

Short Notes on:

REVIVING PRESCRIBED DEBTS

Introduction

In terms of the Prescription Act 68 of 1969 most debts prescribe within three years. It seems obvious that once a matter has prescribed, that is where it ends. The problem starts where the Debtor has no idea the debt has prescribed and continues to make payment or signs an Acknowledgment of Debt and thus effectively reviving the debt.

Section 126B(1)(b) of the National Credit Act 34 of 2005 (hereinafter referred to as the “NCA”)) seeks to prevent this and states, inter alia, that no person may continue to collect or re-activate a debt under a credit agreement to which the NCA applies:

- (i) which has been extinguished by the Prescription Act, No 68 of 1969 (Prescription Act); and
- (ii) where the defence of prescription is raised, or would have reasonably been raised, had the consumer been aware of such a defence, in response to a demand, whether as part of legal proceedings or otherwise.

Kaknis v Absa Bank Limited¹

In the case of *Kaknis v Absa Bank Limited and Another*², Kaknis, concluded various agreements with ABSA. However, over time, Kaknis fell into financial difficulties and was not able to make payment in terms of the agreements. On 8 July 2014, the claim against Kaknis prescribed. Nevertheless, on the 3rd of October 2014, Kaknis concluded an Acknowledgement of Debt in favour of ABSA, which in essence purported to revive the debt in terms of the Agreements. In the court *a quo*, Kaknis averred that the claim prescribed and that Section 126B(1)(b) of the NCA, prevented ABSA from collecting the debt.

¹ *Kaknis v Absa Bank Limited and Another* (08/16) [2016] ZASCA 206 (15 December 2016)

² (08/16) [2016] ZASCA 206 (15 December 2016)

Considering the fact that Section 126B(1)(b) of the NCA only came into effect on 13 March 2015 and that the debt was revived on 3 October 2014, the High Court held that the Section had no retrospective operation and granted summary judgment in favour of ABSA.

Kaknis appealed the decision of the High Court. The Supreme Court of Appeal, in its majority judgment, dismissed the appeal and upheld the High Court's findings that Section 126B(1)(b) of the NCA has no retrospective operation and accordingly did not constitute a defence to the Respondents' claims. It concluded that retrospective application of legislation may impair or inhibit existing rights and obligations and invalidate existing contracts.

In a dissenting judgment, Shongwe JA, considered that the purpose of Section 126B was to "*protect consumers in general, but more particularly the naïve and vulnerable ones*" and this is done by "*balancing the respective rights and responsibilities*" of Credit Providers and Consumers. Shongwe JA, also noted that should Section 126B not apply retrospectively, classes of consumers would be afforded different protection, such that those entering into agreements before Section 126B came into effect would be afforded less protection – this would be at odds with Constitutional Court jurisprudence, which "*emphasised protection of the consumer.*" Shongwe JA and Willis JA also held that the principle against the retrospective operation of the law is not absolute.

However, it was ultimately held that there was no indication that legislature intended for Section 126B to apply retrospectively and there exists a presumption that the Legislature knows the law. In addition, the law as it existed prior to Section 126B(1)(b) was considered valid in itself. Accordingly, the majority of the Court found that Section 126B(1)(b) has no retrospective application in respect of debts incurred prior to 13 March 2015.

Conclusion

The judgment highlighted the legal principle that legislation does not have retrospective effect. This means that where loan agreements were entered into prior to 13 March 2015 to which the NCA applies, the Consumer borrowing the money, whose debt has prescribed and subsequently revived, will be unable to rely on the provisions of Section 126B(1)(B). If someone is indebted to you, it is important to ensure that your debt does not prescribe as you cannot revive it after it has prescribed.

Contact us at SchoemanLaw today if you need to address any debt collection concerns in your business, or to streamline your existing debt collection processes to eliminate potential issues.

