment was intended for the plaintiff;

3) During 2010, 2011 and 2012 respectively, the defendant caused the corporation to pay the plaintiff total amounts of R30 000, R150 000 and R45 000 respectively in terms of the loan agreement, as set out in annexure "D1" to the plaintiff's declaration;

4) The aforesaid payments and conduct constitute tacit acknowledgements of liability by the defendant for repayment of the

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7 Defendant's special plea paragraphs 1.1 to 1.5

loan as contemplated by section 14(1) of the Prescription Act No. 68 of 1969;

5) From time to time during the period 2000 to 2015 and at a meeting between the plaintiff and defendant during or about the end of 2014 or beginning of 2015, the defendant verbally acknowledged to the plaintiff that the defendant was liable to the plaintiff in terms of the loan agreement;

6) The aforesaid verbal acknowledgements constitute express acknowledgements of liability by the defendant for repayment of the loan, as contemplated by section 14(1) of the Prescription Act No. 68 of 1969;

7) Accordingly, prescription commenced to run afresh from the date of the payment on 27 March 2012, alternatively from the date of the payment on 26 April 2012, further alternatively from the dates of the payments referred to in paragraph 4, further alternatively from the dates of the verbal acknowledgements of liability referred to in 5;

8) Summons was served on 25 March 2015, less than a period of three years after prescription commenced to run afresh;

9) In the circumstances, the plaintiff's claim has not prescribed;

10) Save as aforestated, the plaintiff joins issue with the allegations made in the special plea and plead over.[8]

[13] No amendment was sought by the plaintiff to his replication during the trial, despite a pertinent enquiry as to whether the plaintiff wished to do so and this becomes relevant when considering the issues to be determined.

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8 Plaintiff's replication paragraphs 1 to 10

THE DUTY TO BEGIN AND ONUS OF PROOF

[14] It is a long accepted proposition, that the party who raises prescription must allege and prove the date of the inception of the period of prescription.[9]

[15] Accordingly, the parties were in agreement that the defendant would commence in support of its plea.

[16] The defendant adduced no evidence in support of its prescription plea, but Mr McAskin, who appeared for the defendant, made the following submissions:

1) The verbal loan agreement is admitted and it is accepted for purposes of the special plea that the amount loaned was R900 000;

2) Paragraph 4.3 of the plaintiff's declaration sets out the amount of repayment of R15 000 and it is implicit from the table marked "D1" that repayment was to commence on the plaintiff's version in June of 2000 by way of monthly instalments;

3) Interest was capitalised on the main amount as indicated in paragraph 4.4 of the plaintiff's declaration and there is no dispute it is admitted;

4) There was no agreement in respect of the loan repayment on an acceleration clause and therefore each instalment had its own prescription period which would commence to run when such instalment was due on a monthly basis;

5) Accordingly, the last instalment was payable in June of 2005, regard being had to annexure "D1" to the declaration, and accordingly the claim would have prescribed in June of 2008 on a plain reading of the pleadings with regard to the loan amount of R900 000;

6) In respect of interest which is a subsidiary debt, in terms of section 10(2) of the Prescription Act 68 of 1969, such debt would have

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9 Gericke v Sack 1978(1) SA 821 (A)

prescribed at the same time as the principal debt which would have the effect that the prescription date would not differ from June 2008;

7) The *in duplum* rule regulating the principle that interest cannot exceed capital would have become operative in relation to the amount claimed prior to litigation and the total amount claimed has therefore prescribed;

8) At worst for the plaintiff the debt would have prescribed, regard being had to the interest component in August 2009, or June 2008, and summons was issued and served on 25 March 2015 at which stage the claim had prescribed;

9) The replication is of no assistance, as prescription had extinguished the claim as payments made in 2010, 2011 and 2012 could not cause prescription to run afresh as the debt had already been extinguished;

