**THE SUPREME COURT OF APPEAL OF SOUTH AFRICA**

**JUDGMENT**

**Reportable**
Case No: 187/2015

In the matter between:

**THE STANDARD BANK OF SOUTH AFRICA LTD** **APPELLANT**

**and**

**MIRACLE MILE INVESTMENTS 67 (PTY) LTD** **FIRST RESPONDENT**

**PRESENT PERFECT INVESTMENTS 116 (PTY) LTD** **SECOND RESPONDENT**

**Neutral citation:** *Standard Bank v Miracle Mile Investments* (187/2015) ZASCA 91 (1 June 2016)

**Coram:** Leach, Saldulker, Swain and Mbha JJA and Baartman AJA

**Heard:** 13 May 2016

**Delivered:** 1 June 2016

**Summary**: Prescription – extinctive – claim based on agreement providing for a loan repayable in instalments and containing acceleration clause – only enforceable where creditor has made election to cancel agreement and claim full amount – prescription accordingly commences running upon election being made.

## ORDER

**On appeal from:** Gauteng Local Division of the High Court, Johannesburg (Gaibie AJ sitting as court of first instance):

1. The appeal is upheld with costs, such costs to include the employment of two counsel.
2. The order of the court a quo is set aside and is substituted with the following:
'The application is dismissed with costs.'

## JUDGMENT

**Mbha JA (Leach, Saldulker, and Swain JJA and Baartman AJA concurring):**

[1] This appeal, with the leave of the court a quo, is against the judgment of the Gauteng Local Division, Johannesburg (Gaibie AJ) in which it held that the respondent companies, Miracle Mile Investments 67 (Pty) Ltd (Miracle) and Present Perfect Investments 116 (Pty) Ltd (Present), the first and second respondent respectively, were entitled to cancel mortgage bonds registered in favour of the appellant, Standard Bank of South Africa Ltd, over several of the respondents' immovable properties without payment to the bank on the ground that the bank's claim had prescribed. The debt arose from a facility advanced by the bank to Mr Nicolas Chrysostomos

Papachrysostomou (Nicolas) as principal debtor, for which the respondents stood surety.

[2] The appeal raises an important issue of principle concerning when prescription commences to run in an agreement containing an acceleration clause that entitles the creditor bank to claim the whole outstanding amount payable, upon the occurrence of a breach by the principal debtor. The crux of the dispute is when the debt becomes 'due' in terms of s 12(1) of the Prescription Act 68 of 1969 (the Act).[1] Put differently, is the debt due when the principal debtor breaches the obligation to pay the monthly instalment, or is it due when the creditor elects to enforce the acceleration clause, in order to render the whole amount payable?

[3] The respondents contend that prescription commenced to run and that the debt became 'due' when the principal debtor breached his obligation to pay the monthly instalment. On the other hand, Standard Bank avers that since it did not elect to give notice to accelerate payment of the outstanding balance, and until it did, prescription did not begin to run on the full amount.

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[1] Making provision for 'when prescription begins to run', s 12 of the Act in its entirety provides:
'(1) Subject to the provisions of subsections (2) and (3), prescription shall commence to run as soon as the debt is *due*.
(2) If the debtor wilfully prevents the creditor from coming to know of the existence of the debt, prescription shall not commence to run until the creditor becomes aware of the existence of the debt.
(3) A debt shall not be deemed to be due until the creditor has knowledge of the identity of the debtor and of the facts from which the debt arises: Provided that a creditor shall be deemed to have such knowledge if he could have acquired it by exercising reasonable care.' (My emphasis.)

