

SOUTH AFRICA / JUDGMENT

Private Security Sector Provident Fund v Isidingo Security Services (t/a Unitrade (Pty) Ltd) (3048/2021P) [2022] ZAKZPHC 69 (14 June 2022) [2022] ZAKZPHC 69

COURT

Kwazulu-Natal High Court, Pietermaritzburg

BEFORE

Bezuidenhout

CASE / FILE NUMBER

3048/2021P

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IN THE HIGH COURT OF SOUTH AFRICA

KWAZULU-NATAL DIVISION, PIETERMARITZBURG

CASE NUMBER: 3048/2021P

PRIVATE SECURITY SECTOR PROVIDENT FUND APPLICANT

and

ISIDINGO SECURITY SERVICES

(t/a UNITRADE (PTY) LTD) FIRST

RESPONDENT

ANUTHERAN PADAYACHEE SECOND

RESPONDENT

JABULANI NIGEL NDLOVU THIRD

RESPONDENT

PUBLIC SAFETY INDUSTRY REGULATORY

AUTHORITY FOURTH

RESPONDENT

JUDGMENT

BEZUIDENHOUT J:

- [1] Applicant brought an application that Respondents settle the late interest payment owing to them. This application was opposed by First, Second and Third Respondents (herein referred to as the Respondents) who also filed a counter application seeking the following relief.

“1. Declaring that the amount claimed as late payment interest by Applicant from First, Second and Third Respondents, in respect of the debt contemplated in the Acknowledgment of Debt dated 26 November 2013 are prescribed and Applicant is precluded from enforcing such claims against First, Second and Third Respondents.

2. Alternatively declaring that the amounts claimed by Applicant from First, Second and Third Respondents arising from the Acknowledgment of Debt dated 26 November 2013 are impermissible in law and contravene the in duplum rule of law.
3. That Applicant pays the costs of the application.”

This counter application was then opposed by Applicant.

- [2] Thereafter Applicant withdrew the main application and it is only the counter application which then proceeded. Applicants in the counter application are referred to as Respondents and the Respondent in the counter applications as Applicant.
- [3] It is common cause that First Respondent owed Applicant a large sum of money in respect of contributions for its employees which had to be made to Applicant. This related to the period 2005 to 2008. This was however, settled between the parties and an Acknowledgment of Debt was signed by Second Respondent on behalf of First Respondent

on 26 November 2013. In paragraph 1 of the Acknowledgment of Debt it is accepted and acknowledged that First Respondent was

indebted to Applicant in the amount of R12 488 219.04 in respect of outstanding provident fund contributions that were payable. It was further agreed that the said amount would be paid in instalments with the first amount of R 750 000.00 to be paid on 6 December 2013 and thereafter 36 monthly instalments of R 326 061.64 commencing on 7 February 2014 until 7 January 2017.

- [4] Paragraph 2 of the Acknowledgment of Debt reads as follows:

“In terms of Regulation 33 (7) of the Regulations to the Pension Fund Act 24 of 1956 (hereinafter the act), compound interest and late payment of contributions is to be calculated, and paid over and above the debt, from the first day of the month following the expiration of the period in respect of which the contributions were payable until the date of the receipt of such payment by the creditor.”

Paragraph 3 states as follows:

“... and a final instalment due for late payment with interest that will be calculated by ACA based on the total debt owing, time the debt remains outstanding and the relevant term and amount agreed upon to service that debt. The Debtor will be advised of this amount 30 days before conclusion of this agreement or upon payment of the second last instalment as per the terms agreed above.”

[5] It has been submitted on behalf of Respondents that although the acknowledgment of debt provides for the payment of compound interest in respect of late payments this had to be provided to Respondents 30 days before conclusion of the agreement or upon payment of the second last instalment as per terms of the agreement. As the last payment was on 7 January 2017 it would have been the 7 December

2016. It is common cause that Respondents paid the full amount of R 12 488 219.04 in terms of the Acknowledgement of Debt. This also appears from Applicant's certificates stating that the full amount had been paid. These letters are attached as annexures “G”, “H” and “I” and are dated 3 February 2017, 21 February 2017 and 15 March 2017. It was submitted that Applicant's claim for interest has prescribed and further in the alternative that the amount of R 44 000 000.00 which Applicant is now seeking as outstanding interest far exceeds the capital amount which was approximately R 12 000 000.00 and therefore in terms of the in duplum rule cannot be claimed.

