THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Reportable

Case no: 410/2019

In the matter between:

INVESTEC BANK LIMITED	**Appellant**
and	
ERF 436 ELANDSPOORT (PTY) LTD	**First Respondent**
CECILIA JOUBERT NO	**Second Respondent**
ERF 1081 ARCADIA (PTY) LTD	**Third Respondent**
REMAINING EXTENT 764 BROOKLYN (PTY) LTD	**Fourth Respondent**
ERF 22 HILLCREST (PTY) LTD	**Fifth Respondent**

Neutral citation: *Investec Bank Limited v Erf 436 Elandspoort (Pty) Ltd and Others* (410/2019) [2020] ZASCA 104 (16 September 2020)

Coram: Petse DP, Saldulker, Dambuza and Plasket JJA and Poyo-Dlwati AJA

Heard: 31 August 2020

Delivered: This judgment was handed down electronically by circulation to the parties' legal representatives by email, publication on the Supreme Court of Appeal website and release to SAFLII. The date and time for hand-down is deemed to be 09h45 on 16 September 2020.

Summary: Prescription Act 68 of 1969 – s 14 of the Act – whether series of payments in terms of agreement between creditor and debtor were acknowledgements of liability that interrupted prescription.

ORDER

On appeal from: Gauteng Division of the High Court, Pretoria (Fabricius J sitting as court of first instance):

1. The appeal succeeds with costs, including the costs of two counsel where employed.

2. The order of the court below is set aside and replaced with the following:

'1. It is declared that the debt owed by the defendants to the plaintiff, as formulated in the particulars of claim, had not prescribed when summons was served on 21 January 2011.

2. The costs of the hearing of 18 to 21 February 2019 are to be paid by the first, second, third, fifth and sixth defendants jointly and severally. Those costs shall include the costs of two counsel.

3. The action is postponed sine die in respect of the remainder of the issues in dispute.'

JUDGMENT

Plasket JA (Petse DP, Saldulker and Dambuza JJA and Poyo-Dlwati AJA concurring)

[1] The issue for decision in this appeal is whether a debtor acknowledged its liability to a creditor and, in this way, interrupted the running of prescription. In a trial on this separated issue, Fabricius J, in the Gauteng Division of the High Court, Pretoria, held that a claim by the appellant, Investec Bank Limited (Investec), against the first respondent, Erf 436 Elandspoort (Pty) Ltd (Erf 436) as principal debtor, and the remaining respondents as sureties, had prescribed. Flowing from this finding, he dismissed Investec's claim with costs, but granted it leave to appeal to this court.

[2] At the commencement of the appeal, Investec moved an application for condonation for the late filing of the record and for the re-instatement of the appeal which had lapsed. The application was not opposed. Condonation was duly granted and the appeal was re-instated. We then proceeded to hear the appeal.

Background

[3] In February 2000, Investec advanced a loan to Erf 436. It was secured by a notarial mortgage bond, the subject of which was a notarial lease for a period of 50 years in respect of a commercial property in Pretoria concluded by Erf 436 as lessee and the South African Rail Commuter Corporation (the SARCC) as lessor. The loan agreement contained a tripartite agreement between Investec, Erf 436 and the SARCC in terms of which an option was granted to Investec to replace Erf 436 as lessee in the event of Erf 436 defaulting on its obligations to the SARCC.

[4] Erf 436 defaulted about two and a half years later. The lease was cancelled by an order of court on 21 August 2002. This rendered Investec's security worthless. On 10 September 2002, Investec demanded, as it was entitled to do following Erf 436's default, payment by Erf 436 within seven days of the full outstanding balance of the loan. It is not in dispute that prescription in respect of this debt began to run on 17 September 2002, the date on which payment was due.

[5] Investec then exercised its option and concluded a lease with the SARCC. In terms of an agreement between Investec and Erf 436, the latter continued to manage the property and collect rental from sub-tenants. These amounts were credited to Erf 436's loan account with Investec. This arrangement remained in place until about July 2003. The parties also agreed that they would make efforts to sell Investec's rights in terms of the lease with a view to the purchase price being used to settle Erf 436's loan obligation.

[6] A second agreement between Investec and Erf 436 was concluded in about June 2003. In terms of this agreement, Investec took over the function from Erf 436 of managing the property and collecting rental from sub-tenants. The income collected

by Investec was similarly allocated to the repayment of Erf 436's loan. This arrangement remained in place from 1 July 2003 until 1 July 2009 when Investec sold its rights as lessee to an entity called Johnny Prop (Pty) Ltd (Johnny Prop). After the sale, an amount of R2 999 459.51 was credited to Erf 436's loan account.

