IN THE HIGH COURT OF SOUTH AFRICA,
GAUTENG DIVISION, JOHANNESBURG

CASE NO: 2011/11563

(1) REPORTABLE: NO
(2) OF INTEREST TO OTHER JUDGES: NO

DATE
SIGNATURE

In the matter between –

INVESTEC BANK LTD	**APPLICANT / DEFENDANT**
and	
KNOOP, KURT ROBERT NO	**1st RESPONDENT / PLAINTIFF**
MOTALA, ENVER MOHAMED NO	**2nd RESPONDENT / PLAINTIFF**
KAJEE, ZEENATH, NO	**3rd RESPONDENT / PLAINTIFF**
NKOMO, MDUDUZI CHRISTOPHER, NO	**4th RESPONDENT / PLAINTIFF**
MBATHA, YVONNE THOKOZILE, NO	**5th RESPONDENT / PLAINTIFF**

JUDGMENT

MOORCROFT AJ:

Summary

Rule 47(4) of Uniform Rules – plaintiff's claim dismissed after failing to put up security in eleven years

Power to dismiss to be exercised with caution

Order

[1] I make the following order:

1. *The application to file a supplementary answering affidavit is dismissed;*
2. *The plaintiffs are ordered to pay the costs of the application to file a supplementary answering affidavit on the scale as between attorney and client;*
3. *The pending action instituted by the plaintiffs against the defendants under case number 2011/11563 is dismissed;*
4. *The plaintiffs are ordered to pay the costs of the action dismissed under case number 2011/11563 on the attorney and client scale;*
5. *The plaintiffs are ordered to pay the costs of this application in terms of Rule 47(4) on the attorney and client scale.*

[2] The reasons for the order follow below.

Introduction

[3] This is an application[1] in terms of Rule 47(4) initiated in September 2022. The subrule provides that the Court may dismiss any proceedings instituted or strike out any pleadings filed by the party in default, or make such other order as to it may seem meet had security not been given within a reasonable time.

[4] Rule 47(4) reflects the previously existing[2] inherent jurisdiction that the High Court had to dismiss proceedings when a party ordered to put up security, fails to comply with the order.[3]

[5] The power to dismiss proceedings must be exercised sparingly and with circumspection.[4]

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1 CaseLInes 011-1.

2 *Excelsior Meubels Beperk v Trans Unie Ontwikkelings Korporasie Beperk* 1957 (1) SA 74 (T) 76D.

3 Cilliers AC, Loots C and Nel HC *Herbstein and Van Winsen: Civil Practice of the High Courts and the Supreme Court of Appeal of South Africa* 5th ed, 2009 ch13-p4185th ed, 2009 ch13-p 418, *Selero (Pty) Ltd v Chauvier* 1982 (3) SA 519 (T) 522A–C. See also Van Loggerenberg DE and Bertelsmann E *Erasmus: Superior Court Practice* RS 20, 2022, D1-633.

4 *Western Assurance Co v Caldwell's Trustee* 1918 AD 262 at 271, *Kuiper and Others v Benson* 1984 (1) SA 474 (W) 477A, *Molala v Minister of Law and Order and Another* 1993 (1) SA 673 (W), *Sanford v Haley* NO 2004 (3) SA 296 (C) par. 8.

The liquidators

[6] The present respondents ("the liquidators" of Rollco Roofing Systems (Pty) Ltd) were appointed provisionally on 13 February 2008. Summons was served on 13 April 2011. In the summons the liquidators claimed R5 043 793.85 from the defendant, now the applicant ("the bank"). The money was alleged to have been paid by Rollco to the bank in January 2008. The claim was based on sections 29 and 30 of the Insolvency Act, 24 of 1936 and section 340(1) of the Companies Act, 61 of 1973.

[7] An application was summary judgment was opposed in 2011 and leave to defend was granted by consent. A declaration was served after notice of bar had been given. The bank then served notices in terms of Rule 23(1) and Rule 30(2)(b), and in terms of Rule 47. The application for security application was premised on a number of grounds, inter alia the defence of prescription that had also been raised in the summary judgment application.

