

**REPUBLIC OF NAMIBIA**



**HIGH COURT OF NAMIBIA, MAIN DIVISION, WINDHOEK  
RULING**

CASE NO.: HC-MD-CIV-ACT-OTH-2019/00664

In the matter between:

**H.A.W RETAILERS CC T/A ARK TRADING**

**PLAINTIFF**

and

**BLANDINE YOLANDE SWARTBOOI**

**DEFENDANT**

**Neutral Citation:** *H.A.W Retailers CC t/a Ark Trading v Swartbooi* (HC-MD-CIV-ACT-OTH-2019/00664) [2020] NAHCMD 89(10 March 2020)

**Coram:** RAKOW, AJ

**Heard:** 18 February 2020

**Delivered:** 10 March 2020

**Flynote:** Practice – Judgments and orders – Summary judgment – Bona fide defence – Defendant must satisfy court that had bona fide defence – Defence of

prescription raised – Analysis of s 11(1)(a)(ii) of the Prescription Act 68 of 1969 and whether applicable against a surety.

**Summary:** The essence of the matter before court, is whether the defense against the claim of the enforcement of the suretyship has prescribed, is a valid defense which will result in the dismissal of the summary judgement application, or whether it at the time of instituting the action, was still enforceable and therefore finding that the Defendant has no defense and grant the default judgement. Therefore, if there is a judgement against the principal debtor but not against the surety and the surety is sued more than three years after the judgement was handed down, has the claim against the surety become prescribed or not?

**Held** – a claim against a surety to a debt, which debt had become a judgement debt, prescribed only after 30 years from the date of the judgement and that s 11(a)(ii) of the Prescription Act 68 of 1969 is therefore applicable on determining the prescription period in circumstances where a debt had become a judgement debt and therefore applicable to the surety to such a debt also.

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### ORDER

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- a) The defendant's opposition to the summary judgment application is dismissed
  - b) The application for summary judgement is therefore granted with costs.
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### RULING ON SUMMARY JUDGEMENT APPLICATION

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RAKOW, AJ:

#### Introduction

[1] The Plaintiff/Applicant for summary judgement is a closed corporation with limited liability trading in the name and style of Ark Trading. The Defendant/Respondent is an

adult female. She bound herself in her personal capacity as surety in solidum and co-principal debtor with Zappies Construction & Steelwork CC for payment on demand of all monies which the principal debtor may from time to time owe or be indebted to the Plaintiff, inclusive of interest, legal and collection costs on an attorney and own client scale and all other necessary or usual charges and expenses. The surety agreement was then also attached to the Particulars of Claim.

[2] The Plaintiff/Applicant obtained a judgement against the principal debtor in the amount of N\$488 129.85 on 11 September 2013 in the Windhoek Magistrate's Court. The Defendant/Respondent was not a party to these proceedings, although two other defendants were joined, one Willy Urjon Swartbooi, as the 2<sup>nd</sup> defendant and Reichman Hubert Rooi as the 3<sup>rd</sup> defendant. It then seems as if nothing was recovered from the three defendants in the Magistrate's court matter as the Plaintiff/Applicant is now seeking the judgement debt amount from the Defendant/Respondent.

[3] The combined summons was issued by this court on 20/2/2020 and the matter became defended when a notice to defend was filed on 27/2/2020. The Plaintiff/Applicant then indicated that it intends to apply for summary judgement and this is then the application currently before court.

#### The summary judgement application

[4] The affidavit of one Erika Preuss was used in support of the summary judgement application and confirmed that the Defendant is still truly and lawfully indebted to the Plaintiff based on the allegations made in the particulars of claim and that the Defendant has no bona fide defence to the action and solely filed an intention to defend as a delaying tactic. The Defendant, on the other hand, filed an affidavit opposing the Summary Judgement application and opposed the granting of the summary judgement on the ground of prescription of the Plaintiff's claim.