[7] After this amount had been credited, Erf 436's liability for the outstanding balance of the loan was, according to Investec, R3 979 184.50. It claimed this amount from Erf 436 and the sureties in a summons served on 21 January 2011.

[8] As the passage of time between the issue of summons and this appeal will attest, the dispute between the parties has raged for a number of years. It has included a foray to this court on the issue of whether the prescription period in respect of the disputed debt was 30 years or three years. For present purposes, however, all that need be said is that the summons was met once again with a special plea of prescription (as well as a plea over that is not relevant to this appeal).

[9] In its replication, Investec pleaded that, on the basis of the payments made to reduce Erf 436's loan and various statements made in letters on behalf of Erf 436, it made a series of acknowledgments of liability. The result was that 'insofar as prescription may have commenced during September 2002, it was interrupted by express or tacit acknowledgments of liability on the part of [Erf 436] on the dates that each of the payments . . . were effected and on the dates when each of the letters . . . was addressed'.

The evidence

[10] The factual background that I have sketched is largely not in dispute. Indeed, Erf 436 and the sureties closed their case on the separated issue without adducing any evidence. The only evidence was tendered by four witnesses called by Investec who testified about the agreements I have referred to, the payments made to reduce Erf 436's indebtedness to Investec and certain correspondence between the two.

[11] The evidence of Mr W M Oosthuizen, a banker employed by Investec at the time, and Mr Carlos Sanchez, an in-house legal advisor employed by Investec, in

particular, establishes the facts that I have set out above. Their evidence confirms that after Investec stepped into Erf 436's shoes as a lessee, Erf 436 continued to collect rental from sub-tenants until mid-2003, but Investec collected the rental itself thereafter. In both instances, however, in terms of the agreements between Investec and Erf 436, these amounts were allocated to the repayment of Erf 436's loan. So, for instance, during the period from the cancellation of Erf 436's lease until 30 September 2003, Erf 436 paid a total of R830 896.91 towards its loan repayment from rental collected from sub-tenants. At the same time, both Investec and Erf 436 made efforts to find a purchaser for Investec's rights in the property. The proceeds of the sale were also to be allocated to the reduction of Erf 436's loan.

[12] The existence of the agreements between Investec and Erf 436 is confirmed by a series of letters written by one of Erf 436's directors, Mr Pierre Joubert. It is evident that Joubert took an active interest in the management of the property. He also attempted to find sub-tenants for the property and a purchaser of Investec's rights. Even when Investec took over the management of the property, Joubert continued to involve himself in the day-to-day running of the property. His reason for doing so was to protect Erf 436's interests in respect of the agreement in terms of which rental would be used to reduce Erf 436's loan, and to ensure a good purchase price when Investec's rights in the property were sold.

[13] So, for example, by letter dated 12 March 2003 addressed to Mr David Hack, he offered to sell 'the leasehold properties' and the duty-free filling station business that he and his fellow director, Mr Louis Vivier, operated on the property. The purchase price for both was, he said, R5.6 million, being 'the outstanding amount of the Investec Bank Bond'. A copy of this letter was sent to Investec.

[14] In a letter to Investec dated 7 May 2003, Joubert reported on the fact that negotiations with Hack had come to naught but that his efforts to sell Investec's rights continued and that the building was 'virtually fully let'. He also said that Erf 436 'continued to manage and operate the premises as a whole and has been honouring and paying the Investec Bank bond every month'. He proposed that Investec allow Erf 436 to continue managing the property on Investec's behalf for the next nine months

and that he would ensure certain outcomes, including that 'the loan repayments to Investec Bank (account 221162) are paid'.

[15] Despite this offer, Investec decided to continue with its plans to take over the management of the property, to manage the sub-leases, pay its creditors and credit what was left to the repayment of Erf 436's loan. It was agreed between Investec and Erf 436 that this would happen. Joubert appears to have been rather reluctant to give up his control over the property and he continued to look for purchasers and sub-tenants and to involve himself generally in the management of the property. He appears to have dragged his heels in respect of the hand-over of management to Investec.