[8] On 25 October 2011 Moshidi J granted an order[5] in terms of which the liquidators were ordered[6] to give security for the costs of their action against the bank in the amount of R300 000 within ten days of the date of the order. The action was stayed pending compliance.

[9] The respondents never put up the necessary security and the ten-day period expired in November 2011.

[10] In September 2014 the liquidators delivered a notice to amend their summons and declaration. The bank objected on the basis that the liquidators had failed to put up the

5 CaseLines 011-23.
6 In terms of Rule 47(3) of the Uniform Rules.

security as required by the court order three years earlier. Nothing happened for seven months and then the liquidators filed amended pages purportedly in accordance with the notice to amend of 2014.

[11] The bank responded with a notice to remove cause of complaint in terms of Rule 30(2)(b). In June 2015 Wright J granted an order[7] in terms of Rule 30(1), with a punitive cost order against the liquidators.

[12] The liquidators withdrew their notice to amend.

[13] Seven years later and without putting up security, the liquidators served a notice of bar on the bank in July 2022, requiring the bank to file its plea. This led to another notice to remove cause of complaint in terms of Rule 30(2)(b).[8]

[14] In 2022 the amended pages were uploaded to CaseLines as if the amendment had been effected.

[15] Also in 2022 an unsigned document were uploaded[9] to CaseLines that purports to be a notice dated in November 2011 and signifying compliance with the order to put up security, by reference to an undertaking 'marked "A"'. There is however no annexure marked "A" and the bank's representatives say that had never seen such a notice during the years 2011 to 2022.

[16] In August 2022 the bank was informed that a Trust[10] had taken over the litigation from

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7 CaseLines 011-24.
8 CaseLines 011-27.
9 CaseLines 011-36, 020-17.
10 CaseLines 011-39. Four Trusts are involved in the matter and are referred to herein collectively as "the Trust." They are the Shaukat Alli Moosa Family Trust, the Cassim Rashin Moosa Trust, the Goolam Hoosen Moosa Trust, and the Salim Mohamed Moosa Trust. A trust is furthermore not a legal *persona* and the references to the Trust in this judgment is shorthand for 'the Trustees of the Trusts, *nomine officio."* It is mentioned in passing that the Trust did not provide the

the liquidators and intended to pursue the litigation in the name of the liquidators in terms of section 32(1)(b) of the Insolvency Act, 24 of 1936.[11] The indemnity agreement between the Trust and the Receiver of Rollco in terms of which the Trust took over the litigation was entered into during February 2021.[12]

[17] The bank complains that it is prejudiced by the liquidators' failure to put up security and to pursue the litigation for 11 years during which the matter was largely dormant. The passage of time unavoidably leads to evidence becoming more difficult to preserve and memories becoming hazy.

[18] On 19 October 2022 the Trust, now in the shoes of the liquidators, filed a guarantee.[13] This was done in response to the bank's application in terms of Rule 47(4). The guarantee is a revocable one; it contains the following clause:

> *"We reserve the right to withdraw from this guarantee by giving you 3 months' written notice in advance of our intention to do so, calculated from the date of the notice. You may, however, claim under the guarantee during the notice period mentioned herein from the date that such notice is given."*

[19] The bank rejected the guarantee on the ground that it is a revocable guarantee and for other reasons. The guarantee also suffers from the shortcoming that it is dependent on the furnishing of a certified copy of the Registrar's determination. There is none – the determination was made in the Court order itself. Furthermore, the original document was never furnished to the bank and in terms of paragraph 5 of the document payment would only be made upon surrender of the guarantee.

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necessary guarantee within ten days of stepping into the shoes of the liquidators.

11 Under such circumstances the liquidators are still the plaintiffs, albeit that they are nominal plaintiffs. See *Volkskas Beperk, NO v Barclays Bank (DC & O)* 1955 (3) SA 104 (T).

12 CaseLines 011-72.

13 CaseLInes 012-1.

[20] The Trust filed an answering affidavit on 24 October 2022.[14] It is conceded that the liquidators had failed in their obligations to the general body of creditors, and that the liquidators had acted in a haphazard, dilatory, and careless manner.

