

SOUTH AFRICA / JUDGMENT

Liberty Group Ltd v Erasmus NO (54534/2011) [2018] ZAGPPHC 497 (11 July 2018) [2018] ZAGPPHC 497

COURT

North Gauteng High Court, Pretoria

BEFORE

C.P. Rabie

CASE / FILE NUMBER

54534/2011

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HIGH

COURT OF SOUTH AFRICA

(GAUTENG

DIVISION, PRETORIA)

CASE

NO: 54534/2011

REPORTABLE

OF

INTEREST TO OTHER JUDGES

REVISED

11/7/2018

In

the matter between:

LIBERTY

GROUP

LTD Plaintiff

and

LO.

ERASMUS

NO First

Defendant

LS.

ERASMUS

NO Second

Defendant

LO.

ERASMUS Third

Defendant
LS.
ERASMUS Fourth
Defendant
J.R.
DU
TOIT Fifth
Defendant
W.P.B
ILLMAN Sixth
Defendant
R.J.
SEPTEMBER Seventh
Defendant
F.J.
ESPAG Eighth
Defendant

JUDGMENT

1. By agreement between the plaintiff and the sixth defendant this court is called upon to determine a special plea of prescription. The question sought to be determined is the following: does service of a summons by a creditor on a surety of the principal debtor interrupt prescription against another surety of the principal debtor?
2. The background is briefly the following. The plaintiff, as cessionary, issued summons against the eight defendants who all separately bound themselves in writing as sureties and co-principal debtors in solidum to ECE Financial Holdings (the principal debtor) (hereinafter also "ECE") for the payment on demand to Chartered Life Insurance Company Ltd of all sums of money which the principal debtor may owe to Chartered Life Insurance Company Limited.
3. Chartered Life Insurance Company Ltd, later known as Liberty Active Ltd, ceded to the plaintiff all its rights, title and interest in and to any claims that may arise from the clawback of commissions arising from broking agreements concluded with Liberty Active Ltd.
4. The present claim is in respect of commissions that were advanced to the principal debtor before the relevant commission in respect of which the commissions were advanced were paid to the plaintiff. The plaintiff did not receive the relevant commission, as a result of which the advanced and earned commission became repayable. For present purposes it is accepted that the debt became due and payable before 22 September 2011.

5. The principal debtor was placed in final deregistration on 24 February 2011. The summons against the eight sureties was issued on 25 October 2011. The summons was served on the seventh defendant on 29 September 2011. The plaintiff applied for and obtained default judgement in terms of Rule 31 of the Uniform Rules of Court against the seventh defendant on 27 January 2012.
6. The summons was served on the sixth defendant 31 March 2016. The sixth defendant raised a defence of prescription of the plaintiff's

claim which is the dispute which has to be adjudicated by this court. At the pre-trial conference the plaintiff and the sixth defendant

agreed to approach the court in terms of Rule 33(4) to deal with the defence of prescription as a separate issue before any other

issues.

The plaintiff accepted, and it was so agreed, that if the plea of prescription is upheld, the claim against the sixth defendant must be dismissed with costs.

7. At the hearing of the matter an order was made separating the issue of prescription to be adjudicated separately.
8. The issue to be decided in this matter is whether the interruption in the running of prescription in favour of the seventh defendant

interrupted prescription in favour of the sixth defendant.

9. Section 15 of the Prescription Act, Act 68 of 1969, provides as follows:

"(1) The running of prescription shall subject to the provisions of subsection (2) be interrupted by this service on the debtor of any process whereby the creditor claims payment of the debt.

- (2) Unless the debtor acknowledges liability, the interruption of prescription in terms of subsection (1) shall lapse, and the running of prescription shall not be deemed to have been interrupted, if the creditor does not successfully prosecute his claim under the process in question to final judgement or if he does so prosecute his claim but abandons the judgement or the judgement is set aside.
- (3) If the running of prescription is interrupted as contemplated in subsection (1) and the debtor acknowledges liability, and the creditor does not prosecute his claim to final judgement, prescription shall commence to run afresh from the day on which the debtor acknowledges liability or, if at the time when the debtor acknowledges liability or at any time thereafter the parties postpone the due date of the debt, from the date upon which the date again becomes due.

