IN THE HIGH COURT OF SOUTH AFRICA

(WITWATERSRAND LOCAL DIVISION)

CASE N0: 22615/2005

In the matter between:

KAREN HARRIET ELEY (formerly MEMMEL) Applicant

and
LYNN & MAIN INC Respondent

JUDGMENT

GOLDSTEIN J:

[1] In this application for rescission the parties have requested me to decide finally whether the applicant's defence of prescription is valid, and depending on my decision on this point, to grant or dismiss the application.

[2] The essential facts are as follows. In 21 May 2001 Nedbank Ltd obtained a judgment by default against a company known as Help Seal It Southern Africa (Pty) Ltd for the payment of R157 685. 55 together with interest

thereon at 15,5% per annum from 1 March 2000 and costs. On 29 February 1996 the applicant had signed a written deed of suretyship, in which she bound herself, jointly and severally, as surety and co-principal debtor in solidum, for the repayment on demand of any sum which the judgment debtor might then or thereafter owe Nedbank Ltd.

[3] The respondent, as cessionary of the claim of Nedbank Ltd, instituted action against the applicant on 13 September 2005, more than three years after the judgment against the principal debtor was obtained. The question which I have to determine is whether the respondent's claim against the applicant had by that time prescribed.

[4] Section 11 of the Prescription Act, 68 of 1969, ("the Act") reads as follows:

"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 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."

[5] Section 15 of the Act, in so far as it is relevant, reads as follows:

" (1) The running of prescription shall, subject to the provisions of subsection (2), be interpreted by the service on the debtor on any process whereby the creditor claims payment of the debt.

(2) Unless the debtor acknowledge liability, the interruption of prescription in terms of section 1 shall lapse, and the running of prescription shall not be deemed to have been interrupted, if the creditor does not successfully prosecute his claim under the process in question to final judgment or if he does so prosecute his claim but abandons the judgment or the judgment is set aside.
(3)…..
(4) If the running of prescription is interrupted as contemplated in subsection (1) and the creditor successfully prosecutes his claim under the process in question to final judgment and the interruption does not lapse in terms of subsection (2), prescription shall commence to run afresh on the day on which the judgment of the court becomes executable.
(5) …..
(6) ….."

[6] In terms of section 15(4), read with section 11 (a) (ii), the period of prescription of the debt owed by the principal debtor to the judgment creditor was thirty years from the date of judgment of 21 May 2001. The question debated before me was whether the claim against the applicant was to become prescribed after the same period, or after the lesser

period, of three years referred to section 11 (d).

[7] In *Jans vs Nedcor Bank Ltd 2003 (6) SA 646 (*SCA) at 649 D-F Scott JA formulated the question before that Court thus:

"Does an interruption or delay in the running of prescription in favour of the principal debtor interrupt or delay the running of prescription in favour of a surety?"

[8] At 655I -656F the learned Judge of Appeal said:

"[19] The first case in South Africa in which the issue arose was *Cronin v Meerholz* 1920 TPD 403. The plaintiff took judgment against the principal debtor and thereafter sued the surety. At the time there was no prescription in respect of a judgment and what had to be decided was whether the claim against the surety had similarly become 'imprescribable'. Both Wessels JP and Mason J held that it had. To obtain the answer Wessels JP found it necessary (at 406) to

'. . . consider whether, according to the fundamental principles of our law, a contract of suretyship must be considered as independent of the principal obligation or whether it is to be regarded as so bound up with the princi- pal obligation that the A suretyship contract is to be regarded as an accessory obligation'.

In concluding that the latter was correct the learned Judge relied on *Voet* 46.1.36 (quoted in para [14] above) and said the following (at 406 - 7):

'By our common law the surety undertakes to pay the debt of the principal debtor so long as that debt exists in law and has not in fact been paid by the debtor. If, therefore, the debt is extinguished by prescription or the remedy is barred by a limitation of actions the surety is either discharged or the remedy against him is also barred. But if the debt is kept alive by judgment, so that neither prescription nor limitation will run, the surety's obligation by the common law continues to exist, because his obligation and that of the principal debtor is one and the same.'

The learned Judge did not, of course, intend to convey in the final sentence of this passage that the obligations of the surety and principal debtor were not distinct. From the context it is clear that what was intended was that both obligations relate to the same debt or performance.

