

Prescription of Debt: Tacit Acknowledgement of Liability

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INTRODUCTION

Determining whether a matter has in fact prescribed in South African law can often be a rather complicated question. Prescription can range from anywhere between 3 to 30 years, as set out the Prescription Act 69 of 1969 (the "Act").

THE PRESCRIPTION ACT

Section 11(a) and (b) of the Act deals with prescription of 30- and 15-year periods. These periods apply inter alia to circumstances where the debt is secured by a mortgage bond, a judgment debt, debt resulting from taxation imposed or levied by the law, and any debt owed to the State in regard to the rights to mine minerals or other substances or from a loan or advance on money, or a sale or lease of land by the State to the debtor.

Section 11(d) states that the prescription period for any other debt, is a period of 3 years.

Prescription can be interrupted either through, inter alia, an acknowledgement of liability, as set out in section 14 of the Act, which provides that there must be an "express or tacit acknowledgement of liability by the debtor". When prescription is interrupted in such an instance, it will start to run anew again from the time of the acknowledgement of liability.

CASE STUDY

The question of what constitutes a tacit acknowledgement of liability of debt arose in the case of *Investec Bank Limited v Erf 436 Elandsport (Pty) Ltd and Others 2020 ZASCA 104*.

In this matter, Investec entered into a loan agreement with Erf 436 (the "**2000 Loan Agreement**"). The 2000 Loan Agreement 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 ("**SARCC**") as lessor. This was a tripartite agreement between Erf 436, Investec and SARCC.2011.

The 2000 Loan Agreement included that Investec could replace Erf 436 with another tenant at any point should it default on its obligations. Erf 436 defaulted two and a half years after the 2000 Loan Agreement was concluded and the lease was cancelled through an order of court on 21 August 2002.

Investec sent a demand to Erf 436 on 10 September 2002 for payment of the full outstanding amount of the loan within seven days. It was deemed that prescription in terms of the 2000 Loan Agreement had started running on the day the payment was due, being 17 September 2002.

Investec exercised its option and concluded a new lease with SARCC, however Erf 436 continued to manage the property and collect rental from sub-tenants. These rental amounts were accredited to Erf 436's loan with Investec. Thereafter, Investec and Erf 436 concluded a second agreement (the "**2003 Lease Agreement**"), in which Investec would take over managing the property and collecting rent while continuing to allocate the rental amounts to the repayment of the 2000 Loan Agreement.

On 1 July 2009, Investec sold its rights as lessee to another company and Erf 436's loan account was accredited with R2 999 459.51, leaving a remainder of R3 979 184.50 due on the loan. Erf 436 disputed this amount and on 21 January 2011, Investec sought to claim the outstanding money and the sureties from Erf 436 in a summons. The summons was met with a special plea of prescription where the parties then disputed whether the period was 30 years or three years for this specific debt claim. Investec argued in its replication that, as continuous payments were made to reduce Erf 436's loan and various letters were sent from the entity over the years, it collectively constituted an acknowledgment of debt. They further argued that, while the original prescription started running in September of 2002, it was interrupted every time Erf 436 made a payment or sent a letter, as it constituted an express or tacit acknowledgment of liability for the debt amount. Investec was further able to adduce evidence that on more than one occasion, Erf 436 had admitted to being liable for the loan and the amount therein.

The court a quo ruled in favour of Erf 436 that the claim had prescribed, however, Investec was given leave to appeal.

In the Supreme Court of Appeal's deliberation, they made reference to the case of Cape Town Municipality v Allie NO, which set out that an acknowledgement of liability need not be "a fresh undertaking to discharge the debt", that a debtor's conduct should be as deeply regarded as their words, that determining tacit acknowledgement of liability is an objective test, that silence where there is a duty to speak can be construed as tacit acknowledgment of liability, and that the liability must still subsist. The court undertook to look at the actions of Erf 436 wholistically and in their proper context. This revealed that each payment of rental from the sub-tenants to the loan account was a series of tactic acknowledgments of liability. Each payment restarted the prescription period and as the last payment was made on 30 September 2003, the period of prescription would have therefore ended on 30 September 2006. The letters on behalf of Erf 436 that were sent to Investec on 7 May 2003 and 13 June 2003 also constituted express acknowledgement of debt. This would have taken prescription to 2006 as well. However, on 29 March 2006, an amount of R1 350 00 was credited to Erf 436's loan account from Erf 225 Edenburg (Pty) Ltd, a second company of Erf 436's director. Investec and Erf 436 agreed that Erf 225 Edenburg would pay the R1 350 00 into Erf 436's bond to contribute towards its debt. The court found this to be a tacit acknowledgment of liability and thus prescription was interrupted and restarted, extending to 29 March 2009. On 21 May 2007, the director of Erf 436 queried the mechanics of the monthly payments, but not the amount itself or its liability towards Investec, constituting a tacit acknowledgment of liability. This restarted the prescription period, which would run until 21 May 2010. A final payment was made on 17 July 2008, interrupting prescription again and running until 17 July 2011.

COURT HELD

Investec had issued its summons on 21 January 2011, months before the claim would prescribe on 17 July 2011 and thus the appeal was upheld with costs on the basis that the claim had not prescribed due to Erf 436's continuous and various tactic and express acknowledgments of debt.

CONCLUSION

Through the above case, it is clear that payment of a debt amount constitutes tactic acknowledgements of liability as well as correspondence regarding the debt, and will restart the prescription period with each payment and correspondence.



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