THE SUPREME COURT OF APPEAL
OF SOUTH AFRICA

Reportable
Case no: 455/05

In the matter between:

NEDCOR BANK LIMITED **APPELLANT**

and

R A RUNDLE **RESPONDENT**

Coram: **HARMS, PONNAN, JJA, COMBRINCK, MALAN *et* CACHALIA AJJA**

Date of hearing: **31 AUGUST 2006**

Date of delivery: **26 SEPTEMBER 2006**

Summary: Prescription – interruption of running of extinctive prescription – when does impediment in section 13(1)(g) cease to exist.

Neutral citation: This judgment may be referred to as Nedcor Bank v Rundle [2006] SCA 112 RSA

JUDGMENT

COMBRINCK AJA/…

COMBRINCK AJA:

[1] A money debt normally prescribes three years after it becomes due (section 10 read with section 11(d) of the Prescription Act 68 of 1969). The running of prescription is however interrupted if one of the events described in section 13(1) occurs. Prescription in this matter was interrupted by the happening of the event described in section 13(1)(g) namely the filing of a claim against a company in liquidation. The issue in the appeal is on what date did prescription recommence, in other words when did the impediment created by the sub-section cease to exist?

[2] The appellant ('the Bank') sued the defendant (the present respondent) as surety and co-principal debtor for payment of three claims totalling R204 214,70 alleged to be owing by the principal debtor, Scientific Medical Systems (Pty) Ltd ('SMS'). The defendant filed a special plea of prescription alleging:

(i) that SMS was finally liquidated on 12 December 1997;

(ii) by virtue of the agreements between the Bank and SMS the amounts claimed became due on that date and prescription commenced running;

(iii) in terms of section 13(1)(g) prescription was interrupted by the Bank lodging claims in the liquidated estate of SMS and the impediment contemplated in the sub-section commenced;

(iv) the debts sought to be recovered ceased to be an object of a claim in SMS's insolvent estate from 8 August 2000;

(v) the debts became prescribed at the latest on 7 August 2001 before issue of summons.

[3] The defendant then pleaded over on the merits, in essence placing the recoverability of the debts in issue. The Bank replicated by:

(i) admitting that the debts became due on 12 December 1997;

(ii) alleging that the impediment referred to in section 13 arose on the date it filed its claims against SMS (in liquidation) *viz* 1 June 1998 and 22 July 1998, and ceased to exist on the date of confirmation by the Master of the final Liquidation and Distribution account in the estate of SMS *viz* 19 November 2002; and

(iii) stating that summons was served on the defendant on 23 October 2001 being a date prior to the period of prescription being completed in terms of section 13 of the Act.

[4] The trial proceeded before Schreuder AJ in the Orange Free State Provincial Division. The Bank called one witness and then closed its case. The defendant, on the basis that the claim had prescribed, applied for absolution from the instance with costs, which was granted. The Bank with leave of this court appeals against the order.

[5] The following facts were recorded by the trial court as being common cause:

(i) the Bank's claims were valid and enforceable against SMS;

(ii) the final order of liquidation of SMS was granted on 12 December 1997;

(iii) the Bank lodged its claims in SMS's estate on 1 June 1998;

(iv) the first Liquidation and Distribution account was confirmed by the Master on 8 August 2000;

(v) the liquidator paid out dividends totalling R76 251.91 to the Bank on 18 August 2000;

(vi) the Bank's summons was served on the defendant on 23 October 2001;

(vii) the Master confirmed the second and final Liquidation and Distribution account on 19 November 2002.

[6] The matter in the end turned on a very narrow issue, namely on what date did the impediment cease to exist. Was it on the date of confirmation of the first Liquidation and Distribution account, 8 August 2000 as contended for by the defendant, or was it on the date of confirmation by the Master of the final account as submitted by the Bank?

[7] The judge *a quo* held that the important question to be answered was whether, after confirmation of the first account, there was any realistic prospect of the appellant receiving any further dividend out of the estate of SMS.

