22 FEBRUARY 2017

DISPUTE RESOLUTION ALERT

IN THIS **ISSUE**

BANKING:

AT LAST: SOME JOY FOR CREDITORS!

Creditors face daily uphill battles when trying to collect money from debtors. Not only has the National Credit Act, No 34 of 2005 made it more onerous on creditors to recover debts due to them, but creditors must constantly be aware of the threat of a claim prescribing.

NEW SERIES

PUBLIC LAW:

PROTECTING WITNESSES, PROTECTING THE ICC

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The Prescription Act, No 68 of 1969 (Act) provides that a debt is extinguished by prescription after the period set out in the Act.

A claim for monies owing generally prescribes within a period of three years from the debt becoming due. Our courts have long debated the question of when a debt becomes 'due'. What is, however, certain is that once the prescribed period of prescription runs out, the debt is extinguished and cannot be claimed.

The Supreme Court of Appeal recently overturned a judgment of the High Court which dealt with the question of when prescription commences in the event of an agreement having, what is commonly called, an acceleration clause.

The matter *Standard Bank of South Africa Ltd v Miracle Mile Investments 67 (Pty) Ltd and Another* 2017 (1) SA 185 (SCA) concerned an agreement containing an acceleration clause that entitled the creditor bank to claim the whole outstanding amount payable, upon the occurrence of a breach by the principal debtor. The crux of the dispute in the matter related to the question of when the debt becomes 'due' in terms of s12(1) of the Act. In other words: is the debt due when the principal debtor (this case involved sureties) breaches the obligation to pay the monthly instalment, or is it due when the creditor elects to enforce the acceleration clause, in order to render the whole amount payable?

The background facts can be summarised as follows: In August 2005 Standard Bank and the principal debtor entered into a facility agreement where the principal debtor was granted a line of credit styled a 'Liberator facility' (the facility) for a maximum amount of R13,984,600, which was repayable over a period of 240 months. As security, the respondents executed deeds of suretyship in favour of Standard Bank in terms of which they bound themselves as sureties and co-principal debtors with the principal debtor. Standard Bank registered mortgage bonds over the properties of the respondents as further security.

One of the terms of the facility was that Standard Bank could, in the event of non-payment, convert the facility to one repayable on demand, in which event Standard Bank would be entitled to terminate the facility and claim immediate payment of the outstanding balance by giving a further written notice.

Tim Fletcher was named the exclusive South African winner of the **ILO Client Choice Awards 2017** in the litigation category.

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The basis of the application was that Standard Bank's claim had prescribed on 22 October 2011 as a result of the principal debtor's failure to pay any instalments after the last payment on 21 October 2008.

The principal debtor, after the respondents executed the suretyships, defaulted on his monthly instalment repayments. As a result, and on 12 August 2008, Standard Bank addressed a letter to the principal debtor advising him that he had not met his obligations in respect of the facility and that, in order to bring his account up to date, he had to pay the total arrears of R671,072,88 which was due immediately. In this notice Standard Bank did not elect to accelerate the debt to claim the full amount owing.

The principal debtor was thereafter sequestrated.

On 27 August 2013, more than five years after the first notice was sent to the principal debtor, Standard Bank instituted action against the respondents to recover the debt due and declare the properties mortgaged executable. The respondents proceeded to launch an application during June 2013, in which they sought an order directing Standard Bank to consent in writing to the cancellation of the bonds, notwithstanding that the debt they secured remained unpaid. The basis of the application was that Standard Bank's claim had prescribed on 22 October 2011 as a result of the principal debtor's failure to pay any instalments after the last payment on 21 October 2008. They contended that as there was no longer any principal debt for the bonds to secure, they were no longer liable as sureties.

The sureties contend that prescription commenced to run and that the debt became 'due' when the principal debtor breached his obligation to pay the monthly instalment.

Standard Bank opposed the application, contending that its claim against the principal debtor had not prescribed. It argued that its notice dated 12 August 2008, had merely called upon the principal debtor to bring the arrear instalments up to date and accordingly the full indebtedness under the facility was not due, owing or payable and as such prescription had not commenced running.

The High Court recognised that, whether or not the debt incurred by the principal debtor in terms of the facility had prescribed, depended on when the debt had become 'due', within the meaning of that word in s12(1) of the Act. If the debt became due from the date of the principal debtor's default, namely on 21 October 2008, prescription would have commenced running from that date and the bank's claim would have prescribed on 22 October 2011, prior to Standard Bank's institution of the action for the recovery of the debt against the sureties. The High Court went on to find that if Standard Bank was entitled to accelerate the debt and claim the full amount but failed to do so, this did not prevent prescription from running and that prescription ran from the date that Standard Bank acquired the right to enforce payment of the full amount even though it elected not to do so. We had previously analysed the High Court decision, which analysis can be found at the following link: High Court Decision.