[4] Standard Bank also avers that it is entitled to rely on the 30-year prescription period in respect of a debt secured by a mortgage bond in terms of s 11 of the Act;[2] as well as the interruption of prescription by an acknowledgment of liability by Nicolas in terms of s 14 of the Act.[3]

[5] The relevant background facts giving rise to the dispute can be summarised as follows. In August 2005 Standard Bank and Nicolas entered into a written agreement, the terms of which were incorporated in a letter of grant, a terms and conditions agreement and the bonds[4] – whereby he was granted a line of credit styled a 'Liberator facility' (the facility)[5] for a maximum amount of R13 984 600, which was repayable over a period of 240 months. The first monthly instalment was due 30 days after the first use of the facility. As security expressly required in terms of the facility, the respondents

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[2] Section 11 of the Act provides the following:
'**11. Periods of prescription of debts**
The periods of prescription of debts shall be the following:
*(a)* thirty years in respect of –
(i) any debt secured by mortgage bond;
(ii) any judgment debt;
(iii) any debt in respect of any taxation imposed or levied by or under any law;
(iv) any debt owed to the State in respect of any share of the profits, royalties or any similar consideration payable in respect of the right to mine minerals or other substances;
*(b)* fifteen years in respect of any debt owed to the State and arising out of an advance or loan of money or a sale or lease of land by the State to the debtor, unless a longer period applies in respect of the debt in question in terms of paragraph *(a)*;
*(c)* six years in respect of a debt arising from a bill of exchange or other negotiable instrument or from a notarial contract, unless a longer period applies in respect of the debt in question in terms of paragraph *(a)* or *(b)*;
*(d)* save where an Act of Parliament provides otherwise, three years in respect of any other debt.'

[3] Section 14(1) of the Act provides that the running of prescription shall be interrupted by an express or tacit acknowledgement of liability by the debtor. Section 14(2) provides that if prescription is interrupted in terms of subsec (1), prescription shall commence to run afresh from the date on which the interruption takes place, or from any date thereafter the parties agree to postpone the due date to.

[4] Clause 1.1 of the Liberator facility agreement provides that the:
'agreement is the Liberator facility application, the letter of grant, including [the] terms and conditions . . . and the bond[s] where applicable'.

[5] This has been described as an overdraft facility with a high credit limit for the bank's high end private clients, which is secured to the bank's satisfaction. It is repayable in monthly instalments computed over an extended and predetermined period of 240 months, the terms of which are incorporated the written agreement(s) concluded between the bank and Nicolas as the principal debtor.

executed written deeds of suretyship in favour of Standard Bank in terms of which they bound themselves as sureties and co-principal debtors with Nicolas in *solidum* for his indebtedness to the bank in respect of the facility. The respondents furthermore caused mortgage bonds (the bonds) to be registered over certain of their immovable properties in favour of Standard Bank as part of the collateral required in terms of the facility.

[6] It was an express term of the agreement that Standard Bank could convert the facility to one repayable on demand, inter alia, if Nicolas failed to pay any instalment due and not remedy this default within seven days of written notice having been given to him by the bank. In that event (as well as other events of default as specified therein), Standard Bank would have the right, without prejudice to any other rights or remedies available to it, to terminate the facility and claim immediate payment of the outstanding balance by giving a further written notice.[6]

[7] Pursuant to the conclusion of the facility agreement, the deeds of suretyship were executed by the respondents and the bonds were registered against their

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[6] The relevant parts of the agreement provide as follows:
'**Default and Termination**
12.1 We will not be obliged to make any advance or re-advance under the facility and/or *we may convert the facility to one repayable on demand* and/or we may revise any of the terms and conditions of the facility and/or increase the interest rate charged *if any of the following events occur*:
12.1.1 *you breach any of the terms and conditions of this facility* or any other agreement between us *and you fail to remedy this breach within 7 days of written notice having been given to you to do so*;
12.1.2 *you fail to pay any instalment due in terms of this agreement and you do not remedy this failure within 7 days of written notice having been given to you to do so*;
. . .
12.2 *In any of the events envisaged in 12.1, we shall have the right without prejudiced to any other rights or remedies available to us, to terminate the facility and claim immediate payment of the outstanding balance by giving written notice. It may be effective immediately or from a date stated in the notice. If the facility is cancelled any amounts owing to us become payable*:
12.2.1 *immediately, if stated in the notice*, *or*
12.2.2 *on the date stated in the notice*.' (My emphasis.)

properties in favour of Standard Bank. Thereafter Nicolas drew on the facility, but subsequently defaulted on his monthly instalment repayments when his debit order payments were reversed due to him having insufficient funds to meet his monthly obligations.

