IN THE HIGH COURT OF LESOTHO

(Commercial Division)

CCT/65/07

In the matter between:-

THE LIQUIDATOR OF LESOTHO BANK **APPLICANT**

and

TAMUKU MICHAEL MOLEFE NKALAI **RESPONDENT**

Date of hearing : 31st of March 2010

RULING

Delivered by the Honourable Mr Acting Justice J.D. Lyons

on the 7th day of April, 2010

SUMMARY

Prescription Act Section 3 - contract – general principles – computation of time – time runs from date loss actually sustained – special plea – evidential considerations. (note: internet references to cases given for free access sites).

By a Special Plea filed 29th of October 2007, the applicant herein raises prescription as a special plea. The applicant raised other special pleas but proceed only on the matter of prescription.

The only material placed before me by the applicant is the Summons and accompanying Declaration filed by the respondent on 24th of August 2007. Somewhat unusually the Declaration contains annexures to the main pleading. No objection was taken to these. Thus they fall to be considered as properly part of the pleading (Declaration).

The first task of the court when faced with a limitation (prescription) argument is to ascertain the date from which prescription is to run. Here the applicant/defendant submits it is from the date of the agreement. The respondent/plaintiff submits it is from February 2000 when the applicant last defaulted on his payments, or, alternatively from 22 July 2002 as pleaded in paragraph 6 of the Declaration.

In paragraph 3 of the Declaration the plaintiff pleads that the agreement between the parties (as relied on by the plaintiff) is a Hire Purchase agreement dated 20 September 1996. The agreement is annexure ‘B’ to the Declaration.

Section 3 of the Act reads: --

> "Except as hereinafter is excepted, no suit or action upon any bill of exchange, promissory note or other liquid document of debt of such a nature as to be capable of sustaining a claim for provisional sentence shall be capable of being brought at any

> time after the expiration of eight years from the time when the cause of action upon such liquid document first accrues: Provided that nothing in this Act contained shall extend to or affect any mortgage bond, general or special, or any judgment of any Court in Basutoland or elsewhere".

Section 4 provides that section 3 apply to respective suits and actions including --

(a) for money due for goods sold and delivered;

(b) for money lent by the plaintiff to the defendant;

Thus the agreement herein falls within section 3 of the Prescription Act.

As I said earlier, the first step is to decide the date from which the time runs.

The critical words are "fro**m the time when the cause of action** upon such liquid document **first accrues**" (my emphasis).

The concept of prescription was derived from Roman Law. The term 'from the time the cause of action first accrues' is widely used across many jurisdictions. There are many cases where the it is discussed and argued. Nonetheless I think a general starting principle can be arrived at.

In **Nykredit Mortgage Bank PLC v Edward Erdman Group Ltd.** (*www.publications.parliament.uk/pa/ld199798/ldjudgmt/jd971127/nykr01.htm*), **[1998]1 ALL E.R.305.**

Lord Nichols of Birkenhead, in the leading judgment said,

> *"In recent years there has been much litigation over the date of accrual of a cause of action in tort in respect of financial loss caused by professional negligence. The question usually arises in the context of a claim that an action has become time-barred, because time normally runs for limitation purposes from the date when the plaintiff's cause of action arose.*
>
> *Accrual of a cause of action: actual damage*
>
> *As every law student knows, causes of action for breach of contract and in tort arise at different times. In cases of breach of contract the cause of action arises at the date of the breach of contract……"*

Having stated the simple principle, His Lordship then went on at some length to discuss how it applied to the case before their Lordships, and respectfully might I say, demonstrating just how difficult applying that 'simple' principle can sometimes be!

As a general principle, the question really comes down to whether or not it is the date of infringement of a right, or the date of actual occurrence of damage or loss that should be applied as the date to apply to the limitation/prescription period. The answer is the latter, for if there is no damage, there is no cause of action. (see also, ***Kalgoorlie Consolidated Gold Mines Pty Ltd & Ors v F L Smidth Inc & Ors*** [2003] WASC 52 (25 March 2003) at http://www.austlii.edu.au/au/cases/wa/WASC/2003/52.html and ***Murphy v Overton Investments Pty Ltd*** [2004] HCA 3; 216 CLR 388; 204 ALR 26; 78 ALJR 324 (5 February 2004)

http://www.austlii.edu.au/au/cases/cth/HCA/2004/3.html).