The SCA carefully considered the relevant provisions of the Act and confirmed that s12(1) of the Act provides that prescription begins to run when the debt becomes 'due'

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Thus, so the SCA found, where an acceleration clause affords the creditor the right of election to enforce the clause upon default by the debtor, the debt in terms of the acceleration clause only becomes due when the creditor has elected to enforce the clause.

and not when it first accrued. Thus, so the SCA found, where an acceleration clause affords the creditor the right of election to enforce the clause upon default by the debtor, the debt in terms of the acceleration clause only becomes due when the creditor has elected to enforce the clause. Before an election by the creditor, prescription does not begin to run.

The SCA did consider the policy consideration that a creditor should not be able to determine of his own accord when prescription will begin to run against him, by deferring his election to enforce an acceleration clause but found that this consideration cannot override the clear provisions of the Act.

This does not mean that a creditor can completely escape the consequences of the Act, as the SCA went on to find that while the creditor holds in abeyance his decision whether or not to enforce an acceleration clause, prescription will continue to run in respect of the individual arrear instalments, payable by the debtor.

The SCA ruled that the High Court erred and that in terms of the current Act, a debt must be immediately enforceable before a claim in respect of it can arise. In the normal course of events, a debt is due when it is claimable by the creditor, and as the corollary thereof, is payable by the debtor. It found that in the present case the acceleration clause in the agreement has its own procedural requisites to be satisfied before Standard Bank can claim the full balance owing.

The SCA reversed the decision by the High Court by finding that the balance owing on the facility, excluding the outstanding arrear payments, was not due as Standard Bank did not elect to terminate the facility and claim repayment of the outstanding balance. It therefore follows that prescription did not commence to run on the so-called 'critical date' or 'decisive date' of 21 October 2008.

This judgment is a reminder to creditors to always be vigilant when it comes to recovery of debts due and to make sure they understand the terms of the agreements they enter into with debtors.

Lucinde Rhoodie

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PROTECTING WITNESSES, PROTECTING THE ICC

INVITATION TO COMMENT

The Portfolio Committee on Justice and Correctional Services is currently inviting public comments on The Implementation of the Rome Statute of the International Criminal Court Act Repeal Bill and Related International Instruments Bill [B23-2016]. The Bill aims to repeal the Implementation of the Rome Statute of the International Criminal Court Act, No 27 of 2002, by which South Africa bound itself to the obligations under the Rome Statute. Members of the public are also invited to comment on the declaration of the decision to withdraw from the ICC and the explanatory memorandum to that withdrawal. The deadline for comments is 8 March 2017. They can be emailed to *vramaano@parliament.gov.za*.

NEW SERIES

This is the **second alert in an ongoing series of six exploring the legal ramifications of an African exodus from the International Criminal Court for its witness protection programme.** In particular, the alerts will focus on the implications for witnesses currently in the relocation process, previously relocated witnesses, as well as future witness relocations.

The witness protection programme is responsible for, among other things, the provision of "protective measures and security arrangements" for witnesses who are at risk on account of their testimony before the Court.

If the South African call for African states to withdraw collectively from the International Criminal Court (ICC or Court) finds enough support, this could create a number of problems for the Court's witness protection programme, the International Criminal Court Protection Programme (ICCPP).

The Witness Protection Framework

Article 43(6) of the Rome Statute of the International Criminal Court provides for a victims and witnesses section (VWS) within the Registry of the ICC. The VWS is responsible for, among other things, the provision of "protective measures and security arrangements" for witnesses who are at risk on account of their testimony before the Court. Under article 68(1), the Court itself also has a duty to take appropriate measures to protect the safety, physical and psychological well being, dignity and privacy of witnesses.

The ICC's obligations are partially fulfilled through the operation of the ICCPP. The precise manner in which it operates is confidential; however, regulation 96(3) the ICC Registry Regulations (ICC-BD/03-03-13) does provide some guidance on the criteria for participation in the programme. The VWS must consider:

(1) the involvement of the witness before the Court;

(2) whether the witness or her family is endangered because of her involvement with the Court; and

(3) whether the witness agrees to enter the ICCPP.

Rule 16(4) of the ICC Rules of Procedure and Evidence (ICC ASP/1/3) provides for the negotiation of relocation agreements for witnesses who are at risk on account of their testimony before the Court.

Although the ICC actively pursues a policy of concluding relocation agreements with States Parties and non-States Parties,

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Given this state of affairs, any failure by states to cooperate in a meaningful way is extremely problematic: according to a former Registrar of the ICC, it is one of the biggest threats to the adequate protection of witnesses.

it has also made it clear that relocation of witnesses, particularly international relocation, is always a last resort due to the extent of the physical and psychological upheaval for the witness and her family (see *Katanga*). Once relocated, the protective states are expected to provide assistance with comprehensive resettlement programmes.

The Court maintains contact with relocated witnesses as long as necessary and tends to work in partnership with the protective states to achieve full integration of the relocated protected witnesses and their families. However, it remains the protective state's responsibility to maintain effective protection of the witness and her family, with the ICC merely monitoring that protection (see Summary Report).

