THE SUPREME COURT OF APPEAL
REPUBLIC OF SOUTH AFRICA

JUDGMENT

Case no: 266/08

INGWANE NELSON HOLENI Appellant

and

THE LAND AND AGRICULTURAL DEVELOPMENT BANK OF SOUTH AFRICA Respondent

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Neutral citation: *Holeni v The Land and Agricultural Development Bank of South Africa* (266/08) [2009] ZASCA 9 (17 March 2009)

CORAM: Streicher, Navsa, Cloete, Jafta JJA and Bosielo AJA

HEARD: **20 February 2009**

DELIVERED: **17 March 2009**

CORRECTED:

SUMMARY: Section 11(b) of the Prescription Act 68 of 1969 ─ 'the State' does not encompass the Land and Agricultural Development Bank of South Africa ─ therefore a three-year period rather than a 15-year period of prescription applies.

ORDER

On appeal from: High Court, Pretoria (Motata J sitting as court of first instance).

1. The appeal is upheld with costs.
2. The order of the court below is set aside and is replaced by the following:

'1. The defendant's special pleas to the plaintiff's first and second claims are upheld and both claims are dismissed.

2. The plaintiff is ordered to pay the defendant's costs.'

JUDGMENT

NAVSA JA (Streicher, Cloete, Jafta JJA and Bosielo AJA concurring):

[1] This case concerns the application of s 11 of the Prescription Act 68 of 1969 (the Act). We are called upon to decide whether the debts owed by the appellant to the respondent, the Land and Agricultural Development Bank of South Africa ('the bank'[1]), are extinguished after the lapse of a period of three years *or* after 15 years have passed. If the former, the appeal should succeed.

[2] On 19 May 2004 the bank instituted action in the Pretoria High Court against the appellant, Mr Ingwane Holeni, claiming two amounts from him. In addition to contesting the merits of the claim Mr Holeni raised special pleas of prescription. It was agreed between the parties that the special pleas should be adjudicated first and the court below (Motata J), in terms of Uniform rule 33(4), made an order in this regard.

[3] The court below dismissed the special pleas with costs. The present appeal, with the leave of that court, is against this order.

[1] This appellation will be used throughout to refer to the bank in its various legislative incarnations over a period of nearly a century.

[4] Since the special pleas did not take issue with the bank's material averments relating to prescription they were determined on the basis of the facts alleged by the bank. The relevant facts appear in the following two paragraphs.

[5] In respect of claim 1: During May 1999 the parties concluded a loan agreement, in terms of which the bank lent and advanced R300 000 to Mr Holeni for the purchase of cattle. The amount was repayable in monthly instalments over a period of eight years, with each instalment of R8 500 being due on the 15th day of each month. The first instalment was due on 15 May 1999. The monies were advanced to Mr Holeni, who, according to the bank, has to date paid it only an amount of R734.18. It was the bank's case that the full amount became due and payable as a result of Mr Holeni's breach of the agreement.[2] The bank claimed a total of R707 664.33 which included capital and interest.[3]

[6] In respect of claim 2: During May 1998 the bank granted Mr Holeni a 'seasonal loan' for the production of crops. The total of R35 000 drawn by him was to be repaid by 15 June 1999. Mr Holeni defaulted in repaying the debt. According to the bank he has to date paid only an amount of R1 039.20. Despite being called upon to do so Mr Holeni failed to remedy the breach, once again rendering due and payable the outstanding balance and interest. The bank claimed a total of R77 877.63 which includes capital and interest. As with the first claim, we need not concern ourselves with the amount being claimed.

The Issue

[7] The summons containing both claims was served on 20 July 2004, more than three years after the respective dates on which each debt became due. In his special pleas, Mr Holeni relies on the three-year period of prescription provided for by s 11(d) of the Act to resist the bank's two claims.

[2] See para 43.
[3] For present purposes we do not need to consider the *in duplum* rule.