[8] After referring to the decisions in *Leipsig v Bankorp Ltd* 1994 (2) SA 128 (A), *Nedcor Bank Ltd v Sutherland* 1998 (4) SA 32 (N), *Kilroe-Daley v Barclays National Bank Ltd* 1984 (4) SA 609 (A), *Jans v Nedcor Bank Ltd* 2003 (6) SA 646 (SCA) and in

particular *Absa Bank Beperk v De Villiers* 2001 (1) SA 481 (SCA), the learned judge expressed the view that according to these cases it was not only the confirmation of the final Liquidation and Distribution account that would cause the impediment to cease. It is clear from these decisions, so he said, that this event was but one of the events which could result in the requisite measure of finality, and that once there was no further realistic prospect of a dividend the impediment ceased to exist. On the figures contained in the first Liquidation and Distribution account it was apparent, so the judgment went, that it was highly improbable that any further dividend would be payable to the Bank. Indeed, the sole witness called by the Bank, conceded as much. Accordingly, the Bank had failed to prove that as of the date of confirmation of the first Liquidation and Distribution account the debts owed formed the object of a claim in the insolvent estate. It followed that the impediment ceased to exist on 8 August 2001. The principal debt consequently became prescribed a year later – before the issue of summons.

[9] In my view the fundamental flaw in this reasoning is that it purports to read words into the section which are not there. Section 13(1) reads:

'If –

(a) - (f) . . .

(g) the debt is the object of a claim filed against the estate of a 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 28 of 1966);

(h) . . .

(i) the relevant period of prescription would, but for the provisions of this subsection, be completed before or on, or within one year after, the day on which the relevant impediment referred to in para *(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 para *(i)*.'

[10] The question is simple. On a proper interpretation of the section, when does a debt cease to be 'the object of a claim filed against the estate of a debtor'? In *Jans v Nedcor Bank Ltd supra* at 650D Scott JA said:

'It was accepted by this Court in *Kilroe-Daley v Barclays National Bank Ltd* 1984 (4) SA 609 (A) at 621I that the impediment contemplated in s 13(1)(*g*) commences when the creditor's claim is filed. It ceases to exist once the Master confirms the final liquidation and distribution account (*Leipsig v Bankorp Ltd* 1994 (2) SA 128 (A) at 135I).'

In none of the decisions referred to by the judge *a quo* do I find support for the proposition that other events may be considered if they bring about a measure of finality. Neither can words to this effect be read into the section. (Cf *Bank of Lisbon International Ltd v Neves* 1992 (3) SA 349 (W).) Indeed, it would lead to a measure of subjectivity and legal uncertainty if the reason for the cessation of the impediment was to be the lack of a prospect of a further dividend. Counsel for the defendant could not explain how this measure would operate in practice.

[11] The judge *a quo* relied on the judgment in *Absa Bank Beperk v De Villiers* (*supra*) as support for his conclusion. He referred in particular to the following passage (at 487G):

'Boonop het appellant nie bewys dat daar te enige stadium realistiese vooruitsigte was dat 'n gewysigde of heropende likwidasierekening enige dividend ten opsigte van die hoofskuld sou meebring nie.'

If one analyses the facts of that case, however, it becomes clear that the court did not depart from the principle laid down earlier that it is only on confirmation of the final account that the impediment ceases to exist. The facts were these. The principal debtor's estate was finally sequestrated on 4 June 1992. The Master confirmed what was referred to as the 'first final Liquidation and Distribution account' on 13 September 1993. An amended 'second and final Liquidation and Distribution account' was confirmed by the Master on 4 February 1997. The court (at 487F) emphasized that the first account was intended to be a final account and not an interim account. Three years later, for reasons not disclosed in the judgment, the liquidator filed a further amended final account. The court held that this later account could not have postponed the ceasing of the impediment nor could it revive the debt. The passage quoted above was merely a further consideration advanced to support the main finding and in no way purported to constitute a new method of determining when the impediment ceases.

[12] In the instant case the court was dealing with an interim account even though the appellation 'First and Final account' appears on the account. This much is clear from letters written by the liquidator at the time wherein it stated that a further second account is being drawn. Confirmation of the first account on the authorities quoted could not bring an end to the impediment.

[13] Much of the confusion arises from the indiscriminate use of the words 'first and final' to describe an account. It is a contradiction in terms as the use of the word 'first' presupposes a further account – the first is therefore not final. It would bring clarity to

liquidation if an interim account was referred to as ‘a section 403 account’ and a final account as a ‘section 408 account’.

[14] In the event

(a) the appeal succeeds with costs;

(b) the order of the court *a quo* is set aside and is substituted with the following:

‘The special plea of prescription is dismissed with costs.’

(c) the matter is referred back to proceed on the merits.

P C COMBRINCK
ACTING JUDGE OF APPEAL

CONCUR:

HARMS JA
PONNAN JA
MALAN AJA
CACHALIA AJA