

IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA



CASE NO.: 67734/2019

(1)	REPORTABLE: YES / NO
(2)	OF INTEREST TO OTHER JUDGES: YES/NO
(3)	REVISED.
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In the matter between:

EH HASSIM HARDWARE (PTY) LTD

Plaintiff

and

MOKHABO SAMUEL APHANE

Defendant

JUDGMENT

van der Westhuizen, J

[1] On or about 10 September 2019, the plaintiff instituted an action against the defendant, and served it upon the defendant on or about 13

September 2019. The defendant defended the action and pled two special pleas and also pled over.

- [2] The matter came before me on 10 August 2022 and only the first special plea of prescription, was argued.
- [3] The cause of action pled was premised upon a money judgment obtained against a Close Corporation, Nthlateng Trading 11 CC, granted by the Limpopo High Court on or about 26 June 2019. The plaintiff further averred that the defendant was liable for settling the said judgment in terms of a suretyship provided by the defendant in favour of the plaintiff. The said suretyship was provided in respect of a credit facility granted by the plaintiff to the aforementioned Close Corporation during November 2011. The suretyship was granted in respect of the due compliance by the Close Corporation's obligations in terms of the Credit Facility Agreement.
- [4] The first special plea recorded the following:
- (a) In paragraph 6 of the plaintiff's particulars of claim, the plaintiff alleged that goods were sold and delivered to the Close Corporation, but the plaintiff failed to alleged when such goods were so sold and delivered;
 - (b) In paragraph 8 of the plaintiff's particulars of claim, the plaintiff alleged a reconciliation of the monies due by its principal debtor upon which it relied, and appended a copy thereof;
 - (c) The said reconciliation recorded that the last transaction between the plaintiff and the Close Corporation occurred on or about 20 July 2012. The remainder of entries on the said reconciliation related to interest charged for the period 31 July 2012 to 1 June 2015;

- (d) Any amount due to the plaintiff by the Close Corporation and the defendant became due and payable during July 2015;
 - (e) A period of more than 3 years had lapsed since the plaintiff's alleged claim against the defendant fell due;
 - (f) The plaintiff issued summons against the Close Corporation during or about 2017 and on 30 May 2019, judgment against the Close Corporation was granted by default;
 - (g) That the running of the prescription of plaintiff's claim against the Close Corporation was not interrupted, and accordingly the plaintiff's alleged claim against the defendant was extinguished;
 - (h) Consequently, the defendant pled that in terms of the provisions of section 11 of the Prescription Act, 68 of 69 (the Act), the plaintiff's claim against the defendant had prescribed.
- [5] The plaintiff filed a replication in which it was at pains to point out that its claim against the defendant was premised upon the money judgment granted against the Close Corporation on 20 May 2019 and that the summons against the defendant was issued on 10 September 2019 and served upon the defendant 13 September 2019 within six months since the grant of the money judgment.
- [6] The Deed of Surety upon which the plaintiff relied forms part of the Credit Facility Application and was contained in clause 18 thereof. The relevant portion of that clause reads as follows:

"In the event of the Applicant being a legal entity or trust, then the signatory/ies, in addition to so representing the Applicant, hereby bind himself/themselves jointly and severally as surety/ies and co-principle debtor/s in solidum with the Applicant unto and in favour of E H Hassim, it's (sic) order of assigns, for

the due and proper fulfilment of all the obligations of and for the punctual payment of all sums which are or may become due by the Applicant to E H Hassim in terms of, or in connection with or arising in any way whatsoever out of the purchase by the Applicant from E H Hassim of any goods and/or the rendering of services and/or the provision of monetary loans or arising out of any the provisions of this document or arising from any other cause of action whatsoever, either contractually or delictually, and further upon and subject to the following terms and conditions:

- a. - ...
- b. - ...
- c. – *The Surety shall remain in force as a continuing covering security until such time as all the obligations of the Applicant to E H Hassim have been duly and properly fulfilled and shall remain in full force and effect notwithstanding any fluctuation in or temporary extinction of such indebtedness.*
- d. ...”