[16] Joubert's reluctance appears clearly from a letter dated 30 May 2003, in which he asked Investec to allow Erf 436 to continue with its management of the property. He said that '[w]e would also in any event like to be assured that the monthly rentals collected will be applied towards the monthly payment of our loan with Investec'.

[17] In a letter to Investec's attorney dated 13 June 2003, Joubert described Investec's decision as 'very unreasonable'. One of the reasons he gave for wishing to continue to manage the property was to ensure that rental collected was, indeed, applied to the repayment of Erf 436's loan. He confirmed that Erf 436 was 'diligently paying our loan commitment to Investec Bank'.

[18] In January 2004, a meeting was held by Oosthuizen and Joubert to discuss the possible sale of Investec's rights to a property developer. This sale did not eventuate, but on 3 February 2004 Joubert wrote a letter to Investec's attorney in which he confirmed a proposal additional to two proposals discussed at the meeting. This proposal involved a sale of Investec's rights back to Erf 436, with transfer being delayed until after Erf 436 had repaid its loan. He said:[1]

'As far as the repayment/discharge of [Erf 436's] bond is concerned (R5 300 000), we must naturally have one or other agreement in place between [Erf 436] (or its nominee) that

[1] My translation.

basically stipulates that all income from the property, whether rental income or expropriation money or [from] a purchase transaction are credited to [Erf 436].'

[19] Joubert had attached to the letter what appear to be notes made in preparation for his meeting with Oosthuizen. Two other possible proposals were contained in the notes. What stands out in respect of all three proposals is that, for Erf 436, they all involved mechanisms for the repayment of its loan, which Joubert admitted was about R5.3 million at that stage.

[20] In a letter dated 2 November 2005, written by Joubert to Investec in respect of the sale of property belonging to another of his entities, Erf 225 Edenburg, (Pty) Ltd, he proposed that some of the proceeds be allocated to the repayment of Erf 436's loan. Oosthuizen testified that Investec gave its approval to the proposal, the transaction proceeded and, on 29 March 2006, an amount of R1 350 000 was credited to Erf 436's loan.

[21] Oosthuizen and Sanchez testified about the eventual sale of Investec's rights to Johnny Prop. Because of various difficulties, the sale was delayed and it was only in 2009 that payments were made to reduce Erf 436's loan. An amount of R430 000 was paid on 30 June 2009 and R2 569 459.61 was paid on 1 July 2009. That left a balance owing on the latter date, according to Sanchez, of R3 523 036.

[22] Oosthuizen's evidence was that Investec and Erf 436 had a difficult relationship at times but they had worked together to find a solution to their common problem of how Erf 436 was going to repay its loan. While Investec could simply have issued summons, taken judgment and executed on it, he explained that Investec decided that it would be in the best interests of both parties to try to manage the situation as they did. During the entire process, Joubert never once denied Erf 436's liability to Investec. On the contrary, he admitted that liability on a number of occasions.

[23] Joubert died during the second half of 2009. Various meetings with his wife, who had been appointed the executrix of his estate, produced no agreement as to how

Erf 436 would pay the outstanding balance. As a result, summons was issued on 21 January 2011.

The Prescription Act 68 of 1969

[24] In terms of s 10(1) of the Prescription Act, 'a debt shall be extinguished by prescription after the lapse of the period which in terms of the relevant law applies in respect of the prescription of such debt'. Section 10(2) provides that when a principal debt is extinguished by prescription, so are any subsidiary debts, such as suretyships. Section 11 lists the periods of prescription – ranging from 30 to three years – for a variety of types of debts. The parties have agreed that the period of prescription in this case is three years, and not 30 years, that issue having been decided by this court in *Investec Bank v Erf 436 Elandspoort (Pty) Ltd and Others*.[2]

[25] Subject to exceptions, s 12(1) provides that prescription begins to run 'as soon as the debt is due'. Section 13 sets out a number of circumstances – such as when a creditor is a minor or a debtor is out of the country – that delay the running of prescription.

[26] Section 14 of the Prescription Act, which is of application in this case, allows for the interruption of prescription. It provides:

'(1) The running of prescription shall be interrupted by an express or tacit acknowledgement of liability by the debtor.

(2) If the running of prescription is interrupted as contemplated in subsection (1), prescription shall commence to run afresh from the day on which the interruption takes place or, if at the time of the interruption or at any time thereafter the parties postpone the due date of the debt from the date upon which the debt again becomes due.'

