THE SUPREME COURT OF APPEAL
REPUBLIC OF SOUTH AFRICA

JUDGMENT

REPORTABLE
CASE NO: 614/2006

In the matter between

KAREN HARRIET ELEY (formerly MEMMEL) **APPELLANT**

and

LYNN & MAIN INC **RESPONDENT**

CORAM: **MTHIYANE, LEWIS, PONNAN JJA, HURT AND KGOMO AJJA**

HEARD: **2 NOVEMBER 2007**
DELIVERED: **22 NOVEMBER 2007**

Summary: **Whether the claim against a surety in respect of a debt where judgment has been given against a principal debtor prescribes after three years as contemplated in s 11(d) of the Prescription Act 68 of 1969, or after 30 years as contemplated in s 11(a)(ii) of the Act.**

Neutral Citation: **This judgment may be referred to as *KH Eley v Lynn & Main Inc* [2007] SCA 142 (RSA).**

MTHIYANE JA

MTHIYANE JA:

[1] Section 11(a)(ii) of the Prescription Act 68 of 1969 ('the Act') provides that the period of prescription shall be thirty years in respect of 'any judgment debt' and in terms of s 11(d), three years in respect of 'any other debt'. In terms of s 15(4) of the Act 'prescription shall commence to run afresh on the day on which the judgment of the court becomes executable'. This appeal is concerned with the question whether the claim against a surety who has bound herself as surety and co-principal debtor in respect of a debt which was confirmed and reinforced by a judgment against the principal debtor, became prescribed after three years or after 30 years as contemplated in s 11(a)(ii) of the Act.

[2] The appeal is against the order of Goldstein J in the Johannesburg High Court in terms of which he dismissed an application by the appellant for the rescission of a default judgment. The appellant as surety had raised a defence that the claim against her had become prescribed after three years, notwithstanding that a judgment had been obtained against the principal debtor.

[3] The salient features of the history of the matter are set out in the appellant's affidavit in support of her application for rescission. On 29 February 1996 the appellant executed a deed of suretyship in terms of which she bound herself as surety and co-principal debtor *in solidum* for the repayment of 'all or any sum or sums of money which the debtor may now or from time to time hereafter owe or be indebted to the bank, its successors or assigns . . . whether such indebtedness arises from money already advanced or hereafter to be advanced . . . or otherwise howsoever

. . .'. The bank referred to in the deed of suretyship is Nedbank Limited (later known as Nedcor Bank Limited). The deed of suretyship was executed to provide the bank with collateral security for the amounts advanced or to be advanced to Help Seat It Southern Africa (Pty) Ltd (the principal debtor) on overdraft. The appellant had, as director of the principal debtor, signed an application form on the principal debtor's behalf on 9 September 1994, for the opening of a cheque account with Nedbank Limited ('the bank'). When she was asked by the bank to provide security she readily acceded to their request. As the appellant put it in her supporting affidavit:

'An overdraft was required and Nedbank Limited approached me for a suretyship which I gave to them.'

[4] A year after executing the deed of suretyship the appellant experienced marital problems. In 1997 she left her husband and her chosen *domicilium citandi* as stated in the suretyship deed, was divorced and remarried. In the meantime the principal debtor fell into debt and apparently failed to meet its financial obligations to the bank. The appellant blames her former husband for the financial woes of the principal debtor. She emphatically declares that it was he who 'caused it to suffer financial hardship.' Nothing, in my view, turns on this.

[5] As was to be expected the bank sued the principal debtor for the recovery of the moneys it had advanced and on 21 May 2001 it obtained judgment by default, for:

'1. Payment of the sum of R157 685,55

2. Interest on R157 685,55 to date of payment at the rate of 15.50 per centum per year from 1 March 2000.

3. Costs in the amount of R650,00 plus sheriff's fees in the sum of R117,07.'

[6] On 25 March 2003 the bank ceded all right, title and interest in and to the book debts to the respondent with effect from 2 January 2003.

[7] The respondent, as cessionary, thereafter instituted action against the appellant as surety and co-principal debtor *in solidum*, for the repayment of the amount then due and owing by the principal debtor. Summons was served at the appellant's chosen *domicilium citandi* on 14 September 2005. As no appearance to defend was delivered, the respondent duly took judgment by default on 18 October 2005, for:

'1. Payment of the sum of R157 685,55

2. Interest on R157 685,55 to date of payment at the rate of 15,50 per centum per year from 1st March 2000

3. Costs of suit on the scale as between attorney and client to be taxed.'

[8] Subsequently, the appellant launched an application for rescission of the default judgment. In her supporting affidavit she alleged that she had been unaware that summons had been issued against her as she had left her *domicilium* by the time summons was served. She averred that if she had been aware of the true situation she 'would have entered an appearance to defend immediately.' She denied that she was liable to the bank and premised her defence on two points. First, she contended that the respondent's claim had become prescribed. This because judgment against the principal debtor was obtained on 21 May 2001 and summons was served only on 14 September 2005, more than three years later. Second, she denied that there had been a cession of the claim based on the judgment debt by the bank.

[9] When the matter came before Goldstein J the second point was not argued for reasons that are not readily apparent; the parties requested the

learned judge 'to decide finally whether the [appellant's] defence of prescription is valid, and depending on [his] decision on this point to grant or dismiss the application.' The application for rescission was dismissed with costs. The judge followed and applied *Jans v Nedcor Bank Ltd.*[1] He held that the prescriptive period in respect of the claim against the appellant was the same as that in respect of the claim against the principal debtor, that is 30 years, and granted the appellant leave to appeal to this court.