[21] The liquidators did not proceed with the litigation even though the Trust was in contact with them and made enquiries. The Trust requested the liquidators to pursue the litigation since 2015 and in 2019 the Trust actively began taking steps to take over the litigation.

[22] The Trust was hamstrung by the incomplete record on CaseLines and did not have a full set of pleadings and other documents to hand. It came to the notice of the Trust at a late stage that security had not been furnished by the liquidators.

Prescription

[23] The following dates are relevant to the defence of prescription:

23.1 January 2008: Payment that later gave rise to the action made to the bank;

23.2 11 February 2008: Rollco placed in provisional liquidation;

23.3 13 February 2008: Provisional liquidators appointed;

23.4 18 March 2008: The liquidators demand payment from the bank;

23.5 13 April 2011: Summons served.

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[14] CaseLines 011-50.

[24] The three-year[15] prescription period is applicable. Prescription begins to run when the debt is due.[16] This principle is subject to three[17] provisos referred to in section 12(1) of the Prescription Act: Section 12(3) and (4) reads as follows:

> *(2) If the debtor wilfully prevents the creditor from coming to know of the existence of the debt, prescription shall not commence to run until the creditor becomes aware of the existence of the debt.*
>
> *(3) A debt shall not be deemed to be due until the creditor has knowledge of the identity of the debtor and of the facts from which the debt arises: Provided that a creditor shall be deemed to have such knowledge if he could have acquired it by exercising reasonable care.*

[25] Prescription is delayed under certain circumstances listed in section 13 of the Act. Subsection (1) lists a number of impediments to the running of prescription and provides that when the period of prescription would, but for the provisions of the subsection, be completed before or on, or within one year after, the day on which the relevant impediment has ceased to exist, the period of prescription shall not be completed before a year has elapsed after the day on which the impediment ceased to exist.

[26] Section 14 of the Act provides for interruption of prescription by acknowledgement of debt and the judicial interruption of prescription is dealt with in section 15. When prescription is still running, service of process interrupts prescription provided the proceedings are prosecuted to finality.

[27] The liquidators demanded payment from the bank on 18 March 2008. In the absence of any explanation to the contrary they knew of the debt on that date, and the debt prescribed by the latest on 17 March 2011.

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15 Section 11(d) of the Prescription Act, 68 of 1969.
16 Section 12(1).
17 The third is not relevant to this matter.

[28] In paragraphs 12.5 and 26[18] of the founding affidavit the bank make pertinent averments regarding prescription. The averments are not dealt with at all in paragraph 65 and 75.2[19] of the answering affidavit that constitute the response to paragraphs 9 to 13 and 26 of the founding affidavit. The averments made by the bank are unanswered save for a bland statement: *"I deny that the claim has prescribed."*

[29] It was argued that the dispute should be properly raised in a plea and that the matter of prescription cannot be ventilated without both versions being before the Court. Prescription is *"firmly denied."* The liquidators point out that the bank never filed a plea in eleven years but the answer to this point of criticism is that they did not file a plea because the action was stayed by an order of court.

[30] The denial is therefore a bald denial and the deponent failed to deal with the point of substance. It was also argued on behalf of the Trust that prescription *"has been merely alleged."* This statement in the heads is clearly incorrect when regard is had to paragraph 12.5 of the bank's affidavit.[20]

[31] When the facts indicate that a claim is prescribed there is an evidentiary onus, an onus of rebuttal, on the party denying prescription to show that the debt did not prescribe. In a matter such as this it is necessary to allege the facts that, if accepted at trial when evidence can be led, rebuts the inference that the debt arose more than three years before summons was served, or that the debt was admitted, or that prescription was delayed. The Trust chose not to do so.

[32] It is not the case for the Trust that there is (or even might be) be a defence to the prescription defence but that they do not have access to the facts or records that support the

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18 CaseLines 011-11 & 22.
19 CaseLines 011-66 & 70.
20 CaseLines 011-11.

defence.

[33] The only possible inference is that the claim is prescribed.