10) In respect of a meeting at the end of 2014 or the beginning of 2015 where it was verbally acknowledged that the money was owed, same could not avail the plaintiff as the debt had on the face of it prescribed and the acts of interruption all took place after the claim had prescribed in circumstances where there could be no revival of the expired debt;

11) Mr McAskin relied on Absa Bank Bpk v de Villiers[10] wherein the following was stated by Howie JA:

> "*Held, further, as to onus, that it was trite law that the party who raised prescription had to prove it. Where, however, it was clear, without more, that the period of prescription had expired, the defendant had a complete defence: the claim had been finally extinguished.*
>
> *If reliance was placed on interruption of prescription or delay in the completion of prescription, the position was not merely that*

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10 2001(1) SA 481 (SCA) at 486 to 7

the plaintiff had to begin. If, on the evidence in a particular case, it was uncertain whether or not interruption, or the events referred to in s 13(1), had occurred, the claim would in that situation necessarily have to fail. The replication raised by such a plaintiff was thus a separate issue in respect of which there existed a separate onus (in the sense of a full onus.)"

12) Mr McAskin placed reliance on the following comment contained in the work of MM Loubser "*Extinctive prescription*" the first edition published in 1996 at page 141:

> "*Should the debtor, after the applicable prescription period has elapsed, expressly or tacitly acknowledge liability, the question arises whether the running of prescription has interrupted in terms of section 14(1) of the Prescription Act.*
>
> *If the theory is accepted that prescription extinguishes a debt, there cannot be interruption after prescription has taken effect.*"[11]

13) Accordingly, Mr McAskin submitted that on whichever approach is taken after prescription has run its course, the evidence is irrelevant;

14) It was submitted that there was no point in leading evidence as even if there was an arrangement that the defendant could pay when he had money, that doesn't alter the due date of the debt where every month comprised a new debt.

[17] Mr Meijers, who appeared for the plaintiff, then made his own opening address emphasising that there was no commencement date pleaded in the declaration and that there was nothing in the special plea indicating that the debt had become due. Accordingly, submitted Mr Meijers, the onus was on the party taking the point to plead that the debt had become due and that in terms of paragraph 10 of the replication it was then presumed to be denied.

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11 Lipschitz v Dechamps Textiles GMBH and another 1978(4) SA 417 (C) at 430 D to G

[18] Mr Meijers submitted on behalf of the plaintiff, that the de Villiers authority was inapplicable and would only have been applicable if there had been a commencement date pleaded.

[19] Mr Meijers further submitted that the debt, being the loan of R900 000 comprised a singular concept and that it was not a valid argument that each instalment payable comprised a new time period for purposes of prescription.

[20] Mr Meijers indicated he would be relying on the Makate v Vodacom case and that of Dees Realtors for the submission that the concept of a debt in terms of section 10 of the Prescription Act was a single unitary concept and that evidence would be led as to the commencement date notwithstanding the fact that the onus was on the defendant.

[21] Also, the plaintiff would indicate that there had been interruptions of prescription by payment.

[22] Thereafter Mr McAskin, for the defendant, briefly addressed me again and then closed the defendant's case, at which stage Mr Meijers called the plaintiff to testify.

THE EVIDENCE

[23] Mr Arthur Churchill Fisher testified that the defendant was his half-brother on his mother's side and that in 2000, he (the defendant) was out of work and delinquent in respect of his creditors and couldn't find a job.

[24] The plaintiff testified that the parties then found the opportunity to run a Shell garage, being Gardenview Service Station, and that the plaintiff loaned the defendant the money for the purpose of getting him employed and to save his house being foreclosed on by the building society.

[25] The plaintiff indicated the defendant and his wife had come to see the plaintiff in financial trouble, as the building society wanted to foreclose on their house and that the defendant had no money and was delinquent with all his debts, and that his wife was crying.

[26] The plaintiff testified that a close corporation was the vehicle in which they would own the shares in the service station and that Shell would have to sanction the purchase.

[27] The loan agreement provided that the defendant would start to repay the loan when the business moved into the premises and took over the Shell service station.