[10] The main issue in the appeal is whether the respondent's claim against the appellant has become prescribed. In terms of s 15(4), read with s 11(a)(ii), the period of prescription of the debt owed by the principal debtor to Nedbank Limited (the judgment creditor) was thirty years from the date of judgment on 21 May 2001. The question debated in the court below and in the appeal before us was whether the claim against the appellant as surety who bound herself as surety and co-principal debtor would prescribe after the same period or after the lesser period of three years referred to in s 11(d). In *Rand Bank Limited v De Jager*[2] the court held that in spite of a judgment against the principal debtor the period of prescription applicable to the claim against the surety remained three years and is therefore considerably shorter than that applicable to the claim against the principal debtor.

[11] In *Jans v Nedcor Bank Ltd*, Scott JA undertook an exhaustive analysis of the fundamental principles applicable to suretyship under South African law. The earlier cases of *Cronin v Meerholz*[3] and *Union*

[1] 2003 (6) SA 646 (SCA).
[2] 1982 (3) SA 418 (C).
[3] 1920 TPD 403.

Government v Van der Merwe,[4] which were not followed in *Randbank Limited v De Jager*, were fully discussed and referred to with apparent approval in *Jans*. The court held that *Randbank* was incorrectly decided. The common thread that runs through these cases (other than *Randbank*) is that the obligation of the principal debtor and the surety relate to the same debt. The thrust of the dicta is, therefore, that if the principal debt is kept alive by a judgment, the surety's accessory obligation by common law continues to exist.

[12] The appellant sought to distinguish *Jans v Nedcor Bank Ltd* from the present matter on the basis that *Jans* was concerned with the interruption or delay in the running of prescription and not directly with the issue whether a judgment against the principal debtor results in prescription against a surety being extended in terms of s 11(a)(ii) of the Act. Although counsel does not say so in so many words, in my view the argument advanced on the appellant's behalf coincides with the approach adopted in *Rand Bank v De Jager*, where it was held that in spite of the judgment against the principal debtor, the period of prescription in favour of the surety remained three years. That case has, as I have said, been overruled.

[13] The distinction which the appellant seeks to draw is illusory. *Jans v Nedcor Bank Ltd* sets out the fundamental principles applicable to suretyship contracts in general and is not confined to the effect of the interruption of the running of prescription against the principal debtor. This is particularly clear from the judgment where, after discussing the nature of the contract of suretyship, Scott JA makes the following

[4] 1921 TPD 318.

observation, relevant to the question we are concerned with in the present matter:[5]

'The very existence of the debt is therefore dependent upon the existence of the suretyship while the object and function of the latter is, of course, to ensure proper payment of the former. To permit the claim against the surety in these circumstances to prescribe before the claim against the principal debtor, in the words of Wessels JP in *Union Government v Van der Merwe* (*supra* at 320), would be "almost subversive of the whole contract of suretyship."'

[14] In the appeal before us it was not argued that *Jans v Nedcor Bank Ltd* was wrongly decided. There is no reason why it should not be followed. Accordingly the contention that the claim against the appellant had become prescribed after three years falls to be rejected.

[15] The judgment in *Bulsara v Jordan & Co Ltd*[6] also relied on by the appellant does not assist her. In *Bulsara*, judgment was given against the principal debtor on 23 May 1989 after summons had been served on him on 20 March 1987. Summons was served on *Bulsara* (as surety) on 28 May 1990. In construing the deed of suretyship the court held that it included the judgment debt against the principal debtor as the subject of the suretyship. In any event the summons on *Bulsara* was served well within the three-year period of prescription referred to in s 11(d). The court in *Bulsara* expressly refrained from considering the correctness of the decision in *Randbank*, but there is nothing in the judgment that is inconsistent with the principles laid down in *Jans*. And there is nothing in the deed of suretyship at issue in this matter that warrants a different construction.

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[5] Para 30.
[6] 1996 (1) SA 805 (A).

[16] I turn to the second point which was raised on the pleadings but not argued in the court *a quo*. Counsel for the appellant submitted that the cession of the claim based on the judgment debt was not apparent from the deed of cession annexed to the summons. The argument is without merit. In terms of the deed of cession Nedbank Limited ceded to the respondent 'all right, title and interest in and to the book debts and *any judgment in respect of any such book debts* . . . . For purposes of the foregoing, 'book debts' means collectively the book debts owed to Nedbank by various debtors, a list of which is annexed hereto, and includes all claims . . . against any *third party* (whether or not such third party is jointly or severally liable with such debtors) for, or in relation to, the debts comprising such book debt . . . and *includes all security provided to Nedbank*'. . . . (My emphasis.) The principal debtor's name (Help Seat It Southern Africa (Pty) Ltd) appears on the schedule to the cession. The said schedule was annexed to the particulars of claim.

[17] The case pleaded is that Nedbank ceded to the respondent its claim against Help Seat It Southern Africa (Pty) Ltd (the principal debtor) including any judgment in respect thereof and all security provided to Nedbank in respect thereof. The appellant bound herself to Nedbank Limited as surety and co-principal debtor, in consequence of which the respondent was entitled to claim the debt from the appellant. It has never been suggested that the judgment against the principal debtor related to something other than the banking facilities which the appellant applied for as director of the principal debtor. The wording of the suretyship deed expressly covers a judgment against the principal debtor. I agree with counsel for the respondent that it would be artificial to hold that the suretyship covers the book debt, but not a judgment obtained in respect of

the book debt. It follows that the argument that the claim was not properly pleaded must also fail.

[18] Accordingly the appeal is dismissed with costs.

KK MTHIYANE
JUDGE OF APPEAL

CONCUR:

LEWIS JA
PONNAN JA
HURT AJA
KGOMO AJA