[20] The following year Wessels JP adopted the same approach in *Union Government v Van der Merwe* 1921 TPD 318. In the course of his judgment, with which De Waal J concurred, the Judge President said (at 321):

'The legal scope of the surety's contract is identical with that of the principal debtor - *accessorium sui principalis naturam* sequitur. The surety undertakes the same obligation as the debtor, and undertakes to perform this same obligation so soon as the debtor, when called upon, fails to perform it. Troplong, *Cautionnement*, 46. It is true there are two contracts, the one between the creditor and the debtor and the other between the creditor and the surety. But the contract between the creditor and the surety is not an independent contract with an obligation of its own but an accessory contract with the very same obligation that exists between the principal debtor and the creditor.' "

[8] At 663E-F the Court said the following:

"[32] To sum up, I am unpersuaded that the acceptance of *Voet's* view is unfair to sureties. On the contrary, it leads to a result which is both convenient and equitable, particularly when considered against the backdrop of the commercial realities of our modern society. In the circumstances, I can see no justification for departing from it. In my view, therefore, the position in the South African law is that an interruption or delay in the running of prescription in favour of the principal debtor interrupts or delays the running of prescription in favour of the surety."

[9] Applying the *dicta* in *Jans* results in the claim against the applicant prescribing 30 years after the judgment obtained against the principal debtor by the creditor. Scott JA went on in *Jans* at 663G-H to say that the

judgment in *Randbank Ltd v De Jager* 1982(3) SA 418 (C) had been wrongly decided. As counsel for the respondent correctly submitted, the facts in the latter case were similar to those obtaining in the present matter, and the Court there decided that the period of prescription applicable to the claim against the surety was considerably shorter than that applicable to the claim against the principal debtor.

[10] Counsel for the applicant, however, relies on *Bulsara v Jordan & Co (Conshu Ltd*)1996(1) SA 805 (A), in which a judgment was given against the principal debtor on 23 May 1989, after the summons had been served on him on 20 March 1987. Summons was served on the surety, Bulsara, on 28 May 1990. At 811 A-D appears the following passage:[1]

> "In terms of s 11(d) of the Act the period of prescription in respect of the principal debt was three years. When judgment was given on 23 May 1989 in favour of the creditor against the principal debtor in respect of goods sold and delivered, the prescriptive period of 30 years in terms of s 11(a)(ii) of the Act became applicable against the creditor in respect of that cause of action.
>
> The prescriptive period in respect of the suretyship debt was also three years according to s 11(d) of the Act. When did the suretyship debt become due and enforceable against Bulsara? I indicated *supra* in construing the deed of suretyship that it included a judgment debt against the principal debtor as the subject of the suretyship. When judgment was given on 23 May 1989 against the principal debtor the amount due and payable by Bulsara became liquidated and shortly thereafter the amounts due and payable in respect of interest and costs were likewise liquidated when the various bills were taxed. Summons was served on Bulsara on 28 May 1990, well within the aforementioned three-year period of

1 References to "the Act" in the passage are, of course, references to the Prescription Act 68 of 1969

prescription. Hence Bulsara cannot rely on the plea of prescription."
(My underlining)

Bulsara was not expressly overruled in *Jans*. Counsel for the respondent contends that the *dicta* which determine the period of three years are obiter. He points out that it was not necessary for the Appellate Division to determine the period of prescription of the debt of the surety since summons was served only about a year after the judgment. The issue in *Bulsara* was whether the deed of suretyship concerned was wide enough to cover the judgment debt of the principal debtor; once this was established, the claim against the surety had clearly not prescribed whatever the applicable prescription period and the Court was thus not required to decide such period. Furthermore, as counsel for the respondent also pointed out, Joubert JA stated at 811E that the correctness or otherwise of the judgment in *Randbank Ltd* did not arise for decision in the appeal. I prefer not to decide whether the *dicta* were *obiter*. If they were not, I am, it seems, either bound to follow the judgment of the Superior Court with which I agree[2], or the latest judgment of the Court[3]. I respectfully find myself in agreement with the law as stated in *Jans,* and *Jans* is more recent than *Bulsara,* and so on either basis, I must follow J*ans.*

[11] In the result, I find that the claim of the respondent against the applicant has not prescribed, and that the application for rescission falls to be dismissed. Senior counsel, who appears for the respondent, has asked for the costs two counsel. Whilst I have been greatly assisted by him in resolving the difficulty created by the dicta in *Bulsara,* I do not think that

2 K. van Djjkhorst: The Law of South Africa 2nd Edition Vol 5 Part 2 par 163 sub voce fn 8
3 Hahlo & Kahn: The South African Legal System and its Background p 253 sub voce fn 38

ordering the costs of two counsel is warranted. I was informed that the respondent has briefed two counsel because this is a test case; there is no reason why the applicant should finance that.

[12] In the result, the application is dismissed with costs.

_____

E L GOLDSTEIN

JUDGE OF THE HIGH COURT

For the applicant:	B W Maselle
Instructed by:	Alan E Warrener Attorney
For the respondent:	J A Ploos van Amstel SC R M van Rooyen
Instructed by:	Lynn & Main Inc
Date of hearing:	10, 12 October 2006
Date of judgment:	18 October 2006