- [7] In the said clause 18, the surety renounced the benefits of *excussionis*, *divisionis* and cession of action.
- [8] Clause 1 of the Credit Facility stipulates that payment terms were strictly 30 days from the date of first statement or unless otherwise agreed in writing by E H Hassim, no prior demand being required.
- [9] The plaintiff’s particulars of claim did not allege any interruption of prescription, other than the mere allegation in the replication that the summons against the defendant was issued on 10 September 2019 and served upon the defendant 13 September 2019 within six months since the grant of the money judgment.
- [10] It was submitted on behalf of the plaintiff that the period of prescription, applicable in the present instance, was thirty years as provided for in

terms of the provisions of section 11(a) of the Act, the cause of action being premised upon a money judgment obtained against the Close Corporation.

[11] It is settled law that prescription of the liability of a surety in terms of a suretyship is the same as that of the principle debtor and that any interruption of the period of prescription in respect of the principle debtor is an interruption of the period of prescription *vis-à-vis* the surety.¹ Furthermore, it is trite that when the principal debt becomes prescribed, the surety is released.²

[12] It is trite that when a principal debt is kept alive by a judgment, the surety's accessory obligation continues to exist.³

[13] The period of prescription in respect of a debt of general nature is stipulated in section 11(d) of the Act, which provides as follows:

“save where an Act of Parliament provides otherwise, three years in respect of any other debt.”

[14] Section 12 of the Act determines when the period of prescription begins to run. In that regard, section 12(1) reads as follows:

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

[15] The Act further stipulates the instances which would interrupt the running of prescription, i.e. an acknowledgment of liability on the one hand⁴, and judicial interruption in the form of service on the debtor of any process whereby the creditor claims payment of the debt.⁵

¹ *Jans v Nedcor Bank Ltd* 2003(6) SA 646 (SCA)

² *Jans v Nedcor Bank Ltd, supra*

³ *Eley v Lynn & Main Inc.* 2008(2) SA 151 (SCA)

⁴ Section 14(1) of the Act

⁵ Section 15(1) of the Act

- [16] The reconciliation, annexure POC2 to the plaintiff's particulars of claim is confusing to say the least. Although it recorded that the last transaction between the Close Corporation and the plaintiff occurred on 20 July 2012, the outstanding balance in respect of goods or services sold or rendered, however, recorded at 25 February 2012 a greater amount due than the balance recorded at 20 July 2012. At 25 February 2012, the balance due was recorded to be an amount of R1 479 627,27. It being a greater amount than that of 20 July 2012 (R381 906,14), it is logical and sensible to assume that it reflected the principal debt due. The following and remaining entries thereon, were mere recordals of interest charged since 31 July 2012 to 15 June 2015. No further entries were recorded after 15 June 2015. No payments were recorded on the reconciliation document.
- [17] *In casu*, and in terms of the provisions of clause 1 of the Credit Facility Application, the balance at 25 February 2012, read with the provisions of section 12(1) of the Act, the principal debt of the Corporation, and by parity that of the surety, became due on or about 24 March 2012. From that date the period of prescription commenced. In terms of the provisions of section 11(d) of the Act, the three year period of prescription was completed on or about 24 March 2015. Even if the later date of 20 July 2012 is considered to be the correct date, completion of the period of prescription would be 19 August 2015. Well before the plaintiff issued process against the Close Corporation. The principal debt had by then become extinguished.
- [18] It is to be gleaned from the allegations in paragraph 9 of the plaintiff's particulars of claim, that due to the Close Corporation's breach of the Credit Facility Agreement, summons was issued against the Close Corporation during 2017 and default judgment was obtained on 30 May 2019.