[28] The defendant was to commence repayment immediately but couldn't pay the plaintiff so the plaintiff afforded him a bit of a holiday as he had no money. The plaintiff testified that the first payment was made in 2010 and then 2011. The only payments on the loan occurred in 2010, 2011 and 2012.

[29] In further discussions the defendant indicated to the plaintiff that he was unable to repay the loan as his daughter in London was having a bad time financially and he had to buy her a vehicle and support her.

[30] The defendant brought various deals to sell his shares in the close corporation, four in all, to the plaintiff and said he would make good his debts. The plaintiff testified that an agreement of the sale of member's interest between Tetrafull 1071 CC and the plaintiff and one Bharat Bullah had an effective date of 2 May 2012 and it was decided to sell the plaintiff's share as Shell would not allow the sale of 100% of the shares.

[31] It was decided, according to the plaintiff, that he would let the defendant stay as he was more competent vis-à-vis the day-to-day running of the business. Plaintiff testified that the purchase price for the shares was renegotiated in a variation agreement and adjusted to R5 million. The plaintiff further testified that he expected the sale of the defendant's shareholding within three months to a year, but that it dragged on and on and that the shares were only sold three to four years later.

[32] The plaintiff testified in respect of his Standard Bank account that an amount of R15 000 was deposited to his current account on 27 March 2012.

[33] The plaintiff failed to prove payment of any further amount set out in the replication.

[34] The plaintiff testified that in 2014 or 2015 when they were wrapping up, looking at the numbers, the defendant indicated that he had paid the money back to the plaintiff, but there was no record, and the plaintiff said that the defendant should pay him because of the sale of the business.

[35] Thereafter, the defendant, according to the plaintiff, said that when he drew the money he had given the plaintiff the portion, but this never happened.

[36] Plaintiff testified that they had lunch together every day to discuss the business and that he was very perturbed with how the loan was handled and that it made the atmosphere uncomfortable talking about it.

[37] Whilst being cross-examined it was suggested to the plaintiff that the loan was really to save the house and if this had been the case why didn't the plaintiff merely pay the bank, to which the plaintiff answered that the defendant would still have been sitting with no work.

[38] In response to the question as to when the defendant would have to start paying the loan back, the plaintiff answered when they moved into the business, shortly after taking stock during May 2000.

[39] The plaintiff testified that although the defendant had to pay the loan immediately he gave him a holiday because he was delinquent and the plaintiff agreed that the defendant could defer the payments.

[40] When it was put to the plaintiff that he gave the defendant a holiday for ten years, the plaintiff testified that he, the defendant, was drawing a salary when the defendant came to advise him that his daughter in London was in financial difficulty and that he, the plaintiff, wasn't keeping his eye on the ball. The plaintiff elaborated that the defendant was also sending money to Australia so as to be fair to his other child.

[41] The plaintiff testified under cross-examination that the lunch which occurred daily was an opportunity to bring up the loan from time to time, but it spoilt the lunch and that the issue of the unpaid loan started to spill over and spoil the relationship in the family.

[42] It was put to the plaintiff that he had offered two conflicting versions as to what the defendant said, namely:

1) that he would pay as and when the member's interest in the close corporation was sold; and

2) that he said he had paid it in full.

[43] When asked to acknowledge the inconsistency, the plaintiff testified that it varied all the time, that the goalposts shifted, that it was depending upon what was happening overseas and never bore fruit.

[44] It was then put to the plaintiff that if necessary the defendant would testify that his house was paid off in full and that he had no need to finance anything.

[45] In re-examination the plaintiff was asked to clarify the reference to giving a holiday and he stated that the defendant was delinquent and could not pay, and significantly that in spite of the commencement date the defendant asked if they could move the date for repayment.

[46] The plaintiff then closed his case.

ASSESSMENT OF EVIDENCE

[47] It was submitted by the plaintiff in argument that all the court had was the testimony of the plaintiff on which to determine the issues.