[8] On 12 August 2008, Standard Bank addressed a letter to Nicolas in terms of s 129 of the National Credit Act 34 of 2005 (the NCA). He was advised that he had not met his obligations in respect of the agreement and that, in order to bring his account up to date, he had to pay the total arrears of R671 072.88 which were due immediately. Of critical importance is that this notice did not contain any intimation by the bank of an election to accelerate the debt to claim the full amount owing. Nicolas made no payments to Standard Bank after 21 October 2008, at which date the amount owed was R 7 432 443.

[9] Nicolas' estate was provisionally sequestrated on 7 February 2012, which order was made final on 23 April 2012. In terms of the deeds of suretyship executed by the respondents, the sequestration had no bearing upon their liability and the continued enforceability of the bonds. On 27 August 2013, Standard Bank instituted action against the respondents, inter alia, to recover the debt due and declare the properties mortgaged executable. That action is still pending.

[10] The respondents in the interim launched an application during June 2013, in which they sought an order directing Standard Bank to consent in writing to the

cancellation of the bonds, notwithstanding that the debt they secured remained unpaid. The basis of the application was that Standard Bank's claim had prescribed on 22 October 2011 as a result of Nicolas' failure to pay any instalments after the last payment on 21 October 2008, which had interrupted the running of prescription. They contended that as there was no longer any principal debt for the bonds to secure, they were no longer liable as sureties.

[11] Standard Bank opposed the application, contending that its claim against Nicolas had not prescribed. Its notice in terms of s 129 of the NCA dated 12 August 2008, had merely called upon Nicolas to bring the arrear instalments up to date and accordingly the full indebtedness under the facility was not due, owing or payable. In the circumstances prescription had not commenced running.

[12] The court a quo recognised that, whether or not the debt incurred by Nicolas in terms of the facility had prescribed, depended on when the debt had become 'due', within the meaning of that word in s 12(1) of the Act.[7] If the debt became due from the date of Nicolas' default, namely on 21 October 2008, prescription would have commenced running from that date and the Bank's claim would have prescribed on 22 October 2011, prior to Standard Bank's institution of the action for the recovery of the debt against the sureties and Nicolas. Having recognised that the phrase 'debt is due' in s 12(1) is not defined in the Act, the court a quo examined the jurisprudence dealing with the interpretation of the phrase. Relying on *Hamilton Plase (Edms) Bpk v Stadler* 1977 (3) SA 361 (NC) and *Orton v Barhouch* 1973 (2) SA 565 (D), it held that if

[7] Which provides that 'prescription shall commence to run as soon as the debt is due'.

Standard Bank was entitled to accelerate the debt and claim the full amount but failed to do so, this did not prevent prescription from running. Prescription ran from the date that Standard Bank acquired the right to enforce payment of the full amount even though it elected not to do so.

[13] As Professor Loubser[8] has pointed out, *Hamilton* and *Orton* were decided under s 5(1)(*d*) of the Prescription Act 18 of 1943 (the old Act), which provided that prescription commenced running when the right of action first *accrued* and not when it became *due*. These cases held that prescription in respect of the creditor's right of action to claim the full outstanding amount of the debt, began to run immediately upon the default of the debtor, when the creditor's right of action accrued and not when he elected to enforce it. In *Orton* it was held that prescription ran from when the creditor could have brought his action. Because he could have done so on the first default, prescription ran from that date. The cause of action arose at the time when the debt could first have been recovered by action. In *Hamilton*, the same view was adopted. The creditor was not faced with a choice between irreconcilable causes of action. The only cause of action he possessed was to claim the capital amount owed to him. His choice was simply when to take action, either at the time when the breach occurs, or to wait for a later stage. This was a choice available to any party to a contract and if he waited too long he ran the risk of the debt becoming prescribed.