[8] The relevant parts of s 11 read as follows:

'The periods of prescription of debts shall be the following:

(a) thirty years in respect of–

(i) any debt secured by mortgage bond;

(ii) any judgment debt;

(iii) any debt in respect of any taxation imposed or levied by or under any law;

(iv) any debt owed to the State in respect of any share of the profits, royalties or any similar consideration payable in respect of the right to mine minerals or other substances;

(b) fifteen years in respect of any debt owed to *the State* and arising out of an advance or loan of money or a sale or lease of land by *the State* to the debtor, unless a longer period applies in respect of the debt in question in terms of paragraph *(a)*;

. . .

(d) save where an Act of Parliament provides otherwise, three years in respect of any other debt.' (My emphasis).

[9] The bank contends that it is directly controlled by the State, exercises a public power or performs a public function in terms of legislation and can thus rightly be described as 'an organ of State' as defined in s 239 of the Constitution. It was submitted that this meant that the bank could rely on the benefit of the extended 15-year period of prescription provided for in s 11(b) of the Act. It was on this basis that the court below held in favour of the bank.

[10] The question in this case is whether the court below was correct in that conclusion. Put differently, can the Land Bank be considered to be 'the State' as referred to in s 11(b) of the Prescription Act 68 of 1969 and can it consequently claim the benefit of the 15-year period of prescription? The answer obviously depends upon the interpretation of the expression 'the State' in that section of the Act.

The State

[11] The state as a concept does not have a universal meaning. Its precise meaning always depends on the context within which it is used. Courts have consistently refused to accord it any inherent characteristics and have relied, in any particular case, on practical considerations to determine its scope. In a plethora of legislation no consistency in meaning has been maintained.[4]

[12] Baxter provides an example. He points out that for some purposes such as state liability, where the old doctrine of crown immunity has had to be neutralised and compensation is to be paid from the State Revenue Fund, 'the State' covers the organs and activities of central government alone while, for purposes such as treason and sedition, it has been held to include all organs of public administration.[5]

[13] The Constitution has no definition of 'state'. In Chapter 4 the composition of Parliament as the national legislative authority is spelt out. In Chapter 5 the powers of the President and national executive authority are described. Chapter 6 deals with Provinces and their legislative and executive authorities. Chapter 7 sets out the status and objects of municipalities which constitute local government. Chapter 8 provides for courts and the administration of justice and in Chapter 9, provision is made for state institutions supporting constitutional democracy.

[14] Section 239 of the Constitution, on which the respondent relies, defines 'organ of state' as follows:

'(a) any department of state or administration in the national provincial or local sphere of government; or

(b) any other functionary or institution -

(i) exercising a power or function in terms of the Constitution or a provincial constitution; or

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[4] Baxter *Administrative Law* (1984) pp 94-96. *Greater Johannesburg TMC v Eskom* 2000 (1) SA 866 (SCA) at para 16. M M Loubser *Extinctive Prescription* (1996) p 42.

[5] *Administrative Law* p 96.

(ii) exercising a public power or performing a public function in terms of any legislation, but does not include a court or a judicial officer.'

[15] The respondent relies, in particular, on s 239(b)(ii) for the contention that the bank is a constituent part of the state and therefore entitled to rely on s 11(b) of the Act.

[16] The definition of 'organ of state' in the Constitution might be important in respect of constitutional and administrative law matters and for other related purposes. The crucial question in the present case is what the legislature intended by the use of that expression in s 11(b) of the Act? This being so, it is in my view unhelpful to look to other enactments.

[17] It should also be borne in mind that, when the Act was promulgated, the definition of 'organ of state' in s 239 of the Constitution was more than two decades into the future. It can hardly be contended that the legislature, at that time, had in mind a broader meaning of 'the State' to coincide with what is presently contained in that definition. In any event, the Constitution itself differentiates between the state and organs of state. The Constitution can therefore not be used as authority for the proposition that 'the State' in the Act should be interpreted so as to include organ of state.

