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# DISPUTE RESOLUTION **ALERT**

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# State self-reviews: Has the *Gijima* principle been narrowed?

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**What's in a name? Quite a lot it seems, according to a unanimous bench of the Supreme Court of Appeal in *Compcare Wellness Medical Scheme v Registrar of Medical Schemes and Others* (267/2020) [2020] ZASCA 91 (17 August 2020). The facts are uneventful. It concerns a medical scheme's attempt to change its name under the Medical Schemes Act, 1998. More significantly, however, it sheds light on a potentially critical development in South African administrative law – concerning the performance of public powers and functions.**

This case marks a determined distinction from the Constitutional Court's contentious decision in *State Information Technology Agency SOC Limited v Gijima Holdings (Pty) Limited* 2018 (2) SA 23 (CC) which held that the Promotion of Administrative Justice Act, 2000 does not apply when an organ of state, acting in its own interest, seeks to review its own decision. This being so because the right to just administrative action enshrined in section 33 of the Constitution rights is, according to *Gijima*, only enjoyed by private persons. The State is a bearer of those obligations. Such self-reviews must be pursued, so *Gijima* held, under the broader rubric of the principle of legality. It is an open secret that *Gijima* has not found universal favour with many questioning its foundational basis and philosophical underpinnings. What *Gijima* did leave open, however, was a scenario where: in seeking a review of its own decision or of another – an organ of state is acting in the public interest in terms of section 38 of the Constitution. In *Compcare*, the SCA was called to determine the correct pathway in this scenario.

The facts in *Compcare* were at first blush rather straightforward: Compcare Wellness Medical Scheme, a medical scheme registered in terms of the Medical Schemes Act, applied to the Registrar of Medical Schemes for approval to change its name. It intended on changing its name to "*Universal Medical Scheme*" to align itself with its administrator, Universal Healthcare Administrators (Pty) Ltd. The Registrar is empowered to refuse to register a medical scheme's name or to change a medical scheme's name if this would be '*likely to mislead the public*'. The Registrar therefore denied the request on the basis that it would likely '*mislead the public*', despite various steps that Compare was willing to implement to mitigate any potential confusion between itself and its administrator. Here, Compcare argued that with these mitigating factors, there was no ascertainable harm or prejudice to its members or to the general public if a medical scheme and its administrators share a common brand. This proposal, however, indicated that Compcare was aware of the potential for the public to be misled. The Registrar's decision was subsequently upheld on appeal by the appeal committee of the Council of Medical Schemes.

Things then took a turn for the worse. Following the ruling of the appeal committee, Compcare elected to appeal to the Appeal Board. The Appeal Board upheld the appeal and ordered the Registrar to give effect to the name-change subject to conditions regarding the steps to be taken by Compcare to avoid the likely confusion.

# State self-reviews: Has the *Gijima* principle been narrowed?*...continued*

The case further raises important questions regarding the State's ability to review decisions under PAJA, when acting in the public interest.

The Registrar and the Council brought an application in the Gauteng Division of the High Court, Pretoria for the review and setting aside of the Appeal Board's decision. The High Court held that the Appeal Board had misdirected itself in granting the appeal and by ordering the Registrar to approve the name-change subject to conditions. In the result, the High Court reviewed and set aside the Appeal Board's decision to give effect to Compcare's name change. It is the decision of the SCA that concerns us.

The central issue before the SCA was whether the correct pathway to review the decision of the Appeal Board by the Registrar and the Council was via PAJA or the principle of legality – the latter being applicable when the exercise of the public power does not fall within the definition of administrative action in PAJA. Unlike the state applicant in *Gijima*, the Registrar and the Council grounded their standing to review the Appeal Board's decision on section 38(d) of the Constitution, which grants standing to approach a Court to *"anyone acting in the public interest"*. This was buttressed by the fact that the Medical Schemes Act contemplates the possibility of a proposed name change causing harm to the public. Both the High Court and the Supreme Court of Appeal readily accepted that the Registrar and the Council were acting in the public interest.

Ultimately, the SCA held that PAJA was the correct pathway to upset the decision of the Appeal Board. This was so because when the Registrar and the Council brought the review application in the public interest, they did so in order to safeguard the fundamental right of each member of the public to just administrative action as enshrined in section 33 of the Constitution. The SCA found that the Registrar and the Council in fact stepped into the shoes of members of the public on whose behalf they litigated and, in this sense, they were, despite being organs of state, bearers of fundamental rights to just administrative action.

To get back to the earlier query. What's in a name? The answer remains: quite a lot. That is so because while a review in terms of the principle of legality and under PAJA may produce the same result, the path varies. So rather than narrowing *Gijima*, *Compcare* presents a significant development on the proper approach to the constraints placed on organs of state in the review of decisions by the other organs of state. The case further raises important questions regarding the State's ability to review decisions under PAJA, when acting in the public interest. It remains to be seen whether the impact of the decision in *Compcare* is limited to the semantics of the name of a medical scheme, or whether it in fact opens a new chapter on which the State's ability to review its own decisions can be further developed and interrogated. Either way, this does not appear to be the end of this saga!