- (4) If the running of prescription is interrupted as contemplated in subsection (1) and the creditor successfully prosecutes his claim under the process in question to final judgement and the interruption does not lapse in terms of subsection 2, prescription shall commence to run afresh on the day on which the judgement of the court becomes executable.
- (5) If any person is joined as a defendant on his own application, the process whereby the creditor claims payment of the debt shall be deemed to have been served on such person on the date of such joinder.
- (6) For the purposes of this section 'process' includes a petition, a notice of motion, I rule nisi, a pleading in reconvention, a third party notice referred to in any rule of court and any document whereby legal proceedings are commenced."
10. The applicable period of prescription in respect of the debt in question is determined in section 11 of the Prescription Act as three years. The period of prescription applicable to section 15 (4) is thirty years.
11. The sixth and the seventh defendants were both sureties and co-principal debtors of ECE, the principal debtor, and, as mentioned,

the plaintiff served the summons on the seventh defendant within the prescription period and duly obtained judgement against the seventh defendant. However, the summons was served on the sixth defendant outside the prescription period of three years and this resulted in the sixth defendant's special plea of prescription of the plaintiff's claim. More particularly the sixth defendant, inter alia, pleaded that:

"1.10 Due to service of process only being effected on 31 March 2016, prescription had not been interrupted by way of service of process as envisaged by the Act.

1.11 Therefore any alleged debt due by the sixth defendant to the Plaintiff, has prima facie prescribed and has been extinguished on 14 March 2014. In the premises the plaintiffs claim against the sixth defendant has prescribed."

12. The plaintiff filed a replication to the sixth defendant's special plea of prescription which reads as follows:

"1.1 The sixth defendant bound himself as surety and co-principal debtor in solidum with ECE Investment Holdings Pty Ltd (the principal debtor) to the plaintiff.

1.2 The seventh defendant bound himself as surety and co-principal debtor in solidum with the principal debtor to the plaintiff.

1.3 The claim in the summons became due and owing by the principal debtor and all co-debtors on 14 March 2011.

1.4 The plaintiff caused the summons to be served on the seventh defendant on 11 October 2011.

1.5 The running of prescription in favour of the principal debtor and all co-debtors was interrupted by the service of the summons on the seventh defendant.

1.6 The debt has accordingly not prescribed.

1.7 Accordingly, the sixth defendant's special plea of prescription falls to be dismissed with costs."

13. According to the replication the crux of the plaintiffs case against the plea of prescription is to be found in paragraph 1.5 quoted above, namely, that the running of prescription in favour of the principal debtor and all "co-debtors" was interrupted by service of the summons on the seventh defendant, who was a surety and co-principal debtor.
14. This proposition is flawed for the reason that it erroneously assumes the sureties to be co-debtors. The sixth and the seventh defendant were each a surety and co-principal debtor but this does not mean that they were co-debtors of the principal debtor or in respect of themselves. The sixth and the seventh defendants' position cannot be equated with that of a co-debtor. The nature of the liabilities of the sixth and seventh defendants were accessory in nature. They were each liable to the creditor in respect of the debts of the principal debtor as sureties only and not as principal debtors. The sole consequence of a surety binding himself as a co-principal debtor is that he renounces the benefits, such as excussion and division, available to him and becomes liable with the principal debtor jointly and severally. Cf Neon & Cold Cathode Illuminations Pty Ltd v Ephron 1978 (1) SA 463 (A) at 471 C-0 . The sixth and the seventh defendants were co-sureties and not co-debtors. In law, co-sureties have no contractual privity with each other, unless otherwise agreed. Cf Forsyth and Pretorius, Caney 's Law of Suretyship 5th edition, p
53. In casu there was no such agreement and thus no mutual suretyship between sixth and seventh defendants.
15. During argument before this court a somewhat different argument was proposed on behalf of the plaintiff. According to this argument this court should extend the common law exception that interruption of prescription in favour of the principal debtor also interrupts

prescription running in favour of the surety. It was submitted that this extension should have the effect that the converse should also apply, namely, that interruption of prescription in favour of the surety should also interrupt prescription in favour of the principal debtor. It was further submitted that once that had been found, i.e., that prescription in favour of the principal debtor had been interrupted, it would lead to the further logical extension of the principle namely that interruption of prescription in favour of a surety also interrupts prescription in favour of a co-surety. This argument would have the result, in casu, that since summons had been served by the creditor (the plaintiff) on the seventh defendant within the period of prescription and judgement obtained, the period of prescription in favour of the sixth defendant had been interrupted by such service and would remain interrupted for 30 years.