[18] I agree with the submission on behalf of Mr Holeni that, since s 11(b) of the Act provides for a 15-year prescription period ─ an exception to the general prescription period of three years ─ the meaning attributed to 'the State' should be restricted.[6]

[19] The benefit for the state provided by s 11(1(b) came about because it was thought that the treasury should be protected.[7] To my mind, contextually, the

[6] See L C Steyn *Die Uitleg van Wette* 5ed (1981) pp 80-82.
[7] J C de Wet *Opuscula Miscellanea* (1979) p 111. Section 13(2) of the Prescription Act 18 of 1943 which first provided for the 15-year benefit for the state was introduced by s 30(1) of the Finance Act 46 of 1945.

plain meaning of 'the State' as it appears in s 11(b) of the Act is that of a juristic person, capable of suing in its own name for what is due to the treasury.[8] It is being referred to in its incarnation as government, going about government business and recovering monies due to treasury.[9] Further support for this conclusion appears in the next three paragraphs.

[20] The state is referred to in two other places in the Act. In s 19, the following appears:

'This Act shall bind the State.'

This provision was necessary because of the rule, at the time, that the state is not bound by its own laws.[10] The reference here must be to the state as a governing entity with legal personality.

[21] In s 11(a)(iv) of the Act, referred to above, the state has the benefit of a 30-year period of prescription in respect of any share of profits, royalties or any similar consideration payable in respect of the right to mine minerals or other substances. There can be no doubt that the reference to the state in that context must mean the state in its role as government acting for the benefit of the treasury.

[22] Thus, in terms of the rule of interpretation that the same words must be similarly interpreted in different parts of an act, the reference to 'the State' in s 11 must also be to the state as government and as a juristic person in its own right,[11] unless there are indications to the contrary. I turn to consider that question.

Is the bank 'the State' for purposes of s 11(b) of the Act?

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[8] In the sense described in *Die Regering van die Republiek van Suid-Afrika v SANTAM Versekeringsmaatskappy Bpk* 1964 (1) SA 546 (W). Executive power was seen as the embodiment of the State for that purpose.

[9] See Loubser *Extinctive Prescription* p 42.

[10] *Boardman v Minister van Finansies* 1984 (1) SA 259 (T) at 267C-E.

[11] *Sinovich v Hercules Municipal Council* 1946 AD 783 at 804.

[23] Counsel for the bank referred to s 25(5) of the Constitution which provides that the state should take all reasonable legislative and other measures, within its available resources, to foster conditions which enable citizens to gain access to land on an equitable basis and contended that the Land and Agricultural Development Bank Act 15 of 2002 (LADA), to which the bank owes its existence, was a legislative measure to that end. It was pointed out that the bank was using taxpayers' money in furtherance of state objectives. Counsel submitted that the bank, which was subject to government control, was therefore operating as part of the State and as such was entitled to the preferential treatment provided for in s 11(b) of the Act.

[24] Furthermore, counsel for the bank contended that in interpreting s 11(b) of the Act we were obliged, in terms of s 39(2) of the Constitution, to promote the spirit, purport and objects of the Bill of Rights. This meant that we should interpret it in a manner that ensures that the bank's funds are protected to enable it to meet its constitutional objectives. It was submitted that this was best achieved by interpreting 'the State' in s 11(b) in such a manner as to encompass the bank.

[25] LADA came into operation on 10 June 2002. It repealed the Land Bank Act 13 of 1944 (the LBA).[12] Section 2(1) provides:

'The Bank established under section 3 of the Land Bank Act, 1912 (Act 18 of 1912), and which continued to exist in terms of section 3 of the Land Bank Act, 1944 (Act 13 of 1944), continues to exist under the name of the Land and Agricultural Development Bank of South Africa despite the repeal of those Acts.'

[26] Significantly, s 2(2) of LADA provides as follows:

'The Bank is a legal person and is, in its corporate capacity, capable of suing and being sued and is, subject to the provisions of this Act, capable of purchasing or otherwise acquiring, holding or alienating property, movable or immovable, and of performing such acts as legal persons may generally by law perform.'

[12] The LBA was the operative act when the advances were made to the respondent.