The interruption of prescription against a principal debtor automatically interrupts prescription against a surety.[3]

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[2] *Investec Bank v Erf 436 Elandspoort (Pty) Ltd and Others* [2017] ZASCA 128. See too *Botha v Standard Bank of South Africa Ltd* [2019] ZASCA 108; 2019 (6) SA 388 (SCA) paras 26-28.

[3] *Jans v Nedcor Bank Ltd* [2003] ZASCA 15; 2003 (6) SA 646 (SCA) para 32.

[27] The reason for rules relating to prescription was discussed by Marais AJ in *Cape Town Municipality v Allie NO*.[4] He said:

'Over the years the Courts and the writers on the law have sought to provide a rationale for the doctrine of prescription or the limitation of actions. It is unnecessary to burden this judgment with a discussion of the plausibility of the explanations which have been suggested. Whatever the true rationale may be, it cannot be denied that society is intolerant of stale claims. The consequence is that a creditor is required to be vigilant in enforcing his rights. If he fails to enforce them timeously, he may not enforce them at all. But that does not mean that the law positively encourages precipitate and needless law suits. It is quite plain that both at common law, and in terms of the Prescription Acts of 1943 and 1969, a creditor may safely forebear to institute action against his debtor if the debtor has acknowledged liability for the debt. *Lubbers and Canisius v Lazarus* 1907 TS 901; *De Beer v Gedye and Gedye* 1916 WLD 133. And it seems right that it should be so. Why should the law compel a creditor to sue a debtor who does not dispute, but acknowledges, his liability?'

[28] The policy underlying prescription in general, as well as the exception that is created by s 14, were explained in *Murray & Roberts Construction (Cape) (Pty) Ltd v Upington Municipality*:[5]

'Although many philosophical explanations have been suggested for the principles of extinctive prescription . . . its main practical purpose is to promote certainty in the ordinary affairs of people. Where a creditor lays claim to a debt which has been due for a long period, doubts may exist as to whether a valid debt ever arose, or, if it did, whether it has been discharged . . . The alleged debtor may have come to assume that no claim would be made, witnesses may have died, memories would have faded, documents or receipts may have been lost, etc. These sources of uncertainty are reduced by imposing a time limit on the existence of a debt, and the relevant time limits reflect, to some extent, the degree of uncertainty to which a particular type of debt is ordinarily subject (s 11 of the Act).

The same considerations which provide a justification for extinctive prescription also suggest that the time limits should not be immutable. Where the creditor takes judicial steps to recover the debt, and thereby to remove all uncertainty about its existence, prescription should obviously not continue running while the law takes its course (s 15 of the Act). Moreover, s 14 of the Act provides that the running of prescription is interrupted by an express

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[4] *Cape Town Municipality v Allie NO* 1981 (2) SA 1 (C) at 5G-H.

[5] *Murray & Roberts Construction (Cape) (Pty) Ltd v Upington Municipality* 1984 (1) SA 571 (A) at 578F-579B. See too *KLD Residential CC v Empire Earth Investments 17 (Pty) Ltd* [2017] ZASCA 98; 2017 (6) SA 55 (SCA) paras 13-17; *Bradford & Bingley PLC v Rashid* [2006] UKHL 37 para 3.

or tacit acknowledgement of liability by the debtor. The reason is clear – if the debtor acknowledges liability there is no uncertainty about the debt. No purpose would accordingly be served by requiring the creditor to interrupt prescription by instituting legal proceedings for the recovery of the debt.'

[29] *Cape Town Municipality v Allie NO*[6] concerned whether the Cape Town Municipality had acknowledged liability and so had interrupted prescription in terms of s 14 of the Act in relation to Ms Allie's claim. In dealing with s 14(1) of the Act, Marais AJ identified what he described as a number of self-evident aspects of the section. They were:[7]

'Firstly, I do not think the acknowledgment of liability need amount to a fresh undertaking to discharge the debt. "I admit I owe you R100" is manifestly an acknowledgment of a liability to pay R100 but it is not a fresh or new undertaking to pay it . . .