[48] Because the evidence of the plaintiff was not contradicted, it does not follow that same has to be accepted, which is dependent on the quality of the evidence given.[12] Where evidence is vague and contradictory same will not pass muster. In Siffman v Kriel[13] the court said:

> "*It does not follow, because evidence is not contradicted, that therefore it is true. Otherwise the court, in cases where the defendant is in default, would be bound to accept any evidence the plaintiff might tender. The*

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12 Shenker Bros v Bester 1952(3) SA 664 (A) at 670 F to G

13 1909 TS 538

story told by the person on whom the onus rests may be so improbable as not to discharge it."

[49] I have no doubt that the plaintiff was an honest witness, but his evidence did nothing to advance the contentions on his behalf and in fact supported the contentions of the defendant by establishing:

1) that the agreement was to start to repay the loan as soon as the plaintiff and defendant moved into the premises of the Shell service station and commenced conducting business;

2) this was confirmed by the plaintiff indicating that the defendant had to commence paying immediately, but as he couldn't pay he gave him a bit of a holiday as he had no money.

[50] The plaintiff's evidence is inexplicable by virtue of his testimony that he had lunch every day with the defendant and was very perturbed about how the loan was handled, but did nothing to insist on repayment of his money.

[51] There is simply a *lacuna* of ten years before the first 2010 payment is made on the plaintiff's evidence of an instalment, or in fact any amount for repayment of the loan. Under cross-examination the plaintiff asserted that the defendant would have to start paying when they moved into the business and took over shortly after taking stock.

[52] The plaintiff was simply unable to give any satisfactory explanation as to why he would give the defendant a ten-year holiday in making repayments, other than to suggest that he wasn't keeping his eye on the ball and that the situation led to unpleasantness and started to spoil the relationship in the family.

[53] The main criticism in respect of vague and contradictory evidence, is to be made in the plaintiff's assertion as to the so-called express and tacit conduct which interrupted prescription. Of the three repayments alleged in the replication, the plaintiff was able to establish:

1) One deposit of R15 000 into his Standard Bank account where it appeared that such payment was made on 27 March of 2015;

2) The other payments can be simply disregarded as no evidence was adduced in respect of them;

3) In respect of the acknowledgement that the money was owing at the end of 2014 or beginning of 2015, the plaintiff was unable to give any date when this meeting occurred, and in fact testified to the contrary that when he raised the issue of the loan the defendant said that he'd paid it in full.

[54] On the pleaded replication, the plaintiff has failed to establish that any payments comprised interruption of prescription or that at a meeting there was an acknowledgement of liability.

[55] In light of the timing of the pleaded replication and the view I take in respect of the debt arising for purposes of the Prescription Act 68 of 1969, these considerations and criticisms of the plaintiff's evidence are not dipositive of his claim, as the debt had already become extinguished by prescription.

THE STATUTORY REQUIREMENTS OF PRESCRIPTION

[56] The statutory provisions of the Prescription Act 68 of 1969 are well known and both parties referred me to Sections 11(d), 12(1) and 14. The reliance placed on section 13(1)(d) and 13(1)(i) is contentious and will be dealt with below.

[57] The whole question of prescription was recently given a new gloss by the Constitutional Court, in respect of interpretation in the matter of Makate v Vodacom (Pty) Ltd,[14] wherein it was held by Jafta J at paragraph [87]:

> "*Since the coming into force of the Constitution in February 1997, every court that interprets legislation is bound to read a legislative provision through the prism of the Constitution. In Fraser, van der Westhuizen J explained the role of section 39(2) in these terms: 'When interpreting legislation, a court must promote the spirit, purport and objects of the Bill of Rights in terms of section 39(2) of the Constitution. This court has*

[14] Constitutional Court case no. CCT52/15, judgment handed down on 26 April 2016

made clear that section 39(2) fashions a mandatory constitutional cannon of statutory interpretation.'"