[6] It appears from the papers that the dispute about the outstanding amount related to the years 2005 to 2008 and that these outstanding amounts were settled by way of the acknowledgment of debt which was signed on 26 November 2013. The Acknowledgment of Debt does make provision for compound interest in respect of late payments still to be made by Respondents although the contribution amount of R 12 488 219.04 had been paid in full. There is also no indication on the papers that since this amount was paid up in terms of the Acknowledgment of Debt during January 2017 that Respondents had not continued to pay the monthly contributions which they are bound to do. The only issue therefore between the parties is

whether, at this stage, there is a legal obligation by Respondents to pay the late payment interest claimed by Applicant. It is also common cause that to date Applicant has not instituted an action claiming the said amount although it had withdrawn its application in that regard.

[7] Section 10 of the Prescription Act no. 68 of 1969 stipulates out as follows:

“Extension of debts by prescription (1) subject to the provisions of this chapter and chapter 4 a debt shall be extinguished by prescription

after the lapse of a period which in terms of the relevant law applies in respect of the prescription of such debt; (2) by the

prescription of a principle debt a subsidiary debt which arose from such principle debt shall also be extinguished by prescription; (3) notwithstanding the prescription of subsection 1 and 2 payment by the debtor of the debt after it has been extinguished by prescription in terms of either of the said subsections shall be regarded as payment of a debt.”

Section 11 sets out the prescriptive periods and in section 11 (d) it states:

“Save where an act of Parliament provides otherwise 3 years in respect of any other debt.”

Section 12 (1) sets out that prescription shall commence to run as soon as the debt is due. Section 14 of the Act provides that the running of prescription shall be interrupted by an express or tacit acknowledgment of liability by the debtor. It would then

commence to run again from the day which the interruption takes place.

[8] It was submitted that Applicant did not when it had to do so claim the late payment interest from First Respondent in terms of clause 3 of the Acknowledgment of Debt. The 3 year period would accordingly have expired in early 2020 as it would have commenced at the latest on 7 January 2017. It was further submitted that Applicant had on each occasion, that it claimed payment of this interest, given different amounts and failed to set out how it was complied. In paragraph 4 of the acknowledgement of debt interest will be calculated from the first day of the month following the expired period in respect of which the contribution was payable. This would thus have been during the period 2005 to 2008. Moreover Respondents admitted such interest was due on 26 November 2013.

[9] It was submitted on behalf of Respondents that in *Trinity Asset Management (Pty) Ltd v Rhinestone Investments 132 (Pty) Ltd 2018 (1) SA 94 (CC)* the Constitutional Court accepted that there were compelling reasons for prescriptive periods. In *Paulsen and Another v Slipknot Investments 777 (Pty) Ltd 2015 (3) SA 479 (CC)* referring to the in duplum rule it was held in paragraph 107:

“In this dispute there is no grumbling about what the in duplum rule lays down or its longstanding pedigree as part of our law. It is common law norm that regulates the accrual of interest on a debt that is due and payable. The rule is that arrear interest stops accruing when the sum of the unpaid interest equals the extent of the outstanding capital. The plain policy consideration underlying the rule is to prevent a broken debtor from being compounded by the ever growing interest burden. The purpose of the rule is dual. It permits a creditor to recover double the capital advanced to the debtor whilst it seeks to alleviate the plight of debtors in financial distress.”

[10] It was submitted on behalf of Respondents that the decision of *Municipal Workers Retirement Fund v Ndlambe Local Municipality 2018) ZAE CGHC 139* which is relied upon by Applicant is distinguishable as in that case the issue was the ongoing failure to make the correct monthly contributions and short payments were made. The court therefore concluded that the repeated short payments was a continuing interruption of the prescription in relation to every amount which the Municipality was obliged to pay the Fund.

[11] It was submitted that in the present case it is common cause that all the monthly payments have been made. Also the amount that had to be paid in terms of the Acknowledgment of Debt was paid by 7 January 2017. I was also referred to the decision of *EThekwini Municipality v Mount Haven (Pty) Ltd 2019 (4) SA 394 (CC)* where it was held in paragraph 8

that a debt for the purpose of section 11 of the Prescription Act included an obligation to pay money which would prescribe after a period of 3 years. It was further submitted that nowhere in the papers is there any indication that Respondents had expressly or tacitly acknowledged liability for the late payment of interest which is now being claimed. It is only in the acknowledgement of debt signed in 2013 referred to above.