[14] The ratio for these decisions was the policy consideration that a creditor should not be able to determine, of his own accord, when prescription will begin to run by

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[8] M M Loubser *Extinctive Prescription* (1996) at 71-.

deferring his election to enforce an acceleration clause, contained in an instalment contract. This principle was relied upon by the court a quo in stating that if Standard Bank's argument was accepted, it could effectively delay prescription from running.

[15] However, as Professor Loubser emphasizes, contrary to the provisions of the old Act, s 12(1) of the current Act provides that prescription begins to run when the debt becomes 'due' and not when it first accrued. Thus where an acceleration clause affords the creditor the right of election to enforce the clause upon default by the debtor, the debt in terms of the acceleration clause only becomes due when the creditor has elected to enforce the clause. Before an election by the creditor, prescription does not begin to run.[9] The policy consideration that a creditor should not be able to determine of his own accord when prescription will begin to run against him, by deferring his election to enforce an acceleration clause, cannot override the clear provisions of the Act. Whilst the creditor holds in abeyance his decision whether or not to enforce an acceleration clause, prescription will continue to run in respect of the individual arrear instalments, payable by the debtor. The creditor's election to enforce the acceleration clause has the effect of transforming the existing instalment debts, into a single debt for the full amount outstanding under the contract. If a creditor elects not to enforce the acceleration clause, he is entitled to wait until all the individual instalments have fallen due before instituting action, albeit at the risk that prescription may then have taken effect in respect of earlier instalments.

[9] Ibid.

[16] Professor Loubser points out that depending upon the terms of the contract an acceleration clause may automatically come into effect upon default by the debtor, without any election by the creditor. This would be the case where the creditor has in advance made an election in terms of the contract to enforce the acceleration clause. Because an acceleration clause is intended to operate solely for the benefit of the creditor, it is imperative that the contract should clearly indicate the parties' intention that the acceleration clause shall come into operation automatically if that is to be a term of their contract.

[17] Christie supports the views of Professor Loubser and explains the position as follows:

'If the contract contains an acceleration clause making the entire balance of the debt payable on the debtor's failure to pay any one instalment, it will only be necessary to examine the clause carefully in order to see whether anything in addition to the debtor's default, such as a written demand, is required to bring it into operation. The normal acceleration clause does not itself make the balance of the debt payable but gives the creditor the option to demand it, so prescription runs from his demand, not from the debtor's failure to pay the instalments.'[10]

[18] Similarly, Joubert points out that:

'Where the contract contains an acceleration clause entitling the creditor to payment in full if a debtor falls in arrears with the payment of one instalment, then prescription in respect of the balance, commences as soon as the balance can be claimed. Where the

[10] R H Christie & G B Bradfield *Christie's The law of contract in South Africa* 6 ed (2011) at 436.

clause allows the creditor an election, it commences when he exercises his right to claim payment in full; where the clause operates automatically prescription commences as soon as the debtor falls in arrears'.[11]

[19] Professor McLennan[12] who was critical of the decision in *Orton* stated that the difficulty was that:

'Each instalment gives rise to a separate cause of action as and when it falls due for payment, and, obviously, prescription cannot begin to run until the particular instalment falls due for payment. The rights conferred on a creditor by an acceleration clause such as the one in the present case are surely additional to and not in substitution for the ordinary rights attaching to the debt. So, although the period of prescription in respect of the right date from the acceleration clause may begin to run as soon as the debtor is in default, this does not, it is submitted, affect the creditors' rights in respect of the instalments that are not yet due. The curious result of *Orton's* case is that an acceleration clause, which is intended entirely for the benefit of the creditor, can actually operate to its detriment. There may be many good reasons why a creditor should decide not to enforce an acceleration clause.'