[58] In Makate's case, the provisions of the Prescription Act 68 of 1969 implicated or affected rights in the Bill of Rights requiring the obligation in section 39(2) to be activated.

[59] In this matter, it was not suggested that in the determination of the meaning of the word "*debt*" as envisaged in the Prescription Act 68 of 1969, that the effect thereof impinged on the plaintiff's constitutional rights. The Constitutional Court held that it was not necessary to determine the exact meaning of a "debt" as envisaged in section 10 having referred to the meaning ascribed to it in Eskom[15] as being the meaning ascribed to it in the shorter Oxford English Dictionary, namely:

> "*1* *Something owed or due: something (as money, goods or services) which one person is under an obligation to pay or render to another.*
>
> *2* *The liability or obligation to pay or render something: the condition of being so obligated.*"

COMPETING SUBMISSIONS

[60] The plaintiff contended both for the interruption of prescription and a new point that one of the further sections of the Prescription Act 68 of 1969 was that section 13(1)(d) as read with 13(1)(i), in that the debtor and creditor were partners and if the debt is a debt which arose out of the partnership relationship, then the completion of the debt will be delayed until after such impediment seeks to exist. This argument was objected to on behalf of the defendant on the basis that it had not been pleaded and that to raise same for the first time in argument comprised an ambush.

[61] The sections which provide for the delay of completion of prescription were recently dealt with by two judges in the Cape in the matter of van Deventer and

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15 Electricity Supply Commission v Stewarts and Lloyds of South Africa (Pty) Ltd 1981(3) SA 340 (A) at 344 E

Another v Nedbank Limited[16] wherein Rogers J considered the provision where it had been pertinently raised in a pleading with a view to determining whether the reference to a company could include a close corporation. In that matter the point was pleaded.

[62] In Silhouette Investments Limited v Virgin Hotels Group Limited,[17] Farlam JA dealt with section 13(1)(b) at p621F of the judgment, arising from the appellant applying at the hearing of the appeal for leave to file a replication to the respondent's special plea in which the ground was specifically pleaded and the respondent, not having opposed the application.

[63] Instructive from the above two decisions, is the fact that in order to rely upon such a statutory provision, being that the partnership agreement between the parties was an impediment against the running of prescription for the entire period, that the partnership continued in such a case and that prescription would therefore only commence to run after 2 May 2012 when the plaintiff ceased to be a member of the close corporation, the statutory provision needed to be pleaded and proved at the trial.

[64] There was no evidence adduced by the plaintiff,in respect of a partnership, nor does the fact that both parties held 50% member's interest in a close corporation translate into the proving of a partnership or the dissolution thereof.

[65] The plaintiff bore a full onus to plead and prove the impediment to the running of prescription. This onus was not discharged.

[66] I am of the view that the plaintiff cannot rely in any event, on an un-pleaded provision of the Prescription Act 68 of 1969 where the effect of raising it for the first time in argument, is that the defendant is ambushed in the conducting of his case.

[67] In Kali v Incorporated General Insurances Limited,[18] Milne J held:

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16 2016(3) SA 622 (WCC)
17 2009(4) SA 617 (SCA)
18 1976(2) SA 179 (D) at 182 A

"*A pleader cannot be allowed to direct the attention of the other party to one issue and then, at the trial attempt to canvass another.*"

[68] In Shill v Milner[19] it was held:

"*The object of pleadings is to define the issues: and the parties will be kept strictly to their pleas where any departure would cause prejudice or would prevent full enquiry.*"

[69] In Impremed (Pty) Ltd v National Transport Commission[20] the court summarised the principles:

"*At the outset it need hardly be stressed that the whole purpose of pleadings is to bring clearly to the notice of the court and the parties to an action the issues upon which reliance is to be placed.*"

[70] Having enquired of the plaintiff whether they wished to bring an amendment, and being advised that they declined to do so, I hold that the plaintiff is unable to rely on the provisions of 13(1)(d) of the Prescription Act 68 of 1969.