Supplementary affidavit

[34] The Trust filed a supplementary affidavit on 11 January 2023 and applied for the necessary leave to do so.[21] The application is made on the basis that it is a response to information that only came to the Trust's knowledge when the replying affidavit[22] was perused. The response is limited to paragraphs 18 and 20 of the bank's replying affidavit.

[35] In paragraph 62 of the answering affidavit reference is made to the guarantee that was filed.[23] The bank responded in paragraphs 18 and 20 of the replying affidavit. The deponent to the supplementary answering affidavit referred to the filing notice referring to an undertaking of 2011 that is in fact not attached[24] to the notice, but is referred to already in the bank's founding affidavit. It was uploaded to CaseLines on behalf of the Trust in July 2022 and was known before the answering affidavit was filed.

[36] The Trust's attorneys received payment of the amount of R300 000 from the Trust but could not pay the amount directly to the Registrar of the Court. A bank guarantee was required and was obtained. When the guarantee proved unacceptable to the bank, they wrote to the bank to enquire about the perceived shortcomings but no reply was received. Instead the guarantee and its shortcomings were addressed in the replying affidavit. In response, the deponent states that the guarantee of October 2022 is satisfactory.

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21 CaseLines 020-3.
22 CaseLines 011-111.
23 CaseLIne s 012-1.
24 Annexure A7, CaseLines 011-36, Annexure YM1, CaseLines 020-17.

[37] There is no facts in the supplementary affidavit that constitute evidence that only came known after filing of the answering affidavit but what the Trust says that the averments became relevant only when the replying affidavit was read. The legal arguments raised, particularly the adequacy of the guarantee of October 2022, could of course be raised legitimately as the arguments were based on evidence already before Court.

[38] The supplementary affidavit therefore not only dealt with evidence known when the answering affidavit was filed, but added nothing to the legal arguments already at the disposal of the Trust.

[39] The bank filed a replying affidavit[25] to the supplementary answering affidavit.

[40] No case is made out to receive the supplementary affidavits in evidence. They take the matter no further, and the application is dismissed in terms of the order made above.

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[25] CaseLines 021-3.

Conclusion

[41] The liquidators were ordered to put up security by November 2011. They never did. Eleven years later the Trust, having stepped into the shoes of the liquidators who are now nominal plaintiffs, delivered a copy of a revocable ‘guarantee’ with many shortcomings. Even if one were to postulate a situation that when the Trust stepped into the shoes of the liquidators they were required to remedy past shortcomings *inter alia* by putting up security and delivering a guarantee within ten days, the did not do so. They have not done so many months later.

[42] It is common cause on the affidavits that the liquidators failed in their obligations to the general body of creditors, and that they liquidators acted haphazardly, dilatory, and carelessly, and in a dilatory manner. The Trust, now litigating in the name of the liquidators and clothed in their clothes, cannot completely distance themselves from events before they became involved.

[43] The bank seeks a *de bonis proprius cost* order against the liquidators on the basis that their failure to put up security and prosecute the matter to finality amounts to dereliction of duty. The only reason why such an order is not granted, is because the Trust may be held liable for the costs *de bonis proprius.* An attorney and client cost order is however justified because of the way in which the liquidators dealt with the matter over more than a decade.

[44] I therefore make the order in paragraph 1 above.

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J MOORCROFT

ACTING JUDGE OF THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION

JOHANNESBURG

Electronically submitted

Delivered: This judgement was prepared and authored by the Acting Judge whose name is reflected and is handed down electronically by circulation to the Parties / their legal representatives by email and by uploading it to the electronic file of this matter on CaseLines. The date of the judgment is deemed to be **20 MARCH 2023**.

COUNSEL FOR THE APPLICANT:	C VAN DER LINDE
INSTRUCTED BY:	DU TOIT – SANCHEZ – MOODLEY INC
COUNSEL FOR THE RESPONDENTS:	J P PRETORIUS
INSTRUCTED BY:	ZAYEED PARUK INC
DATE OF THE HEARING:	8 MARCH 2023
DATE OF JUDGMENT:	20 MARCH 2023