*Vincent Manko, Yana Van Leeve and Jonathan Sive*

# Your time is up: An analysis of Investec Bank Limited v Erf 436 Elandspoort (Pty) Ltd and the interpretation of the Prescription Act

The subject of the notarial mortgage bond was a notarial lease for a period of fifty years in respect of a commercial property in Pretoria.

**A debt generally prescribes within three years of it becoming due. A prescribed debt is extinguished by law and cannot be enforced hereafter. There are, however, certain instances in which the three-year period can be interrupted and it is important for every creditor to be aware of the time that is left in order to recover a debt from a debtor. This area of law is by no means simple.**

The recent Supreme Court of Appeal (SCA) judgment of *Investec Bank Limited v Erf 436 Elandspoort (Pty) Ltd and Others* (410/2019) [2020] ZASCA 104 (Judgment) dealt primarily with whether the acknowledgement of liability to a creditor, interrupts the running of prescription in terms of the Prescription Act 68 of 1969 (the Act).

In February 2000, Investec advanced a loan to Erf 436, which was secured by a notarial mortgage bond. The subject of the notarial mortgage bond was a notarial lease for a period of fifty years in respect of a commercial property in Pretoria. The loan agreement was in the form of a tripartite agreement between Investec, Erf 436 as the Lessee, and the South African Rail Commuter Corporation (SARCC) as the Lessor. The tripartite agreement included an option in terms of which Investec could replace Erf 436 as Lessee, should Erf 436 default on its obligations to the SARCC.

The lease agreement was cancelled by court order on 21 August 2002, based on the default by Erf 436 which, in turn, rendered Investec's security worthless.

On 10 September 2002, Investec demanded payment by Erf 436 within seven days of the full outstanding balance of the loan. It was not in dispute that prescription in respect of this debt began to run on 17 September 2002, the date on which payment was due.

Consequently, Investec then exercised its option and concluded a lease with the SARCC. In terms of an agreement between Investec and Erf 436, the latter continued to manage the property and collect rental from sub-tenants, these amounts were credited to Erf 436's loan account with Investec. This arrangement remained in place until July 2003. The parties also agreed that they would make efforts to sell Investec's rights in terms of the lease with a view that the purchase price would be used to settle Erf 436's loan obligation to Investec.

A second agreement between Investec and Erf 436 was concluded in June 2003, in terms of which Investec took over the function from Erf 436 of managing the property and collecting rental from sub-tenants. The income collected by Investec was similarly allocated to the repayment of Erf 436's loan. This arrangement remained in place from 1 July 2003 until 1 July 2009 when Investec sold its rights as Lessee to an entity called Johnny Prop (Pty) Ltd (Johnny Prop). After the sale to Johnny Prop, the sale amount received was credited to Erf 436's loan account. After this amount had been credited. Investec claimed the outstanding amount from Erf 436 and the sureties in a summons served on 21 January 2011.



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# Your time is up: An analysis of Investec Bank Limited v Erf 436 Elandspoort (Pty) Ltd and the interpretation of the Prescription Act

*...continued*

The SCA considered various other similar cases and held that the acknowledgement of liability, in order to effectively interrupt prescription, can be made by the principal debtor or its agent.

Investec argued that, on the basis of the payments made to reduce Erf 436's loan and various statements made in letters on behalf of Erf 436, it made a series of acknowledgments of liability and the result was that 'insofar as prescription may have commenced during September 2002, it was interrupted by express or tacit acknowledgments of liability on the part of [Erf 436] on the dates that each of the payments . . . were effected and on the dates when each of the letters . . . was addressed'.

The Act, in section 10(1) provides the following –

> *'a debt shall be extinguished by prescription after the lapse of the period which in terms of the relevant law applies in respect of the prescription of such debt'*

Section 10(2) further stipulates that, should a principal debt be extinguished by prescription, any subsidiary debts, such as suretyships, also lapse. The ordinary periods of prescription are provided for in section 11, the periods range from three to thirty years and depend on the type of debt. Both parties in this matter agreed that the period of prescription for the debt owed is three years. Section 12(1) provides that, subject to certain exceptions, prescription starts running as soon as a debt is due. Section 12 is supplemented by the provisions of section 13 which identifies circumstances which may delay the running of prescription.

Section 14 of the Act, which seems to find most application in the matter at hand, provides as follow –

> *"14. Interruption of prescription by acknowledgement of liability. —*
>
> *(1) The running of prescription shall be interrupted by an express or tacit acknowledgement of liability by the debtor.*
>
> *(2) If the running of prescription is interrupted as contemplated in subsection (1), prescription shall commence to run afresh from the day on which the interruption takes place or, if at the time of the interruption or at any time thereafter the parties postpone the due date of the debt, from the date upon which the debt again becomes due."*

The above amounts to the conclusion that prescription against a principal debtor automatically interrupts prescription against a surety.