- [12] It was submitted on behalf of Applicant that from the Acknowledgment of Debt it is clear that the outstanding interest still had to be determined. It was further submitted by Applicant that in terms of clause 3 of the Acknowledgment of Debt the amount constituting interest would be calculated by ACA and that Respondents would then be advised of the said amount.
- [13] It is common cause that Respondents complied with their obligations in terms of the Acknowledgment of Debt as far as the payment of arrear pension fund contributions were concerned.
- [14] It was further submitted on behalf of Applicant that the provisions of the Acknowledgment of Debt relating to the compounded late payment interest did not absolve First Respondent from liability for the payment of such interest. I was referred to the decision of *Municipal Workers Retirement Fund v Ndlambe Local Municipality* which I have already dealt with above. It was further submitted that the late payment interest was still owing in terms of section 14 A
- (7) of the Pension Fund Act. First Respondent was aware that in terms of Regulation 33 (7) of the Pension Fund Act the compound interest remained payable to Applicant. The amount of interest calculated in terms of the Acknowledgement of Debt is not before Court and therefore the relief that the in duplum principle shall apply cannot be exercised.
- [15] Section 13 A(7) of the Pension Fund Act 24 of 1956 states:
- “Interest at a rate as prescribed shall be payable from the first day following the expiration of the period in respect of which such amounts were payable on:*
- (a) the amount of any contribution not transmitted into a funds bank account for the expiration of the period prescribed therefore by subsection 3 (a)(i);
 - (b) the amount of any contribution not received
 - (i) by a fund for the expiration period prescribed therefore by subsection 3 (a)(ii); or
 - (ii) in the circumstances contemplated in subsection 3 (b) (a) (iii) by the insurer concerned before the expiration of the period prescribed therefore by that subsection.”

- [16] It is indeed so that there is a statutory obligation to pay interest on outstanding amounts. It was also acknowledged by Respondents in the Acknowledgement of Debt. However the fact that there is a statutory obligation to do so does not mean that it can never prescribe. As set out above the payment of such interest is a debt and this will prescribe after a period of 3 years. The Prescription Act specifically makes provision for other prescriptive periods where it relates to for example, taxation or court orders, bills of exchange etc.
- [17] In terms of the Acknowledgement of Debt the amount of interest which was payable should have been provided to Respondents by no later than 7 December 2019. This, it is common cause, was not done. Further there is nothing in the papers that any action has been commenced against Respondents in respect of such interest. The interest payable in terms of the Acknowledgement of Debt related to the amounts which were paid by First Respondent in respect of contributions for the period 2005 to 2008. Accordingly a consideration of the Acknowledgement of Debt indicates that prescription would have run the latest from 7 January 2017. Therefore if one considers a period of 3 years it would have prescribed by January 2020.
- [18] The fact that Applicant did not institute any action for the interest by January 2020 resulted in the claim for interest to have prescribed. There is nothing in the papers, and I have not been shown that there was any interruption of the prescriptive period due to an acknowledgment by Respondents after January 2017 that the interest was owing and payable.
- [19] Accordingly the fact that Applicant complied with the provisions of the Acknowledgment of Debt by paying the amount by 7 January 2017 does not affect the prescriptive period which ran from that time until 7 January 2020 when the claim for interest would have become expired.
- [20] Accordingly Respondents, as set out in the counter application, have shown that the claim for interest has prescribed.
- [21] Due to this finding it is not necessary to deal with the alternative issue of whether the in duplum rule applies or not.

I accordingly make the following order.

1. The amounts claimed as late payment interest by Applicant from First, Second and Third Respondents, in respect of the debt contemplated in the Acknowledgement of Debt dated 26 November 2013, have prescribed and Applicant is precluded from enforcing such claims against First, Second and Third Respondents.
2. Directing that Applicant pay the costs of this application.

BEZUIDENHOUT J.

JUDGMENT

RESERVED: 11

MARCH 2022 (HEARD VIA ZOOM)

JUDGMENT

HANDED DOWN: 14

JUNE 2022

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