PRESCRIPTION PERIOD FOR MORTGAGE DEBT AFTER THE BOND CANCELLED: DOES IT CHANGE FROM 30 TO 3 YEARS?

Botha v Standard Bank of South Africa Ltd (445/2018) [2019] ZASCA 108 (6 September 2019)

This matter relates to a claim against a surety for the shortfall of a debt secured by a mortgage bond over the surety's husband's property. His estate was sequestrated, the bonds cancelled and the property sold to a third party. The surety contended that once the bonds were cancelled the debt was no longer secured by a mortgage bond, and the bank could therefore not rely on the 30-year period of prescription applicable to mortgage debts. The question raised was thus whether the cancellation of a mortgage bond, after the debt has become due and prescription has begun to run, has the effect of changing the prescription period of the debt from 30 years to 3 years.

The Judgment can be viewed here.

FACTS

Mr Botha concluded a home loan agreement with Standard Bank in November 2008. He was the principal debtor. In terms of clause 14, the loan grant was conditional on the registration of a mortgage bond over the property in the bank's favour; and also on obtaining a suretyship from Mr Botha's wife.

Mr Botha subsequently registered three mortgage bonds over the property in favour of the bank to secure the loan and his indebtedness to the bank. Mrs Botha duly bound herself in favour of the bank as surety and co-principal debtor.

In November 2011 Mr Botha's estate was finally sequestrated and trustees appointed to administer it. The bank sought to recover the full outstanding balance then owing to it from Botha's insolvent estate. In September 2012, the bank proved its claim against the estate in an amount of some R 2,3 million. The principal debt, and thus also the surety's debt, then became due and prescription began to run against the debt as contemplated by section 12(1) of the Prescription Act 68 of 1969 (the Act). (*According to section 12(1) and (2), prescription will run as soon as a debt is due. A debt is due once the creditor can identify the debtor and the facts from which the debt arises or until the creditor becomes aware of the existence of the debt.)* But, since the principal debt was the object of the bank's claim in the principal debtor's insolvent estate, it constituted an impediment (interruption) to the continued running of prescription in terms of section 13(1)(g). (*In terms of this section, if a debt is the object of a claim filed against a company in liquidation, the relevant period of prescription would be completed before or on, or within one year after, the date on which the relevant impediment has ceased to exist. An impediment contemplated here ceases to exist when the filed claim is rejected or, if it is accepted, when the final liquidation and distribution account is confirmed by the Master.*) It is common cause that in the present matter the impediment ceased to exist on 26 January 2015 when the Master accepted the trustees' final liquidation account. Consequently, prescription then began running again.

The property was sold in 2012 to a third party and the bonds cancelled. Only part of the bank's claim was paid and it instituted proceedings against Mrs Botha, as surety, for the shortfall. Mrs Botha defended the matter and contended in the main that the principal debt had become prescribed after three years in accordance with section 11(d) of the Act. This was because, so the argument went, once the bonds were cancelled the debt was no longer secured by a mortgage bond, and the bank could therefore not rely on the 30-year period of prescription applicable to such debts in terms of section 11(a)(i) of the Act. The bank, on the other hand, maintained that the cancellation of the bonds did not change the character of the debt, since it remained a debt secured by a mortgage bond as contemplated in section 11(a)(i).

The Court *a quo* upheld the bank's contention, but granted Mrs Botha leave to appeal to this Court.

HELD

Did the cancellation of the bonds change the prescription period applicable to the debt from 30 years to 3 years?

- Our courts have determined that the prescription period applicable to a debt secured by a mortgage bond is fixed at the date on which the debt becomes due and does not alter its character merely because the bond is subsequently cancelled.

- However, recently in *Investec Bank v Erf 436 Elandspoort (Pty) Limited & others* it was observed that the weight of academic authority suggests that if the bond is cancelled before the debt is settled and the security ceases to exist, the debt is no longer secured and the prescription period then changes to three years, as it is with any unsecured debt. That Court also accepted that the loss of security through the cancellation of the bond may have a bearing on the prescription period applicable to a debt that was initially secured by the bond.

- In the Court *a quo*, Mrs Botha relied on *Investec* for her contention that the cancellation of the bonds and sale of the property on 8 November 2012 altered the prescription period from 30 to 3 years. The argument was rejected by the Court *a quo* which considered itself bound to the 1953 case of *Oliff v Minnie*. Here the latter had passed a second mortgage bond in favour of the bank to secure a debt payable on 1 September 1931. In December 1933, the holder of the first bond sold the bonded property in execution, but the proceeds from the sale were insufficient to reduce the indebtedness on the second bond. The property was transferred to the new purchaser without any encumbrances. The bank (holder of the second mortgage bond), however, issued summons on the second bond claiming the shortfall, only in September 1951, 20 years later. *Oliff* (initially successfully) claimed that the debt had become prescribed, under the statute then applicable, eight years after the debt became due. This was reversed on appeal where the Court noted that, starting from the premise that prescription began running when the right of action on the mortgage bond accrued on 1 September 1931, the (second) bond did not cease to be one just because it had become valueless as security. It reasoned that the class of written instrument upon which the action was founded determines the prescription period that is applicable to it. There further was no warrant for suggesting that its classification should alter in mid-stream if the subject matter of the obligation perishes. A mortgage bond that had become valueless as security therefore retained its classification and character despite its demise because the prescription law was not concerned with security.

Application to present matter

- Under the Prescription Act, different prescription periods are statutorily specified on the basis of the type of debt. This is also how the commencement and duration of prescription periods was treated in *Oliff*, under the provision applicable there.

- Prescription periods applicable to debts secured by mortgage bonds run from the date the right of action accrues and the debt is due. Once fixed, the period is immutable and unaffected by the subsequent cancellation of the bond. Put differently, it is the classification of the debt which conclusively determines the period of prescription, not the fate of the security.

The effect of Investec

- The *obiter* in Investec could not apply to the present matter.

- The true position is that it is only when the right of action accrues and the debt is due that the prescription period is determined. And once determined, the period is fixed and immutable; it is not alterable retroactively through the subsequent cancellation of the bond.

- If Botha's submission that the cancellation of the security altered the prescription period were to be upheld, it would mean that the period applicable to the secured debt may be altered retroactively in mid-stream, after prescription has begun to run against the debt. The same debt would then be governed by two different prescription periods. The anomalous consequence would be that where three years have already run against a 30-year debt then, in the absence of any delay or interruption, the debt would become prescribed immediately, thus leaving the creditor remediless through no dilatoriness on its part. This undermines the purpose of the Act, which designates categories of debt according to classes of written instrument and ascribes particular prescription periods to them in order to ensure legal certainty.

- It follows that the Court *a quo* correctly held that it was bound by *Oliff*: Section 10 of the Act says that the debt is extinguished by prescription after the lapse of the period that applies to it. Section 11 fixes the period of prescription for a debt secured by mortgage bond at 30 years and section 12(1) provides that prescription commences running as soon as the debt is due. Thus read, the Act requires a debt to be classified as a debt secured by a bond when it is due – not when the bond is registered – because that is when prescription begins to run. This was also the law applicable in *Oliff*.

CONCLUSION

The appeal accordingly failed.