[5] It is indeed so that the suretyship was concluded on 1 October 2012 and she was never cited or joined as a party to the proceedings in the Windhoek Magistrate's Court

under case number 1287/2013. The summons issued against Zappies Construction & Steel works CC and its members, were issued somewhere around February and March 2013. The Plaintiff/Applicant failed to join Mrs Swartbooi to these proceedings or alternatively instituted separate proceedings against her to recover the debt in question. The argument for the Defendant/Respondent then continues and they argue that the Plaintiff/Applicant only had till March 2016 to institute, cite or join the Defendant/Respondent to any proceedings. It then follows that the institution of summons against the Defendant/Respondent on 19 February 2019, was belatedly done and that the claim against her in her capacity as a surety and co-principle debtor in solidum with Zappies Construction & Steelworks CC had already prescribed around March 2016.

[6] The argument for the Plaintiff/Applicant is that the Plaintiff's claim became a judgement debt against the principal debtor and s 11(1)(a)(ii) of the Prescription Act 68 of 1969 is applicable and the judgement debt therefore will only prescribe after 30 years and not 3 years (as per s 11(d) of the Prescription Act) as the Defendant/Respondent argues.

[7] The Defendant/Respondent also raised a point that if the court is to find that the judgement debt became a debt against her also, such a finding would constitute a violation and/or limitation of her right to a fair trial as enshrined in Article 12(1)(a) of the Namibian Constitution.

Which period of prescription is applicable to the surety?

[8] The essence of the matter before court, is whether the defense against the claim of the enforcement of the suretyship has prescribed, is a valid defense which will result in the dismissal of the summary judgement application, or whether it at the time of instituting the action, was still enforceable and therefore finding that the Defendant has no defense and grant the default judgement. The question for determination is therefore if there is a judgement against the principal debtor but not against the surety and the

surety is sued more than three years after the judgement was handed down, has the claim against the surety become prescribed or not?

[9] The basis on which the surety function is that 'the surety is obligated to perform the obligation of the principal debtor if the latter fails to do so; but the surety is so obligated in respect of only so much of the debtor's obligation as he has secured, and no more.'<sup>1</sup> 'It is further true that prescription of the principle debt will extinguish that debt and thereby release the surety. This follows from the principle that the suretyship is accessory to the principal debt, thus the extinction of the debt would leave nothing to support the suretyship.'<sup>2</sup> What the question in the current case is whether if a judgement is entered against the debtor of the principal debt, prescription is interrupted and the period of prescription also changes to one of thirty years.

[10] In *Cronin v Meerholz*,<sup>3</sup> Wessels JP and Mason J held that:

'(i)t appears to me that in order to solve the problem we must 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 principal obligation that the suretyship contract is to be regarded as an accessory obligation. It seems to be a general principle of our common law that, where there is a principal obligation and a person intercedes as surety to that obligation, his contract is not an independent contract but one accessory to the principal agreement. I can conceive of certain cases where all the parties concerned may intend that the obligations of the principal and surety are to be regarded as independent but prima facie our law regards the obligation of surety as dependent or accessory to the principal obligations.....'

And further 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

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<sup>1</sup> Caney's The Law of Suretyship; 5<sup>th</sup> edition by CF Forsyth & JP Pretorius; Juta 2002 page 96.

<sup>2</sup> Caney's The Law of Suretyship (supra) at page 198.

<sup>3</sup> 1920 TPD 403 at 406.

discharged or the remedy against him is also barred. But if the devt is kept alive by judgement, 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.'

[10] The position changed in 1982 with the decision by Baker J in *Rand Bank Ltd v De Jager*<sup>4</sup> in the Cape Provisional Division. He looked at the various Roman law authorities as well as referring to Voet and how the law developed around the suing of co-debtors *in solidum* and how it seems the code C8.39(40).4(5) – the Corpus Juris's passage applied to co-debtors in general and to co-sureties specifically. He remarked that:

'As a general rule if the creditor wishes to have recourse against all his solidary debtors he must sue them all. If they have all waived the benefits of excussion and *de duobus vel pluribus reis*, prescription starts to run in their favour as soon as summons is served on the one sued, and should logically run for three years. Therefore, in order not to lose his recourse, the creditor must sue the others within those three years. That was the position in Roman law (Wylie at 24). But on Voet's rule, where sureties are involved, the creditor can saddle sureties with 30 years of jeopardy merely by suing the principal debtor, without giving any notice to the sureties at all. For reasons already stated, this is manifestly unfair.'