16. On behalf of the sixth defendant it was submitted that the proposed extension of the common law exception is not part of our law and that this court should not make it so.
17. Both counsel appearing respectively on behalf of the plaintiff and the sixth defendant referred me to the judgement of the Supreme Court of Appeal in *Jans v Nedcor Bank Ltd* 2003 (6) SA 646 (SCA) where the court, per Scott JA, found that an interruption or delay in the running of prescription in favour of the principal debtor interrupts or delays the running of prescription in favour of the surety. Both counsel based their submissions in respect of a further extension or not, on what the Supreme Court of Appeal found in this judgement. It was submitted on behalf of the plaintiff that an analysis of the principles applicable, as discussed in this case, would indicate that the question whether there should be a further extension of the exception, should be answered in the positive, while it was submitted on behalf of the sixth defendant that the question should be answered in the negative.
18. In *Jans v Nedcor* the court had to deal with the question whether or not prescription in favour of a surety should run independently of prescription in favour of the principal debtor. The court traced the history of this debate over the ages starting with a decree of the Emperor Justinian in 531 A.O., the modern citation of the constitution being C8.39(40).4(5). This decree contained no express

reference to sureties and merely stipulated in effect that if prescription in favour of one co-debtor, presumably a debtor in solidum, is interrupted, so that the period of prescription in respect of that debtor is extended, the period of prescription will be extended in respect of all the debtors to the advantage of all the creditors. (Cf *Jans v Nedcor* para (11) and the material portion of the decree quoted therein). The decree of Justinian, which formed part of Roman Law, was thus an extension of the principle that prescription is, generally speaking, only interrupted by service of process on the debtor himself or acknowledgement by the debtor himself of his debt.

19. The further fortunes of Justinian's decree was summarised by Scott JA from paragraph (12] onwards and it is not necessary to refer thereto in detail herein and I shall merely refer to certain salient aspects. Of importance is that the Glossators were the first to equate the relationship between principal debtor and surety with the relationship between co-debtors in solidum for purposes of applying Justinian's decree to sureties with the effect that the interruption of prescription against the principal debtor would also interrupt prescription against the surety.
20. Brunnemann supported this view and Voet, in his *Commentarius ad Pandectas* 46.1.36, as well as others of our old writers, also

concurred with this view. One of these was Pothier who, in his *Obligations*, at paragraph 664 (Evans's translation) stated that the principle underlying C8.39(40).4(5) is that if a creditor makes judicial demand against one co-debtor in solidum the other co-debtors cannot say that the creditor has not exercised the claim which he has against them because the claim against co-debtors in solidum is one and the same; similarly the claim which the creditor has against the surety is the same as that against the principal debtor and therefore by enforcing the claim

against the principal debtor the creditor is enforcing his claim against the surety. Cf *Jans v Nedcor* para [12] - [16].

21. Scott JA discussed the reception and adaptation, or extension, of Justinian's decree in the Roman Dutch law as well as the contrary

views on the subject. He also referred to the recognition in South Africa by the Transvaal Act 26 of 1908 and the Prescription Act 18 of 1943 of the principle that interruption as against the principal debtor shall be deemed an interruption as against the surety and also that interruption as against one joint debtor in solidum shall be regarded as interruption as against another joint debtor in solidum.

22. Scott JA then referred to the first South African case on the issue namely *Cronin v Meerholz* 1920 TPD 403 as well as *Union Government v van der Merwe* 1921 TPD 318 wherein the court, per Wessels JP (in both instances), found that interruption of prescription against the principal debtor shall be deemed an interruption as against the surety. In so doing the court applied what it regarded as our common law and in that regard referred to Voet and others referred to.
23. Scott JA further considered the provisions of the 1969 Prescription Act, which did not re-enact the relevant provisions of the 1943 Prescription Act, as well as the dissenting views of some of our own eminent legal writers and the contrary finding in *Rand Bank Ltd v de Jager* 1982 (3) SA 418 (C). He acknowledged the distinction between the obligation of a co-debtor in solidum and the accessory obligation of a surety, as did all the old writers who favoured the extension of Justinian's decree, but found favour in their arguments as to why that should be. The golden thread running through these arguments relates to the accessory nature of the surety's obligation as well as its commonality with the debtor's obligation. These were the aspect upon which the court in *Cronin v Meerholz* relied and with which the court in *Jans v Nedcor* found favour.

24. Important is the remark at p 660D-G in *Jans v Nedcor* after referring to the dissenting views:

"[27] ... But whether one likes it or not the legislation was part of the Roman law, which in turn became part of the Roman Dutch law accepted in South Africa. It cannot be dismissed simply because it does not fit into a particular perspective of the law as a logical edifice.

- [28] ... Voet is high authority in South Africa. The same may be said of Pothier and Brunnemann. Although opinion on the issue is divided, and has been for centuries, the weight of authority appears to be on the side of Voet. No Roman-Dutch lawyer contents for the opposing view. Moreover, Voet's view has generally prevailed. It was incorporated into the codes of the Netherlands, France, Belgium and other European countries and was accepted in South Africa until the *Rand Bank* case in 1982. There are undoubtedly significant differences between the relationship that exists between principal debtor and surety on the one hand and that between co-debtors in solidum on the other. It is also true that there is some inconsistency in applying Justinian's constitution to sureties to the limited extent that

interruption of prescription against the principal debtor interrupts prescription against the surety but not applying it to the converse situation. It was probably this that Baker J had in mind when he categorised Pothier's view as "unconvincing" and that of Laurent as "logical and sound". But ultimately the differences, in my view, are not so profound as to have precluded those jurists seeking in the past to develop the law from extending the principle embodied in C 8. 39 (40). 4 (5) to sureties to the extent referred to. Once Justinian's enactment is accepted to be the law, as it must, I do not think that the extension involves a step in terms of legal theory which is so far-reaching as to justify rejecting the view of Voet, particularly in the absence of other Roman-Dutch authority and, in effect, putting the clock back after so many years."