Secondly, full weight must be given to the Legislature's use of the word "tacit" in s 14(1) of the Act. In other words, one must have regard not only to the debtor's words, but also to his conduct, in one's quest for an acknowledgment of liability. That, in turn, opens the door to various possibilities. One may have a case in which the act of the debtor which is said to be an acknowledgment of liability, is plain and unambiguous. His prior conduct would then be academic. On the other hand, one may have a case where the particular act or conduct which is said to be an acknowledgment of liability is not as plain and unambiguous. In that event, I see no reason why it should be regarded *in vacuo* and without taking into account the conduct of the debtor which preceded it. If the preceding conduct throws light upon the interpretation which should be accorded to the later act or conduct which is said to be an acknowledgment of liability, it would be wrong to insist upon the later act or conduct being viewed in isolation. In the end, of course, one must also be able to say when the acknowledgment of liability was made, for otherwise it would not be possible to say from what day prescription commenced to run afresh . . .

Thirdly, the test is objective. What did the debtor's conduct convey outwardly? I think that this must be so because the concept of a tacit acknowledgment of liability is irreconcilable with the debtor being permitted to negate or nullify the impression which his outward conduct conveyed, by claiming *ex post facto* to have had a subjective intent which is at odds with his outward conduct . . .

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[6] Note 4.

[7] At 7B-8G. See too *Agnew v Union and South West Africa Insurance Company Ltd* 1977 (1) SA 617 (A) at 622H-623C; *Petzer v Radford (Pty) Ltd* 1953 (4) SA 314 (N) at 317H-318B; *Benson and Another v Walters and Others* 1984 (1) SA73 (A) at 86H-87B; *Standard Bank of South Africa Ltd v Oneanate Investments (Pty) Ltd* 1995 (4) SA 510 (C) at 556E-557D.

Fourthly, while silence or mere passivity on the part of the debtor will not ordinarily amount to an acknowledgment of liability, this will not always be so. If the circumstances create a duty to speak and the debtor remains silent, I think that a tacit acknowledgment of liability may rightly be said to arise . . .

Fifthly, the acknowledgement must not be of a liability which existed in the past, but of a liability which still subsists.'

[30] *Pentz v Government of the Republic of South Africa*[8] concerned whether an admission made by a person to a policeman constituted an acknowledgement of liability for purposes of interrupting prescription in respect of a claim by a government department. The court found, in the first place, that the person had not acknowledged liability. Secondly, the court held that, in any event, for an acknowledgement of liability to interrupt prescription, it had to have been given by a debtor to a creditor or the creditor's agent; and the policeman was not the agent of the government department concerned.[9]

[31] Unsurprisingly, the converse also holds true. The acknowledgement of liability, in order to effectively interrupt prescription, can be made by either the debtor or his or her agent. In *First Consolidated Leasing Corporation (Pty) Ltd v Servic SA (Pty) Ltd and Another*[10] payments were made by a third party to the creditor to reduce what was owed by the debtor concerned as well as other creditors of the third party. It had been assumed that the third party had acted as the debtor's agent but, as Goldstone J found, there was no evidence to establish that agency. Indeed, the only evidence was that of the second defendant who said that he had had no knowledge of the payments and that no arrangement was in place to the effect that the third party would pay on behalf of the debtor. That being so, the creditor had failed to discharge the onus to prove that the payments constituted an acknowledgement of liability by the debtor, with the result that prescription had not been interrupted.[11]

Has Investec's claim prescribed?

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[8] *Pentz v Government of the Republic of South Africa* 1983 (3) SA 584 (A).
[9] At 594A-E.
[10] *First Consolidated Leasing Corporation (Pty) Ltd v Servic SA (Pty) Ltd and Another* 1981 (4) SA 380 (W).
[11] At 383F-384E.

[32] In determining whether Erf 436 acknowledged liability either expressly or tacitly, and when, it is necessary to consider not only what Joubert said but also what he did. His words and conduct must be viewed holistically and in their proper context. That, it seems to me, is particularly so in respect of the monthly payments of the rental of sub-tenants towards the loan and the payment of the purchase price for Investec's rights by Johnny Prop. Viewed in isolation they tell one nothing but viewed in their broader context, with particular reference to the two agreements between Investec and Erf 436, a picture emerges.

[33] When Erf 436 was responsible for the collection of the sub-tenants' rental, its payments of those amounts towards the repayment of its loan constituted a series of tacit acknowledgements of liability. This period ended with a payment on 30 September 2003. Furthermore, during this period, Joubert, on behalf of Erf 436, wrote two letters, dated 7 May 2003 and 13 June 2003, in which he expressly acknowledged liability. The effect of the payments and the letters was that prescription was interrupted on the date of each payment and the date of each letter and commenced running again from those dates. As the last payment during this first period was made on 30 September 2003, the running of prescription was extended to 30 September 2006, with the last day for serving the summons being 29 September 2006.