The *court a quo* held that the claim by the appellant, Investec Bank Limited (Investec), against the first respondent, Erf 436 Elandspoort (Pty) Ltd (Erf 436) as principal debtor, and the remaining respondents as sureties, had prescribed. Investec took this decision on appeal.

# Your time is up: An analysis of Investec Bank Limited v Erf 436 Elandspoort (Pty) Ltd and the interpretation of the Prescription Act

*...continued*

The SCA took a holistic approach towards the conduct and statements by Erf 436's witnesses to determine whether an acknowledgement of liability had occurred.

The SCA considered various other similar cases and held that the acknowledgement of liability, in order to effectively interrupt prescription, can be made by the principal debtor or its agent.

The SCA took a holistic approach towards the conduct and statements by Erf 436's witnesses to determine whether an acknowledgement of liability had occurred. The SCA found that when Erf 436 was responsible for the collection of the sub-tenants' rental, its payments of those amounts towards the repayment of its loan constituted a series of tacit acknowledgements of liability. Subsequent to this period, a Mr Joubert (Joubert), on behalf of Erf 436, wrote two letters in which he expressly acknowledged liability.

The SCA therefore found that the effect of the payments and the letters was that prescription was interrupted on the date of each payment and the date of each letter and commenced running again from those dates. During the period between Investec taking over the management of the property and the final payment of the purchase price for Investec's rights into Erf 436's account, Joubert, in a series of letters, consistently acknowledged Erf 436's liability to Investec. A theme that ran through those letters was that irrespective of who was, in his view, to manage the property, the rental collected from the sub-tenants and the purchase price in respect of the sale of Investec's rights in the property would be allocated towards the repayment of Erf 436's loan.

One payment which occurred on 29 March 2006, before the claim had prescribed, was singled out by the SCA and concerned an amount of R1,350,000 which was credited to Erf 436's account. The payment was made by Erf 225 Edenburg (Pty) Ltd (Erf 225), an entity of which Joubert was also a director. In a letter to Investec dated 2 November 2005, he had informed Investec of a transaction involving Erf 225 and claimed that '*[w]e have analysed and refined the transaction regarding the actual surplus available to be deposited into the bond account (number 221162) of [Erf 436] and calculate that an amount of R1.35 million would be a more accurate amount*'. The evidence presented confirmed that Investec had agreed with Joubert that Erf 225 would pay the surplus of a sale of property towards Erf 436's indebtedness to Investec. As Joubert was a director of both entities, had knowledge of and agreement to the payment must be imputed to Erf 436. The SCA found that the inference that Erf 225 acted as Erf 436's agent is largely undeniable. The payment was a tacit acknowledgement of liability by Erf 436, with the effect that the running of prescription was extended to 29 March 2009.

In 2007, another tacit acknowledgement of liability was made on account of Erf 436 when Joubert enquired regarding the mechanics of the monthly payments into Erf 436's account. The SCA perceived this as a tacit acknowledgement of liability because the very basis of the query was



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*...continued*

The SCA found that the *court a quo* erred in finding that the payments of rental after September 2003 and of the purchase price of Investec's rights in the property were not tacit acknowledgements of liability.

an acceptance by Erf 436 of a liability towards Investec (that it had never denied and had acknowledged consistently); and it discloses knowledge on the part of Erf 436 that payments of rental collected from sub-tenants by Investec had, since mid-2003, been paid towards reducing Erf 436's loan liability. Rather than denying that Erf 436 was liable to Investec, Joubert sought details of how the VAT component of the rentals was dealt with. The effect of this letter was to extend the life of Investec's claim for a further three years from the date of the letter in 2007 to early 2010.

The last monthly payment was made on 17 July 2008, having the effect that prescription was once again interrupted and immediately began to run anew. The further effect of this payment was that the life of Investec's claim was extended, and it was consequently required to serve its summons by 16 July 2011 at the latest. The SCA found that the various acknowledgements of liability had kept the claim alive and summons was issued on 21 January 2011, well before 16 July 2011 when true prescription would have taken place.

The SCA found that the *court a quo* erred in finding that the payments of rental after September 2003 and of the purchase price of Investec's rights in the property were not tacit acknowledgements of liability.

The SCA therefore held that Investec's claim had not prescribed.

This matter illustrates that the interpretation of the Act to determine time periods for when prescription runs and when a claim has prescribed is a moving target. It is always imperative that the necessary steps are taken by a creditor against a debtor to protect your rights and your claim and that one should not rest on one's laurels. This matter also shows that many factors should be considered when interpreting whether prescription is interrupted and that the provisions in the Act are not an exhaustive list.

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