case no: 377/92

IN THE SUPREME COURT OF SOUTH AFRICA

(APPELLATE DIVISION)

In the matter between:

RONALD CONRAD LEIPSIG ..... Appellant

AND

BANKORP LIMITED ..... Respondent

Coram: HOEXTER, NESTADT, EKSTEEN, JJA, NICHOLAS et

HARMS, AJJA

Heard: 19 November 1993

Delivered: 1 December 1993

J U D G M E N T

EKSTEEN, JA :

On 27 August 1986 the appellant, acting in his capacity as a director of William Lipsey and Sons (Pty) Ltd, ("the principal debtor") signed an acknowledgment of debt in which he acknowledged that the principal debtor was indebted to the respondent in the sum of R74 769.64. The principal debtor also undertook to pay this amount, together with such finance charges as respondent might stipulate from time to time, in instalments, and, in the event of a breach or non-performance of any term by it, the full amount owed would become due and payable

..../ 2

At the same time appellant bound himself to respondent as surety and co-principal debtor for "each and every amount which the debtor is at present indebted to the Bank or may in future become indebted to the Bank". Prior to entering into this deed of suretyship appellant had entered into a mortgage bond in which he granted a second mortgage of R60 000 over certain property in favour of respondent as security for any amount owing by him to respondent.

From facts agreed upon by the parties at a pre-trial conference held on 23 April 1992, and from allegations in the pleadings which are common cause, it appears

..../ 3

that the principal debtor defaulted in the pay-ment of the instalment due on 30 January 1987 and that respondent became aware of the default on 3 February 1987.

On 30 April 1987 a liquidation order was obtained against the principal debtor, and on 19 October 1987 respondent filed a claim for R75 633.26 against the company in liquidation. This claim was accepted by the liquidator, and on 16 March 1989 the Master confirmed the second and final liquidation and distribution account. The respondent received two payments from the liquidator in respect of its claim viz Rll 344.99 on 18 April 1988 and R2 946.36 on 4 April 1989.

.... / 4

Based on the deed of suretyship, respondent issued a summons on 1 June 1990 which was served on appellant on 14 June 1990. In it respondent claimed an amount of R93 749.32 and an order declaring the mortgaged property executable. At the pre-trial conference, however, the parties agreed that "the outstanding amount at 15 May 1990 was R67 861.93"..

Relying on section 13 of the Prescription Act, no 68 of 1969 ("the Act") the appellant in his plea raised a defence of prescription. In effect it amounted to this viz that respondent's debt had become "the object of a claim filed against a company in liquidation"

..... / 5

in terms of section 13(1)(g); that the relevant

period of prescription would, but for the pro

visions of para (i) have been completed before,

on, or within one year after the day on which

the impediment created by para (g) had ceased

to exist i e by virtue of the Master's con

firmation of the second and final liquidation

and distribution account on 16 March 1989;

and that the period of prescription had been

completed a year after that date, and that the

debt was therefore prescribed.

The argument before us was directed at the soundness of the defence of prescription raised by the appellant in its plea. Although

at the pre-trial conference the parties are recorded as having agreed "that the issue of prescription be dealt with in terms of Rule 33(4)" it would appear, as I have indicated, that this was the only issue before the court. In his judgment (reported in 1993 (1) SA 247 (W)), the learned judge a quo recorded at p 249 A that both parties had closed their cases without leading evidence, and before us respondent's counsel indicated that in the event of the appeal succeeding the appropriate order would be one dismissing respondent's claim with costs. The whole dispute between the parties turns, therefore, on this issue.

.... / 7

In the present case it should be borne in mind that we are concerned with the debt owing by the appellant to the respondent -an indebtedness which arose from his assumption of the obligation of a surety and co-principal debtor. As was pointed out in Kilroe-Daley v Barclays National Bank Ltd 1984 (4) SA 609 (A) at 622 I - 623 I and the cases there cited, the contract of suretyship, though a separate one from that between the principal debtor and creditor, is nevertheless accessory to the main contract. It follows therefore that where the principal debtor is discharged or released or in any way ceases to be bound, then the obli-

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gation of the surety also ceases to exist (Moti and Co v Cassim's Trustee 1924 AD 720 at 737). If the principal debt has become prescribed by virtue of the provisions of section 13 of the Act, then such prescription will also apply to the appellant's obligation (cf section 10(2)). It is, therefore, the obligation of the principal debtor to the respondent which has to be considered.