[20] The effect of an election possessed by a party to a contract, on the running of prescription, was considered in the decisions of *HMBMP Properties (Pty) Ltd v King* 1981 (1) SA 906 (N) at 910-911 ─ in respect of an anticipatory breach of a contract ─ and *Big Rock v Hoffman* 1983 (1) SA 534 (T) ─ in the context of the giving of notice in terms of s 13 of the Sale of Land on Instalments Act 72 of 1971. In *HMBMP Properties*, it was held that the innocent party's cause of action for damages resulting from the

[11] D J Joubert *General principles of the law of contract* (1987) at 307.
[12] *Annual Survey of South African Law* (1973) at 66.

defaulting party's repudiation of an obligation which is to be performed by him at some future date, only accrues (ie the 'debt' of the default party only becomes *due*) when the innocent party elects to cancel the contract and to treat it as at an end.[13] Prescription, consequently, commenced to run from that date.[14] In *Big Rock v Hoffman* 1983 (1) SA 534 (T) it was held that the furnishing of a notice in terms of s 13 of the Land Instalment Act to remedy a default and a failure to comply, was a condition precedent to the seller's right to claim payment of the full balance owing under the contract. Prescription therefore only began to run after the expiry of the prescribed notice period.

[21] The cases of *Western Bank v Van Vuuren* 1980 (2) SA 438 (T), *First Consolidated Lease Incorporation (Pty) Ltd v Servic SA (Pty) Ltd & another* 1981 (4) SA 380 (W) and *Bankorp Ltd v Leipsig* 1993 (1) SA 427 (W) were all decided under the current Act. However, contrary to the views of academics, these cases affirmed the decisions taken under the old Act that prescription began to run on default by the debtor and not when the creditor elected to claim the balance outstanding. In *Western Bank* it was held that 'debt is due' meant that the debt was immediately claimable, or the debtor was under an obligation to pay the debt immediately. The legislature envisaged a debt in respect of which the claimant could institute action. By analogy with the old Act, prescription began to run from the date on which the right of action first accrued. This right accrued when the first default occurred and the right to claim the balance owing accrued when this occurred. It was held that the contract did not provide that the right to claim the balance only arose when the creditor decided to claim, but arose immediately

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[13] At 910G-H.
[14] See *Big Rock (Pty) Ltd v Hoffman* 1983 (1) SA 534 (T) at 549-550; *Nkata v Firstrand Bank Limited & others* 2014 (2) SA 412 (WCC) para 21 and paras 37-38.

on default of payment. It was held that a creditor would otherwise be able by his own conduct, to delay the running of prescription.

[22] *Servic* followed the decision in *Western Bank* holding that once the right of election arises the debt becomes due. In *Bankorp*, the reasoning in *Hamilton* was followed, namely; where the creditor is entitled to payment, the only issue is to sue for it immediately, or to sue at a later stage; and that consequently, the right to enforce payment must mark the commencement of prescription, because that is when the debt is due. Reference was however made to the attractiveness of the contrary argument that there can be no commencement of prescription until the election is made, because there was no sense in looking for the point in time when the debt is due, if the debt does not even exist.

[23] The decisions in *Orton*, *Hamilton*, *Western Bank* and *Servic*, as pointed out in *Big Rock*,[15] are all distinguishable on the basis that in none of them was the giving of notice by the creditor to remedy a default and a failure by the debtor to comply, a condition precedent to the creditor's right to claim payment of the full balance owing under the contract, as is here the case.

[24] The court a quo accordingly erred in its reliance on *Orton* and *Hamilton* which were not only decided in terms of s 5(1)(*d*) of the old Act, but in neither of them was the giving of notice to remedy a default and a failure by the other party to comply, a condition precedent to the creditor's right to claim payment of the full balance owing

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[15] At 540A-B

under the contract. In terms of the current Act, a debt must be immediately enforceable before a claim in respect of it can arise. In the normal course of events, a debt is due when it is claimable by the creditor, and as the corollary thereof, is payable by the debtor. Thus in *Deloitte Haskins & Sells Consultants (Pty) Ltd v Bowthorpe Hellerman Deutsch (Pty) Ltd* [1990] ZASCA 136; 1991 (1) SA 525 (A) at 532G-H, the court held that for prescription to commence running,

'there has to be a debt immediately claimable by the creditor or, stated in another way, there has to be a debt in respect of which the debtor is under an obligation to perform immediately'.