[34] It is clear from the evidence and from his letters that Joubert was unhappy with Investec's decision to take over the management of the property, but he agreed to it nonetheless. That agreement had two important components that give context to everything that followed. First, it was agreed that Investec would collect rental from sub-tenants and allocate those amounts to the repayment of Erf 436's loan. Secondly, it was agreed that endeavours would be made to find a purchaser for Investec's rights in the property and that the purchase price would be credited to Erf 436's loan.

[35] During the period between Investec taking over the management of the property and the final payment of the purchase price for Investec's rights into Erf 436's account, Joubert, in a series of letters, consistently acknowledged Erf 436's liability to Investec. A theme that runs through these letters is that irrespective of who was, in his view, to manage the property, the rental collected from the sub-tenants and the

purchase price in respect of the sale of Investec's rights in the property would be allocated towards the repayment of Erf 436's loan.

[36] One payment requires specific mention. On 29 March 2006, before the claim had prescribed, an amount of R1 350 000 was credited to Erf 436's account. That payment was made by Erf 225 Edenburg (Pty) Ltd, an entity of which Joubert was a director. In a letter to Investec dated 2 November 2005, he had informed Investec of a transaction involving Erf 225 and said that '[w]e have analysed and refined the transaction regarding the actual surplus available to be deposited into the bond account (number 221162) of [Erf 436] and calculate that an amount of R1.35 million would be a more accurate amount'. The evidence of Oosthuizen was that Investec had agreed with Joubert that Erf 225 would pay the surplus of a sale of property towards Erf 436's indebtedness to Investec. As Joubert was a director of both entities, knowledge of, and agreement to, the payment must be imputed to Erf 436. The inference that Erf 225 acted as Erf 436's agent is irresistible. That payment was a tacit acknowledgement of liability by Erf 436, with the effect that the running of prescription was extended to 29 March 2009.

[37] On 21 May 2007, another tacit acknowledgement of liability was made by Erf 436 when Joubert queried the mechanics of the monthly payments into Erf 436's account. This was a tacit acknowledgement of liability because the very basis of the query was an acceptance by Erf 436 of a liability towards Investec (that it had never denied and had acknowledged consistently); and it discloses knowledge on the part of Erf 436 that payments of rental collected from sub-tenants by Investec had (since mid-2003) been paid towards reducing Erf 436's loan liability. Far from protesting that Erf 436 was not liable to Investec, Joubert sought details of how the VAT component of the rentals was dealt with. The effect of this letter was to extend the life of Investec's claim for a further three years from the date of the letter – until 21 May 2010.

[38] The letter of 21 May 2007 also answers the question as to the effect of Investec's monthly payments to reduce Erf 436's indebtedness to it. It does so by confirming Erf 436's agreement to the arrangement made in 2003 in terms of which the payments were made. In fairness to Joubert, although he was unhappy with the

arrangement, he never once denied the agreement or Erf 436's liability to Investec. Erf 436's agreement to the arrangement and, to put it at its lowest, the complete absence of any words or conduct on its part that could be construed as a denial of liability – its failure, in other words, to speak out if it denied liability – carry with it a tacit acknowledgement of liability every month when its account was credited: it knew and accepted that these payments were made monthly in order to reduce its admitted and current indebtedness to Investec in accordance with a process to which it had agreed.

[39] The last monthly payment was made on 17 July 2008. Prescription was interrupted on that day and immediately began to run again. The effect was that the life of Investec's claim was extended, and it was required to serve its summons by 16 July 2011 at the latest. As the various acknowledgements of liability that I have identified kept the claim alive and summons was issued on 21 January 2011, well before 16 July 2011, that appears to be the end of the matter. For the sake of completeness, however, I shall deal with the effect of the sale of Investec's rights in the property.

[40] From the outset, it was agreed that Investec's rights in the property would be sold and the proceeds allocated towards the payment of Erf 436's loan. From Oosthuizen's evidence and from Joubert's letters, it is evident that Joubert was particularly active in trying to find a purchaser. That is nowhere clearer than in his letter to Investec of 12 October 2006 when he expressed shock on learning that Investec had 'sold' the property without reference to him, and for a price that he considered to be unreasonably low. He spoke of Erf 436's 'vested interest' in the purchase price because 'it has a direct influence on our bond account No. 221161'. He also referred to potential purchasers who were prepared to pay more.