25. Finally, the court in *Jans v Nedcor* found the position in the South African law to be that an interruption or delay in the running of prescription in favour of the principal debtor interrupts or delays the running of prescription in favour of the surety. In so finding the court found that *Rand Bank Ltd v de Jager* was wrongly decided.
26. I now turn to the issue before this court, namely, whether interruption of prescription against the surety and co-principal

debtor of the principal debtor (by way of service of summons), interrupts prescription against another surety and coprincipal debtor. I have mentioned above that it was, *inter alia*, submitted on behalf of the plaintiff that the main principle underlying the extension of the decree to a surety relates to the fact that the creditor's contract with the principal debtor as well as the creditor's contract with the surety, relate to the same obligation. Consequently, so it was submitted, a consistent application of that underlying principle would require that the converse should apply, i.e., that interruption of prescription against the surety should also constitute interruption of prescription against the principal debtor. And furthermore, that such interruption of prescription against the surety, would constitute interruption of prescription against a co-surety.

27. I do not agree with the aforesaid submissions. Neither in the Roman law nor in the Roman Dutch law had it ever been suggested that the converse should apply - in other words that interruption of prescription against the surety should constitute interruption of prescription against the principal debtor. The Roman Dutch writers, who wrote extensively on the topic and debated the pros and cons thereof, were *ad idem* that the converse should not apply. It is consequently simply not part of our common law.
28. It was submitted on behalf of the plaintiff that it is not necessary to amend the common law in order to find for the plaintiff but that it merely requires a consistent application of a principal already accepted by the common law. I do not agree. As mentioned, our common law writers have considered the extension of Justinian's decree and had decided that it should be done to the extent mentioned and no further. To find that interruption of prescription against one surety constitutes not only interruption of prescription against the principal debtor but even against the other sureties, constitutes a substantial deviation of

the common law principles on the topic.

29. Furthermore, and in any event, in my view the principles underlying the reason for the extension of Justinian's decree relating to a co-debtor in solidum to also include a surety, militate against the proposition that interruption of prescription against one surety should constitute interruption of prescription against another surety. I have mentioned above the importance of the accessory nature of the surety's obligation and the commonality with the debtor's obligation which, inter alia, underlie the extension of the decree to include the surety. The obligation of one surety to the main creditor is, however, totally independent from the obligation of another surety to the main creditor although it may relate to the same debtor and possibly the same debt. The obligation of one surety to the creditor can also be different from that of another surety. The element of commonality consequently lacks. But more importantly, the obligation of the one surety is totally separate and distinct and independent from the obligation of the other surety and the obligation of the one is in no way accessory to that of the other. They may relate to the same principal debtor and to the same debt, albeit not necessarily so, but they remain independent contracts with nothing accessory in respect of each other. The sureties' obligations are both accessory to that of the principal debtor's obligations but that does not make them accessory to each other's obligations. A surety's obligation is accessory to the obligation of the principal debtor alone.
30. Consequently, the considerations which led to the extension of Justinian's decree are absent insofar as co-sureties are concerned. I therefore find no justification in the submission that applying the same principles which led to the extension to include a surety, leads to a finding that the interruption of prescription against one surety would constitute the corruption of prescription against a co-surety, or, for that matter, the principal debtor. Then, lastly, it needs to be reiterated that there is the weight of authority against the propositions on behalf of the plaintiff. Authority which have not been deviated from for many centuries.
31. For these reasons the special plea of prescription should be upheld. It was common cause between the parties that should this special plea be upheld, the plaintiffs claim against the sixth defendant should be dismissed.
32. As far as costs are concerned, there is no reason why costs should not follow the event.
33. In the result, the following order is made:
 1. The sixth defendant's special plea of prescription is upheld.
 2. The plaintiffs claim against the sixth defendant is dismissed.
 3. The plaintiff is ordered to pay the sixth defendant's costs of suit.

C.P. RABIE

JUDGE OF THE HIGH COURT

Plaintiff's Attorneys: Gerings Attorneys

Plaintiff's Advocate: Adv J.F. Steyn

Sixth Defendant's Attorneys: Wiekus du Tait Attorneys

Sixth Defendant's Advocate: Adv H.P. van Nieuwenhuizen

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