(See also *The Master v IL Back and Co Ltd* 1993 (1) SA 986 (A) at 1004F-H.) In *Truter & another v Deysel* [2006] ZASCA 16; 2006 (4) SA 168 SCA para 16,[16] Van Heerden JA said that a debt is due when the creditor acquires a complete cause of action for the recovery of the debt, ie when the entire set of facts which the creditor must prove in order to succeed with his or her claim against the debtor is in place or, in other words, when everything has happened which would entitle the creditor to institute action and to pursue his or her claim. In the present context this could only occur if and when Standard Bank elected to give the requisite notices to Nicolas.

[25] In the present case the acceleration clause in the agreement has its own procedural requisites to be satisfied before Standard Bank can claim the full balance owing. As in *Big Rock*, a condition precedent to Standard Bank's right to claim payment of the full balance owing, is the furnishing of written notice to Nicolas to remedy a failure to pay any instalment within seven days, in terms of clause 12.1.2. In the event of a

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[16] See also *Primavera Construction SA v Government, North-West Province* 2003 (3) SA 579 (BPD) at 596A-598A; and 21 *Lawsa* 2 ed (2010) para 1 to 5.

failure to make payment, Standard Bank is entitled in terms of clause 12.2 to terminate the facility and claim immediate repayment of the outstanding balance, by giving a further written notice. This notice may be effective immediately, or from a date stated in the notice. It is common cause that although notice was effectively given in terms of clause 12.1.2 by virtue of the s 129 notice in terms of the NCA to Nicolas, after he had breached his obligation on 21 October 2008, no notice in terms of clause 12.2 to claim payment of the outstanding balance was ever given to him.

[26] Compliance with the jurisdictional requirements for acceleration of the outstanding balance is not simply a procedural matter but is essential in establishing a cause of action. Hence, it is no answer for the respondents to suggest that the failure by Standard Bank to exercise the election to claim the outstanding balance, is an instance of the creditor delaying the running of prescription by its own act. As pointed out in *Bankorp*, there is no sense in looking for the point in time when the debt is due, if the debt does not even exist. It is not a case of delaying an existing claim. The creditor cannot be said to be in default, or guilty of dilatoriness, until he has made his election. The election and communication thereof in the form of the requisite notices are essential pre-conditions to create a cause of action in the first place. The election is one which Standard Bank does not have to take at all. Prescription would therefore commence to run only from the date of a notice claiming the outstanding balance in terms of clause 12.2.

[27] The balance owing on the facility, excluding the outstanding arrear payments, was not due as Standard Bank did not elect to terminate the facility and claim repayment of the outstanding balance. It therefore follows that prescription did not commence to run on the so-called 'critical date' or 'decisive date' of 21 October 2008. The finding of the court a quo in this respect was erroneous, falls to be set aside and the appeal must succeed. Before us it was agreed that the determination of this issue would be dispositive of the appeal. Accordingly, it will not be necessary to determine the additional issues raised by Standard Bank referred to in para 4 above.

[28] I accordingly make an order as follows:

1. The appeal is upheld with costs, such costs to include the employment of two counsel.

2. The order of the court a quo is set aside and is substituted with the following:

'The application is dismissed with costs.'

B H Mbha

Judge of Appeal

APPEARANCES:

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| For Appellant: | S Symon SC (with him X Stylianou) |
| Instructed by: | Ramsey Webber, Illovo |
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| | |
| For Respondents: | H B Marais SC (with him A J Venter) |
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