[71] Even if I am wrong in the above assessment, the plaintiff adduced no evidence of a partnership coming into existence and was content to leave it to closing argument to raise the point that a close corporation is far more like a partnership, which is a submission in the air.

[72] Both parties were in agreement that the question as to whether the debt was payable and the date thereof, was critical to the determination as to whether the matter had prescribed.

[73] In light of the Constitutional Court's acceptance of the dictionary definition of debt, the instalments payable on the loan fall firmly within such definition.

[74] In Umgeni Water v Mshengu,[21] Ponnan JA set out the position in determining whether a debt is due:

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19 1937 AD 101 at 105

20 1993(3) SA 94 (A) 107 C to H

21 [2010] 2 ALL SA 505 (SCA) paragraph 5 to 6

> *"[5] According to s 12(1) of the Act, prescription shall commence to run 'as soon as the debt is due'. The words 'debt is due' must be given their ordinary meaning … In its ordinary meaning a debt is due when it is immediately claimable by the creditor and, as it's correlative it is immediately payable by the debtor. Stated another way, the debt must be one in respect of which the debtor is under an obligation to pay immediately.*
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> *[6] A debt can only be said to be claimable immediately if a creditor has the right to institute an action for its recovery. In order to be able to institute an action for the recovery of a debt the creditor must have a complete cause of action in respect of it. The expression 'cause of action' has been held to mean 'every fact which would be necessary for the plaintiff to prove … in order to support his right to judgment of the court.'"*

[75] This dicta was approved in the Supreme Court of Appeal in 2015, in the matter of van Deventer v Ivory Sun Trading 77[22] per Schoeman AJA.

[76] I find that on the evidence of the plaintiff, the first instalment became due no later than the month following the provision of the loan, admitted to have been in May 2000.

[77] In this regard I am fortified by the annexure to the declaration on which the plaintiff himself relies "D1", specifying the instalments due for a given year and the interest pursuant thereto.

[78] To accept the submission that the debt would only became due at some unspecified date in the future would lead to an absurdity.

[79] I find the attempt to separate the instalments that were due and payable on the repayment of the loan from the loan itself to be artificial and contrived.

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22 2015(3) SA 532 (SCA)

[80] In terms of the authority of the Supreme Court of Appeal, the plaintiff would have had a complete cause of action to sue in respect of every month's unpaid instalment on the loan and as such the debt became due at each of those dates.

[81] If the debt, as I have held, became due and payable upon each of the dates of the instalments being due, then the debt prescribed as argued by Mr McAskin at best for the plaintiff no later than June 2008, or August 2009, when all the instalments were due together with interest thereon.

[82] The effect of prescription was to extinguish the debt as at August 2009.

[83] Accordingly, I find the one payment to the plaintiff in March of 2012 to be irrelevant as is the suggestion, assumed at best for the plaintiff, that the defendant acknowledged his liability in 2014 or 2015.

[84] An acknowledgment of indebtedness on a prescribed debt does not resuscitate the debt.

[85] In assuming the above, I am not at all convinced that the plaintiff has proved that any such statement was made by the defendant.

CONCLUSION

[86] I conclude that prescription commenced to run in respect of each instalment when same became due and that there was a three-year prescriptive period in respect of each such debt, and that the plaintiff's claim prescribed at the latest in August 2009.

[87] As the summons was served on 25 March 2015, more than three years had elapsed after the date on which the debt arose and, as such, the plaintiff's claim has been extinguished by prescription in terms of section 11(d) of the Prescription Act 69 of 1969.

THE ORDER

[88] I make the following order:

1) The special plea is upheld.

2) The plaintiff's claim is dismissed with costs.

JUDGE OF THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION
JOHANNESBURG

Counsel for the plaintiff: Adv GV Meijers
Instructed by:

Counsel for the defendant: Adv CJ McAskin
Instructed by:

Date of Hearing: Wednesday 13 September 2017
Date of Judgment: Friday 22 September 2017