Section 13(1) of the Act as it stands at present - and to all intents and purposes as it stood prior to its amendment by section 11 of Act 139 of 1992 which simply removed references to the then South West Africa

.... / 9

in para (b) and (g) -reads as follows:

"13. (1) If -

(1) the creditor is a minor or is insane or is a person under cura-torship or is prevented by superior force including any law or any order of court from interrupting the running of prescription as contemplated in section 15(1); or

(2) the debtor is outside the Republic; or

(3) the creditor and debtor are married to each other; or

(4) the creditor and debtor are partners and the debt is a debt which arose out of the partnership relationship; or

(5) the creditor is a juristic person and the debtor is a member of the governing body of such juristic person; or

(6) the debt is the object of a dispute subjected to arbitration; or

(g) the debt is the object of a claim filed against the estate of a

.... / 10

> debtor who is deceased or against the insolvent estate of the debtor or against a company in liquidation or against an applicant under the Agricultural Credit Act, 1966 (Act No. 28 of 1966); or (h) the creditor or the debtor is deceased and an executor of the estate in question has not yet been appointed; and (i) the relevant period of prescription would but for the provisions of this sub-section, be completed before or on, or within one year after, the day on which the relevant impediment referred to in paragraph (a), (b), (c), (d), (e), (f), (g) or (h) has ceased to exist, the period of prescription shall not be completed before a year has elapsed after the day referred to in paragraph (i)."
>
> This inept section is by no means

clear and presents obvious problems of interpretation.

.... / 11

In the present case the debt with which we are concerned became due and payable on 3 February 1987 when respondent became aware of the principal debtor's default (section 12(3) of the Act). In the ordinary course, therefore, the debt would have become prescribed on 3 February 1990 (section 11(d)). The principal debtor,however, was placed in liquidation on 30 April 1987 and on 19 October 1987 respondent filed a claim against the principal debtor in liquidation. In terms of para (g) read with para (i) this act of filing a claim constituted an "impediment" and consequently had the effect of extending the period of prescription to the end of a year after it had ceased to exist.

.... / 12

It is by no means clear what the legislature sought to convey by the word "impediment". The Shorter Oxford Dictionary defines "impediment" as "the fact of impeding or condition of being impeded; something that impedes; a hindrance; an obstruction".

Our common law recognized what Van der Keessel (Praelectiones 3.46.4) called an "im-pedimentum juris" whereby the running of prescription was suspended or delayed against minors, insane persons, persons under curatorship, persons absent from the country, or persons unable for some reason or other to enforce their rights until the impediment had come to an end (cf

..../ 13

Van Staden v Venter 1992 (1) SA (A) at 559 C-H. As is pointed out (at H) even in the common law this principle was not applied consistently and various other circumstances were imported as "impedimenta".

If one has regard to the impediments listed in section 13 it seems clear that the impediment does not necessarily come about as a result of an absolute bar to a creditor instituting action against his debtor. A minor or a person under curatorship can sue through his guardian or curator; actions ex contractu and ex delicto between spouses stante matrimonio are not excluded in law (Rohloff v Ocean Accident and Guarantee

..../ 14

Corporation Ltd 1960 (2) SA 291 (A) at 310 F;

the actio pro socio is in certain circumstances available to partners during the existence of the partnership, and a juristic person is not precluded from suing a member of its governing body. In most of these instances, however, it would be undesirable to do so for obvious reasons. In Murray and Roberts Construction (Cape) (Pty) Ltd v Upington Municipality 1984 (1) SA 571 (A) at 579 B Grosskopf AJA put it on the basis that

> "It is accepted in the Act that there are circumstances in which it would be unfair to require of the creditor that he institute proceedings within the time normally allowed. This unfairness arises in the main where it is impossible or difficult for a creditor to enforce his rights within the time limit."

.... / 15

Be that as it may, this much seems clear: that each of the circumstances referred to in section 13(1)(a) - (h) will give rise to an impediment - i e to some legal or practical problem which makes it difficult or undesirable for a creditor to institute proceedings for the enforcement of his claim against the debtor -which impediment will delay the running of prescription, and that prescription will only commence running again after the impediment has ceased to exist. With more particular reference to para (g), with which we are primarily concerned, there is no legal bar to a creditor suing a company in liquidation -

.... / 16

see section 359(2)(a) of the Companies Act 61 of

1973 which provides that:

> "Every person who, having instituted legal proceedings against a company which were suspended by a winding up, intends to continue the same,and every person who intends to institute legal proceedings for the purpose of enforcing any claim against the company which arose before the commencement of the winding up, shall within four weeks after the appointment of the liquidator give the liquidator not less than three weeks' notice in writing before continuing or commencing the proceedings." (My italics.)