[41] What is clear from this letter – and this is consistent with Joubert's position throughout – is that he was aware that the purchase price would be used to reduce Erf 436's indebtedness to Investec, as agreed between them in 2003. Viewed in this context, his knowledge of that fact and his acceptance without demur of the payments made on 29 June 2009 and 1 July 2009 were tacit acknowledgements of liability on the part of Erf 436. Once again, his failure to query them is telling and is consistent

with Erf 436's position throughout – its acceptance that it was liable to Investec in respect of the loan. The result of these tacit acknowledgements of liability is that prescription was yet again interrupted on the dates of payment. Summons had to be served by 30 June 2012 at the latest but was served well within time on 21 January 2011.

[42] It is necessary to say something of the finding of Fabricius J that the payments of rental after September 2003 and of the purchase price of Investec's rights in the property were not tacit acknowledgements of liability. His reasoning was that Erf 436 cannot be said to have acknowledged liability because neither the sub-tenants whose rental was credited to Erf 436's account or Johnny Prop who bought Investec's rights were Erf 436's agents. In my view, questions of agency do not arise, save in the case of Erf 225's payment on behalf of Erf 436, referred to above.

[43] The difficulty I have with the reasoning is that it ignores the context in which the payments were made. That context was an agreement between Investec and Erf 436 that Investec would collect rental from sub-tenants and credit Erf 436 with the nett amounts so collected every month; and that when Investec's rights were sold, the purchase price would likewise be credited to Erf 436's account. The basis for the acknowledgements of liability in respect of each of these payments does not rest on agency, but on the agreement entered into by the parties as to how the loan would be repaid. The *First Consolidated Leasing Corporation* case[12] is thus not of application.

[44] There is no merit in an argument advanced on behalf of Erf 436 that any acknowledgements by Erf 436 were not acknowledgements of a present liability but of a past or, perhaps, a conditional liability. Reliance was placed on *Benson and Another v Walters and Others*.[13] This argument fails on two counts.

[45] First, the facts of *Benson* differ markedly from this matter. In *Benson*, a person's attorney had written to his ex-attorney to say that the client had paid R5 000 in respect of the former attorney's fees and disbursements and undertook 'payment of whatever

[12] Note 10.
[13] Note 7 at 86H-87B.

shortfall you are able to establish on taxation'. Van Heerden JA held that the letter contained 'a conditional undertaking to pay' but was not 'an admission of existing liability'.[14] What the writer intended to convey was the fact that 'he did not know whether an amount of more than R5 000 would be taxed and therefore did not know whether Benson was liable to make a payment to Walters, but that, if a liability did exist, his firm would pay the amount thereof'.[15] This was not an acknowledgement of liability that could interrupt prescription. In the present matter, there has been no suggestion that the amount owed to Investec by Erf 436 was anything but a current debt and there was likewise no suggestion of any conditions attaching to its payment or its quantification. At all times in his correspondence, Joubert accepted that Erf 436 owed money to Investec, even quantifying the amount in some of his letters.

[46] Secondly, it was argued that Joubert may have believed that the debt had been discharged. That runs counter to the evidence. There was never any doubt that when the last tacit acknowledgement of liability was made, Erf 436 was still indebted to Investec. Joubert, the inveterate letter-writer, never once in any of his many missives suggested that the debt had been paid or was anything but a current debt.

[47] The result is that Investec's claim has not prescribed. The appeal must consequently succeed.

The order

[48] I make the following order:

1. The appeal succeeds with costs, including the costs of two counsel where employed.

2. The order of the court below is set aside and replaced with the following:

'1. It is declared that the debt owed by the defendants to the plaintiff, as formulated in the particulars of claim, had not prescribed when summons was served on 21 January 2011.

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[14] At 87C-D.

[15] At 87F.

2. The costs of the hearing of 18 to 21 February 2019 are to be paid by the first, second, third, fifth and sixth defendants jointly and severally. Those costs shall include the costs of two counsel.

3. The action is postponed sine die in respect of the remainder of the issues in dispute.'

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C Plasket

Judge of Appeal

APPEARANCES

For the appellant:	F J Erasmus SC Instructed by: VDT Attorneys, Pretoria Peyper Attorneys, Bloemfontein
For the respondents:	H F Oosthuizen SC Instructed by: Nothling Attorneys, Pretoria De Villiers Attorneys, Bloemfontein