Relocation is only achieved by agreement between the ICC and the protective states. Therefore, it is critical to understand the conceptual difference between framework relocation agreements and actual relocation agreements.

In terms of framework relocation agreements, the contracting states agree that they may agree to receive witnesses under the ICCPP in the future – there is no commitment or obligation to take any particular witness, or witnesses generally, from any country, and the ICC cannot compel them to do so. Actual relocation agreements are the agreements that the Court enters into in respect of actually relocating specific witnesses to the contracting state, whether in terms of a previously concluded framework relocation agreement, or as an ad hoc agreement.

The Importance of State Cooperation

As illustrated, the ICCPP is based on voluntariness (in terms of entering into relocation agreements) and the cooperation of states (in terms of fulfilling obligations under those agreements). Given this state of affairs, any failure by states to cooperate in a meaningful way is extremely problematic: according to a former Registrar of the ICC, it is one of the biggest threats to the adequate protection of witnesses.

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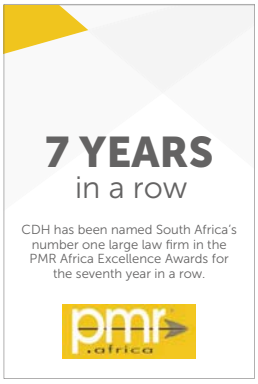
The goal of integrating witnesses as seamlessly as possible into their new society is difficult to achieve without a diverse network from which to choose the protective state.

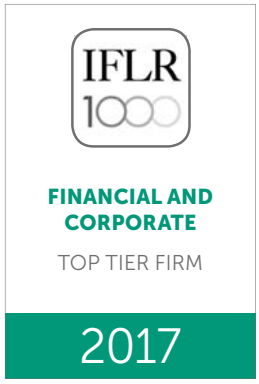
Framework relocation agreements help to facilitate future cooperation requests to states. The importance of these agreements is emphasised by the fact that the Court's Strategic Plan includes the goal of increasing the number of framework relocation agreements entered into with states. However, as expressed by Human Rights Watch, "a central challenge with regard to cooperation and support is converting broad proclamations into policy and practice".

The ICC has entered into 17 framework relocation agreements to date. In total, and in terms of the Court's 2017 proposed budget, there are currently 575 people in the ICCPP (comprising 110 witnesses and 465 dependents). It is predicted that more than 110 witnesses will remain under the ICC's protection in 2017 (which figure includes 49 internationally-relocated witnesses who are in the care of a protective state but being monitored by the VWS) and a further 14,100 individuals will apply for protection. With so few framework relocation agreements in place (considering that there are 124 States Parties), this puts enormous strain on the states who are more willing to cooperate and on the VWS itself.

This paucity of framework relocation agreements affects the ability of the VWS to ensure adequate protection of witnesses, which is essential to the proper and efficient functioning of the Court. Further, the goal of integrating witnesses as seamlessly as possible into their new society (through an attempt to match cultures) is difficult to achieve without a diverse network from which to choose the protective state.

An International Bar Association report previously identified a particular need for framework relocation agreements in Africa, largely because the majority





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The International Criminal Court Protection Programme's reliance on state cooperation has rendered it overly reliant on the willingness of a few states to take on the protective role.

of situations currently before the Court originate on the continent. In March 2016, an official of the Court confirmed that African participation in witness relocation is "very good". As a more general point, the more framework relocation agreements that are in place, the more difficult it will be for ill-intentioned governments and non-state actors to determine where relocated witnesses may live.

It should now be apparent that the ICCPP's reliance on state cooperation has rendered it overly reliant on the willingness of a few states to take on the protective role. With a greater understanding of the witness protection framework and the role of state cooperation, it is now possible to consider issues that may be raised by the potential African walkout in the next alert.

Sarah McGibbon,
overseen by Lionel Egypt

This schedule briefly outlines the focus of the previous and coming instalments in this series. It also includes links to previous instalments.

Date of release	Topic
8 February 2017	Introduction: the factual foundation setting the context in which this issue must be considered.
22 February 2017	**The Witness Protection Framework:** the mechanisms used by the ICC to place witnesses into protection, and the important role of state cooperation in this framework.
8 March 2017	**Potential Problems with the Witness Protection Framework:** What problems may arise as a result of any African exodus?
22 March 2017	**Enforcement Mechanisms – Part 1:** Possible ways of holding states accountable in respect of their obligations to protected witnesses – for what does the Rome Statute provide?
5 April 2017	**Enforcement Mechanisms – Part 2:** Possible ways of holding states accountable in respect of their obligations to protected witnesses – what about new approaches?
19 April 2017	**Concluding remarks:** Summarising key points from the series and potential future steps.

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Cliffe Dekker Hofmeyr is very pleased to have achieved a Level 3 BBBEE verification under the new BBBEE Codes of Good Practice. Our BBBEE verification is one of several components of our transformation strategy and we continue to seek ways of improving it in a meaningful manner.

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