At least under this position, the defendant would have a defense but this was not the end of the argument in South African courts. This decision was supported in a number of decisions until it was overruled in *Jans v Nedcor Bank*<sup>5</sup> in 2003 in a South African Supreme Court decision.

[11] In *Jans v Nedcor Bank*,<sup>6</sup> Scott JA formulated the question for decision as follows:

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

In this matter it was held that:

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<sup>4</sup> 1982 (3) SA 418 (C).

<sup>5</sup> 2003 (6) 646 SCA.

<sup>6</sup> *Supra*.

'there were undoubtedly significant differences between the relationship existing between principal debtor and surety on the one hand and that between co-debtors in solidum on the other. It was also true that there was some inconsistency in applying Justinian's constitution to sureties to the limited extent that interruption of prescription against the principal debtor interrupted prescription against the surety but not applying it to the converse situation. However, ultimately the differences were not so profound as to have precluded jurists seeking in the past to develop the law from extending the principle embodied in the constitution to sureties to the extent referred to. Once Justinian's enactment was accepted to be the law, the extension did not involve a step in terms of legal theory which was so far-reaching as to justify rejecting the view of Voet, particularly in the absence of other Roman-Dutch authority. The position may be different should the interruption or delay in the running of prescription in favour of a surety in this instance cause undue hardship or operate in a manner contrary to social utility.'

And further

'that by its very nature the contract of suretyship was burdensome. The surety undertook the responsibility for the fulfilment of another's obligation. This was the reason the law afforded protection to a surety in a number of different ways. But a balance had to be struck. Sureties did not assume the obligations of others against their wills but with their free consent. Once having done so they could not expect to be entitled simply to disabuse their minds of the fortunes of the principal debtor's liability and then require the law to protect them against their ignorance. If prescription in favour of the principal debtor was delayed or interrupted without their knowledge, they generally had themselves to blame. The acceptance of Voet's view would not result in unfairness to a surety having a commercial interest in the principal debtor's liability. Admittedly the period of prescription could be extended by reason of circumstances relating solely to the claim against the principal debtor, but this was not an unreasonable or illogical consequence of assuming the responsibility for the fulfilment of another's obligation.'

[12] In *KH Eley v Lynn & Mail Inc*,<sup>7</sup> the decision in *Jans v Nedcor Bank Ltd*<sup>8</sup> was followed and it was found that a claim against a surety to a debt, which debt had become a judgement debt, prescribed only after 30 years from the date of the judgement and that s 11(a)(ii) of the Prescription Act 68 of 1969 is therefore applicable on determining the

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<sup>7</sup> (2007) SCA 142 (RSA).

<sup>8</sup> *Supra*.

prescription period in circumstances where a debt had become a judgement debt and therefore applicable to the surety to such a debt also.

### Conclusion

[13] It is therefore the conclusion of this court that the above interpretation in *Jans v Nedcor Bank Ltd*<sup>9</sup> should also be followed by this court as there is no reason presented by the parties not to do so.

[14] The objection under the Constitution of Namibia is not upheld due to the reasons set out under *Jans v Nedcor Bank* regarding the nature of the relationship between the surety and the principal debt. By its nature it is that '*acceptance of Voet's view would not result in unfairness to a surety having a commercial interest in the principal debtor's liability*' that drives this finding.

[15] The defendant therefore presented a ground in opposition of the summary judgement application that is not good in law.

In the effect the following order is made:

Accordingly:

- a) The defendant's opposition to the summary judgment application is dismissed
- b) The application for summary judgement is therefore granted with costs.

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E RAKOW

Acting Judge

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<sup>9</sup> Supra.



APPEARANCES:

PLAINTIFF:

K Mushore

Etzold-Duvenhage

DEFENDANT:

H Engelbrecht

Thomas Appolus Incorporated