A useful definition of when a cause of action accrues is:-

"To come into existence or mature as an enforceable claim or right. For example, a cause of action may be sued upon once it is an enforceable claim." (Webster's New World Law Dictionary Copyright © 2010 by Wiley Publishing,)

As a rule of thumb, therefore, a cause of action first accrues when the plaintiff first suffers loss or damage. That test establishes the date from which prescription is to run, It is a question of fact for the court to consider. There are many instances when this has been brought before the courts. In some cases the contract itself will set the time, though this is not the case here.

In practical terms Mr. Ntlhoki is nearer the mark. The Act specifies 'first' as the qualifier. Looking at annexure 'C' to the Declaration (which purports to be a print out of the applicant/defendant's statement of account), the applicant/defendant appears to have defaulted in his payments in June 1997. On the material before me, this is the first time the plaintiff/respondent is 'caused damage', (assuming the statement is accurate, of course). It is the time that the plaintiff's 'cause of action first accrued'. As the action herein commenced on 24 August 2007 and June 1997 is to be the date when the cause of action 'first accrued', it is well outside the 8-year

period.

Accepting that to be the case, I move on to discuss other matters relevant to the application of the Act.

To avoid injustices occurring, the law has developed that the prescription period (eight years in this case) must be continuous. Any interruption of that period as caused by an act of the defendant (or debtor) can result in the defendant who pleads prescription being denied his plea. Or, in the case of the commencement of other enforcement proceedings, it can result in the prescriptive period being suspended for the course of the interruption. Both situations are raised here.

As Majara J. held recently in accepting the plaintiff's submission in Lesotho Bank v Thabiso Tjamela (CIV/T/132/2006; 17 March 2010 – adopting Watermeyer J. in Standard Bank of South Africa v Neethling 1958 (2) SA 25): -

> "(E)xtinctive prescription can be interrupted by an acknowledgement of debt by the debtor either by part-payment, payment of interest, the giving of security or the admission of liability in any manner whether verbally or in writing." (p.10). I respectfully adopt this as a correct statement of the law as it applies.

In the context of this case, the cause of action first accrued in or about June 1997. This action commenced on 24 August 2007. That

is well outside the extinctive prescription period. In the absence of any interruption of the type described by Majara J. (but not necessarily limited thereto), the applicant's argument would succeed.

On a special plea, the onus is on the applicant to prove his case. Given that an interruption poses a problem for the applicant, the hurdle to be overcome here is annexure 'C' to the Declaration.

Annexure 'C' is introduced in paragraph 6. That paragraph reads:-

> "In breach of his obligations in terms of the Agreement, however, the defendant failed to make payments of certain installments, and as at 29th July 2002 the defendant was in arrears in the amount of M94,715.00 (Ninety Four Thousand Seven Hundred and Fifty Maloti) made up as reflected in Annexure "C".

Paragraph 6 positively pleads a breach. There is no pleading in the body of the Declaration that defensively pleads against an anticipated prescription argument by claiming, for example, that the defendant acknowledged the debt by making certain payments thus causing an interruption to the prescriptive period.

The body of the Declaration, (as I shall call that part of the Declaration that does not include the annexures), offers no resistance to the applicant.

No objection was raised to the annexures being deemed part of the pleading (the Declaration). Nor, in the case of annexure 'C' was any argument raised that, for the purposes of this application, it be limited to the manner in which it is introduced as a part of the pleadings – as reflecting only the amount owing. I am obliged, thus, to consider it as part of the pleading and consider it with no restriction as to its probable evidential content.

Annexure 'B' is the Hire Purchase agreement in question. There is no dispute about that. The date is that pleaded in paragraph 3, as is the description of the vehicle for which the money was lent.

Annexure 'C' looks to be a print out of a bank statement concerning some type of loan. It is headed in the Plaintiff's name. It has a sub-heading marked 'Loan Scheme' and It has columns headed 'Date'; 'Installment'; 'Opening Balance'; 'Interest payment'; 'Principal Payment'; 'No. of Days'; 'Debit (Insurance)' and 'Closing Balance'.