In general, however, the occasion

for such proceedings would be rare, e g where

the creditor seeks to have an unliquidated claim

quantified by the court. As a general rule

there can be no advantage to a creditor in suing

.... / 17

a company in liquidation. The effect of a winding up order is to create a concursus cre-ditorum and it is only through the machinery of the Companies Act that his claim can be satisfied in full or in part (cf Consolidated Textile Mills Ltd v Weiniger 1961 (3) SA 335 (0) at 340 H and, in the case of sequestration, Central Africa Building Society v Pierce N O 1969 (1) SA 445 (RAD) at 447 H - 448 A).

In addition to these considerations part of the underlying ratio to section 13 may well be that

> "in the circumstances mentioned, the creditor is already taking appropriate steps to recover his debt and should

.... / 18

not be required to institute legal proceedings merely to interrupt the running of prescription." (Per Grosskopf AJA in Murray and Roberts' case (supra) at 579 G-H.)

The critical question, however, is when does the impediment cease to exist? The answer to the question posed in respect of the circumstances referred to in para (a) -(f) and (h) seems fairly obvious. It is not so obvious in respect of para (g).

In terms of the section the impediment arises once "the debt is the object of a claim filed ... against a company in liquidation". In his judgment in the court a quo

Flemming DJP held (at 250 E) that :

..../ 19

> "Unless it is set aside by competent authority, 'filing' is an accomplished fact; on a retrospective view it is as immutable as other history that the claim did become the object of a filed claim"

and that the impediment would cease only if the claim was withdrawn, deleted, or rejected by the liquidator, "or as a result of a court order", or if the company was no longer in liquidation (p 251 H-J). Neither the confirmation of the final liquidation and distribution account nor the payment of any dividends in terms of such account would bring an end to the impediment since one could never tell whether some further assets might not turn up so as to give rise to yet a further liquidation and distribution account .

..../ 20

Assuming that the liquidation of a company proceeds in the ordinary fashion this line of reasoning would entail that the impediment to prescription created by the filing of a claim and its acceptance by the liquidator, will never cease, and the running of prescription will be suspended in diem aeternitatis. This, to my mind, would be a startling result, which the legislature could hardly have contemplated.

When a claim is filed it must be considered by the liquidator. If the liquidator accepts the claim he will bring it up in his account. Such an account must eventually lie for inspection and any interested party

..../21

may object. If such objection is sustained by the Master, he will direct the liquidator to amend the account (see sections 406 and 407 of the Companies Act). Up to this stage there can be no certainty as to how much, if anything, a creditor will receive. When, however, the Master has confirmed the final liquidation and distribution account there is a measure of finality. Section 408 of the Companies Act provides that such confirmation "shall have the effect of a final judgment". As was pointed out in the Kilroe-Daley case (supra) at p 627 E-F this does not mean that the account will have the quality of a judgment of a court

..../ 22

of law. It does, however, mean that

> " ... once the Master has confirmed an account, after objections if any have been dealt with, his confirmation of that account is final and it cannot be re-opened save where a Court authorises the re-opening."

In the ordinary course of events it is highly unlikely that the creditor will receive any more from the company in liquidation than has been accorded him in the final account, and the finality attendant on such a determination would, in my view, remove any impediment to the further running of prescription. The creditor would then be able to compel payment of the dividend by the liquidator and to pro-

.../ 23

ceed against any sureties for the balance of his claim without let or hindrance, whether for reasons of fairness or otherwise. The debt is no longer "the object of a claim filed against a company in liquidation", but has crystallized into a dividend due and payable by the liquidator to the creditor.

It follows that in terms of section 13(1) of the Act extinctive prescription had run its course on the effluxion of one year from the date of the confirmation of the final account, i e on 16 March 1990, and that the debt was already prescribed when the summons was served on 14 June 1990.

.../24

The appeal succeeds with costs and the order of the court a quo is altered to read:

"Plaintiff's claim is dismissed with costs."

J.P.G EKSTEEN, JA

HOEXTER, JA)
NESTADT, JA) concur
NICHOLAS, AJA)
HARMS, AJA)