- [19] It follows, that by the time that summons was issued against the Close Corporation for its breach in terms of the Credit Facility Agreement, a period of at least three years had lapsed since the principal debt became due in March 2012, or August 2012.
- [20] It is trite law that a surety has the same defence remedies *in rem* as that is or was available to the principal debtor.⁶ It would include the defence of prescription.
- [21] The case law relied upon by the plaintiff all have the common fact that the process issued against the principal debtor, which led to the obtaining of a money judgment against the principal debtor, were all issued within the three year period of the running of prescription. There were clear interruptions of prescription as provided by section 15 of the Act. The facts in the present instance, as recorded earlier, differs materially from those judgments.
- [22] In the normal course, the Close Corporation would have had the defence of prescription available at the time when process was issued against it during 2017. So too the defendant, had he been joined. The defendant now raised the defence.
- [23] It was submitted on behalf of the plaintiff that the money order obtained against the Close Corporation on 30 May 2019, was a new cause of action upon which the plaintiff was entitled to rely as *per* the authorities the plaintiff relied upon.⁷
- [24] It was further submitted on behalf of the plaintiff, that the plaintiff did not rely on the suretyship in respect of the principal debt relating to goods sold and delivered, but relied upon the terms of the suretyship relating to liability arising from whatsoever other causes. The said submission relied upon the authorities⁸ where it was held that the terms

⁶ *Ideal FinanceCorp v Coetzer* 1970(3) SA 1 (A)

⁷ *Bulsara v Jordan & Co Ltd* 1996(1) SA 805 (A)

⁸ *Bulsara v Jordan, supra; EA Gani (Pty) Ltd v Francis* 1984(1) SA 462 (T)

of the suretyships in those matters were wide enough to include the liability of the surety in respect of a money judgment against the principal debtor.

- [25] The terms of the suretyship *in casu*, recorded earlier, differ materially from the wide terms of the suretyships in those authorities. In the present instance the surety was limited to the sale of goods and rendering of services arising out of the said credit facility. The passage in clause 18 of the said suretyship “... *arising from any other cause of action whatsoever, either contractually or delictually, ...*” is in terms limited. It would only include causes of action arising contractually or delictually. In terms it would thus exclude a money judgment.
- [26] The aforesaid passage differs materially from those in the authorities relied upon, where the relevant passages read “... *from any debt whatsoever.*”⁹ That phrase is clearly unlimited in respect of causes of action. The nature of a money judgment is neither contractual, nor delictual.
- [27] Clause 18(c) is of no assistance *in casu* to the plaintiff. The Close Corporation’s obligations *vis-à-vis* the plaintiff became finally extinguished at the latest August 2015 as recorded earlier.
- [28] Furthermore, as recorded earlier, the principal debt *in casu* had prescribed prior to the institution of process against the Close Corporation. Any subsequent money judgment obtained against the Close Corporation by default would be a *brutum fulmen* against the defendant. It could and would not assist the plaintiff in obtaining judgment against the defendant due to the extinguishing of the principal debt as a result of prescription. The said money judgment, did not and could not keep the principal debt alive. The principal debt was already dead by then through prescription.

⁹ *E A Gani v Francis, supra*

[29] On the extinguishing of the principal debt by prescription, as recorded earlier, interest thereon could not be calculated past the prescription completion date.

□ It follows that the defendant's plea of prescription stands to be upheld. Consequently, the plaintiff's action stands to be dismissed.

I grant the following order:

1. The defendant's special plea of prescription is upheld with costs;
2. The plaintiff's action is dismissed with costs.

C J VAN DER WESTHUIZEN
JUDGE OF THE HIGH COURT

Date of Hearing: 10 August 2022

On behalf of Plaintiff: H van der Vyver
Instructed by: Shaheed Dollie Inc

On behalf of Defendant: TJ Jooste
Instructed by: Waldick Jansen van Rensburg Attorneys

Judgment Delivered: 19 September 2022