The question to be asked (but, such is the nature of a special plea, not necessarily answered), is: - 'Is it the loan statement relative to the agreement in issue?' This question is important because the 'statement' (as it appears to be), runs from June 1997 to February 2001. In the column marked 'Installment' it shows that between March 1998 to February 2000 (inclusive - but except for August and

September 1999) an amount in the sum of M2,141.92 was paid each month.

The question is important for if it can be said that annexure ‘C’ 'pleads', (and I use that term loosely), that the installments shown thereon are payments made by the defendant/applicant in respect of the loan agreement at issue, then it can be argued that these installments are interruptions to the prescriptive period of the type discussed by Majara J. (above).

Now it is not for the plaintiff/respondent to prove anything. That onus falls on the defendant as the applicant. It is for the applicant/defendant to prove on the balance of probabilities, (bearing in mind that no objection was raised to annexure ‘C’ nor a limitation placed on it), that the statement does not apply to the loan in issue. Or, if it is, that the payments apparently made into the account are not of the type outlined by Majara J.

There are some indicators that may support an inference that it is a statement relevant to the loan in issue. The applicants/defendant’s named appears at the top in the box marked ‘Name’. There is an account number but that account number is not found on the Hire Purchase agreement (annexure ‘B’). The installment amount as shown on the second page of the Hire Purchase agreement is the same as the installment shown on the statement. The same can be

said of the interest rate of 22%.

Taking the above in mind, it cannot be said that the statement is not the statement relevant to the loan account in issue. As the loan account suggests that installments have been paid such as could constitute an interruption to the prescriptive period. The applicant/defendant has not satisfied me of that they are not. Therefore it cannot be said, in my judgment, that the applicant has not denied himself use of section 3 of the Act.

In short I am not satisfied that the applicant has proved on the balance of probabilities that there has not been an interruption to prescriptive period.

The advocate for the respondent raised the point that there has been an earlier action in this Court, being a Civil Action 402 of 2002. His argument is that the earlier action, having been brought well within the prescriptive period, is an interruption such that the prescriptive period should be suspended during the term that action ran. The advocate for the applicant submitted that the argument is not available because the earlier action has been discontinued on the plaintiff's initiative.

In my judgment the advocate for the applicant has a point, but not for the reason given. As a judge I can take judicial notice of the fact that an earlier action was filed in this court. However, it is the content of that action that is relevant here. To prove its point the respondent

must demonstrate that the earlier action was similar to this one. To do this counsel (advocate) simply referred me to the pleadings in the earlier action. As a matter of evidence, that is insufficient.

The pleadings in the earlier action are just that -- pleadings. To prove the similarity to the pleadings in this action, the pleadings in the earlier action must be introduced as evidence. To do this they have to be presented to the Court in an acceptable and admissible form. The usual form is by affidavit with the pleadings exhibited thereto. The pleadings in the earlier action have not been presented as evidence. Whilst I can take judicial notice of the existence of the earlier action, I cannot take evidential notice of the pleadings therein. Consequently I cannot consider Civil Action for 402 of 2002.

The respondent's counsel (advocate), Mr. Mabathoane, also raised the point that in the special plea filed herein the applicant raised lis pendens. It was submitted that this should be taken as an admission of a similarity between this and the earlier action. I disagree. Unless a pleading is expressly stated as an admission, it should not be treated as such. In any event, the applicant has withdrawn that plea.

In his Heads of Argument the applicant's counsel (advocate) raised an argument of common-law prescription. When I asked him at the commencement of our discussions as to whether he was going to argue that point, he said he was not. I understood that to mean that he was not arguing it in this application. I did not take it that he was abandoning it, although Majara J's judgment in the Thabiso Tjamela

case presents a formidable obstacle. It is not necessary that I say anything further in this ruling about common law prescription.

Looked at overall, I am not persuaded that the applicant has proved his special plea and I must dismiss it. I do say, however, that I do so by the narrowest of margins. The plaintiff's pleading leaves a lot to be desired and I can well understand why Mr. Ntlhoki saw fit to bring the special plea, notwithstanding that he had the very difficult task of trying to prove a negative.

The respondent/plaintiff is entitled to its costs to be taxed if not agreed.

I thank Counsel for their assistance.

J.D. LYONS

ACTING JUDGE

Mr. Ntlhoki for applicant (defendant on the original action)
Mr. Mabathoana for respondent (plaintiff on the original action).