[27] The objects of the bank are set out in s 3 and include what might broadly be described as the promotion, facilitation and support of agriculture and land reform. The bank is required to address the legacy of racial and gender inequality in the agricultural sector.[13]

[28] Section 4 of LADA provides for the bank to be controlled by a board appointed by the Minister responsible for Agriculture.[14] However, it is the board that directs and controls the operations and business of the bank, implements policies laid down in the Act and develops strategies for the efficient management of the bank.[15] It must develop a code of good practice. Section 5(2) of LADA provides:

'In carrying out its functions, the Board must exercise utmost care and act in the best interests of and for the benefit of the Bank.'

Board members are individually and collectively accountable to the Minister.[16]

[29] The funds of the bank consist of its capital, monies derived from its operating activities, interest on investments, amounts appropriated by Parliament, loans obtained by it, deposits and donations or grants.[17] The bank is entitled to raise additional funds by way of borrowing, from such persons and on such terms as may be determined by the board, subject to a borrowing policy approved by the Minister and the Minister of Finance.[18]

[30] The business of the bank is to provide agricultural and rural financial services in furtherance of the objects of the bank.[19] The Board of the bank must ensure that its annual budgets, corporate plans, annual reports and audited financial statements are prepared and submitted in accordance with the provisions of the Public Finance Management Act 1 of 1999 (the PFMA).[20]

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[13] Section 3(e).
[14] Hereinafter referred to as the Minister.
[15] Section 5.
[16] Section 6.
[17] Section 22.
[18] Section 24.
[19] Section 26(1).
[20] Section 35(3).

[31] Section 36 entitles the bank to establish subsidiaries, if necessary, for its effective operation and the carrying out of its objectives. The majority of directors of the subsidiary must be members of the board, although it need not consist exclusively of such members. Section 37 entitles the bank, with board approval and subject to the PFMA, to enter into a joint venture with any person for purposes of furthering the objects of the bank.

[32] Importantly, s 38(2) provides that the bank may at the request of the Minister or another government department or organ of state act as an advisor to them in respect of matters within or associated with the bank's objectives on such terms as may be determined by the Minister. Furthermore, s 45 of the Act provides that a judicial management order in terms of the Companies Act 61 of 1973 may be granted in respect of the bank by a competent court on application by the Minister or the board.

[33] As can be seen from the provisions of s 2(1) of LADA as set out in para 25 above the bank was established as far back as 1912. Then already it was established as a distinct body corporate, capable of suing and being sued, and of doing or performing such acts and things as a body corporate may by law do and perform.[21] It is true that in relation to all three statutes that regulated the bank during its existence there was government involvement and control in relation to the appointment of board members. Funds were provided by Parliament for it to meet its objectives.

[34] It is clear that it is the board of the bank that directs and controls the operations and business of the bank. It must, of course, do so within the parameters of its empowering statute. As set out in para 27, the bank may raise its own funds within a borrowing policy approved by the Minister. Its funds need

[21] Section 3(1) of Act 18 of 1912.

not exclusively be those appropriated by Parliament and it can even receive donations and grants.

[35] It is also true, as set out above, that the bank is accountable to government and has to comply with the PMFA. However, the bank operates and conducts business as a distinct corporate entity and interacts with different persons *and* the state.[22] Section 46 of the LBA, the predecessor of the Act,[23] drew a distinction between the bank acting in its own capacity and acting on behalf of government. Section 46 of the LBA was the only section in which the bank was authorised to make advances *on behalf* of government for particular purposes out of monies appropriated by Parliament. That authority did not extend to the type of advances made to Mr Holeni. It follows that where the bank was acting outside the provisions of s 46, it was acting in its own name and stead as a distinct and separate legal entity.

[36] It would be a startling proposition for the state, in appropriate circumstances, to be liable to be placed under judicial management under the Companies Act as is provided in LADA in respect of the bank. It is as ludicrous to suggest that the state is able to establish subsidiaries in the same way as the bank may do.

[37] The bank has been in existence for almost a century. Having regard to what is set out above it comes as no surprise that we were not referred to a single instance or authority in which during that time the bank was equated with the state.

[38] To sum up: LADA makes it clear that the bank is a separate juristic person acting in its own name and right, distinct from, although not entirely independent of government.

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[22] In terms of s 38(2) of LADA the bank may act as an advisor to government and organs of state in respect of matters within or associated with the bank's objectives on such terms as may be determined by the Minister from time to time.

[23] The LBA was the prevailing statute at the time that the advances were made.

[39] I am unable to understand how the spirit, purport and objects of the Bill of Rights are served by interpreting s 11(b) of the Act to provide the benefit of the 15-year prescription period. In my view, the objects of the bank are best met by an alert management that recovers monies due to it diligently and promptly so as to optimise the use of its funds to meet the urgent demands of land reform and modernisation of South African agriculture. The facts of this case speak volumes of the bank's laxity in recovering funds due to it.

[40] Furthermore, the modern trend in comparable jurisdictions is towards streamlining prescription periods and not making special provision for public authorities.[24]

[41] In addition, persons interacting with the bank commercially would, in the face of a 15-year prescription period being imposed upon them, encounter difficulties in providing in their books of account for possible future recoveries by the bank and might be reluctant to do business with it.

[42] In any event, the legislature was astute to ensure in the provisions referred to above, and in other sections of LADA, that the bank's funds be carefully controlled and monitored. Several safeguards have been built into the Act. Accountability and transparency appear to be the watchwords. It appears to me that the spirit, purport and objects of the Bill of Rights are best served by permitting the bank to conduct its affairs within the confines of its empowering statute and to restrict the meaning of state in s 11(b) of the Act as referred to above.

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[24] In a memorandum in 1955 to the Law Review Commission, Professor J C de Wet expressed reservations about disparate periods of prescription but reasoned that since the treasury was being protected it would be a lost cause to attempt to persuade the legislature otherwise ─ see J C de Wet *Opuscula Miscellanea* p 77 *et seq*. In its Issue Paper in August 2003 dealing with prescription periods the South African Law Reform Commission considered investigations by law reform bodies in the UK, Australia and Vancouver pp 2-3 of Issue Paper 23 (Project 125) ─ the popular recommendation was that special provision not be made for public authorities.

[43] For all the reasons set out above the appeal should succeed. It was submitted on behalf of the bank that, since there was no acceleration clause in the agreement in terms of which the advance in relation to claim 1 was made, those instalments that fell outside of the three-year prescription period could still be recovered by it and that we should refer that part of claim 1 to the court below for further consideration. I am afraid that this submission cannot succeed. It was the bank's case that the entire amount was due and payable because Mr Holeni had breached the agreement.[25] It is on that basis that the special plea was decided and it is on that basis that the appeal is to be decided.

[44] A special plea of prescription is often referred to as a peremptory exception in the sense that, if established, it renders the claim permanently unenforceable.[26] In the event of the special plea being upheld, the bank's claims fall to be dismissed. There is no indication in the record that the parties intended otherwise; the contrary is the case.

[45] The following order is made:

1. The appeal is upheld with costs.
2. The order of the court below is set aside and is replaced by the following:

'1. The defendant's special pleas to the plaintiff's first and second claims are upheld and both claims are dismissed.

2. The plaintiff is ordered to pay the defendant's costs.'

M S NAVSA
JUDGE OF APPEAL

[25] In para 4.2 of the bank's particulars of claim the following appears:
'The annual payment is repayable in monthly instalments on the 15th day of every month (the due date) in 96 instalments over a period of 8 years. The first instalment is payable on 15th May 1999 amounting to R8 500.00 per month.'
Mr Holeni requested further particulars as follows:
'What entitled plaintiff to claim the full outstanding amount notwithstanding the fact that the date of payment of several instalments had not arrived when summons was issued?'
The bank's response to that request was as follows:
'Because Defendant breached the terms of the agreement.'

[26] See Van Winsen, Cilliers, Loots *Herbstein & Van Winsen* edited by *Dendy The Civil Practice of the Supreme Court of South Africa* 4 ed (1997) p 477 and the authorities cited there.

APPEARANCES:

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