KINGDOM BANK LIMITED
versus
THERIGHT INVESTMENTS (PRIVATE) LIMITED
and
OPIUM INVESTMENTS (PRIVATE) LIMITED
and
PHILLIPA ANN COUMBIS

HIGH COURT OF ZIMBABWE
CHAREWA J
HARARE, 26 October & 07 December 2015; 11 May 2016

Civil Trial

F Siyakurima, for the plaintiff
S Hashiti, for the 1st & 2nd defendant
D Ochieng, for the 3rd defendant

CHAREWA J: The plaintiff, through a series of offer letters commencing 30 March 2009 to 25 July 2011, advanced overdraft and loan facilities to Stir Crazy Group of Companies (Annexures D, E, G, H, J and L to its particulars of claim refers). It is an undisputed fact that Stir Crazy Group of Companies does not exist. It was not put into contention that the benefits of these overdraft and loan facilities were in fact enjoyed by Stir Crazy Investments (Private) Limited (the principal debtor in so far as the plaintiff is concerned).

As a consequence of these loan agreements

1. 3rd defendant purportedly provided security to the plaintiff, through an unlimited guarantee dated 4 May 2009, in favour of Stir Crazy Group of Companies, for the loan advances.
2. 2nd defendant provided similar security, but with respect to Stir Crazy Investments (Private) Limited, a legal entity, on 23 February 2010.
3. On 23 February 2010, 2nd defendant gave power of attorney to any duly authorised employee of plaintiff to pass a surety mortgage bond over its property, being Stand 2729 Salisbury Township Lands, held under deed of transfer number

11285/2002 dated 04 October 2002 in favour of plaintiff as security for facilities granted to Stir Crazy Group of Companies (Private) Limited, the non-existent entity aforesaid.

4. Under power of attorney in favour of dated 31 March 2009 plaintiff registered a surety mortgage bond on 5 November 2010 against both 3rd and 2nd defendants to secure Stir Crazy Investments (Private) Limited's indebtedness to plaintiff in the amount of $300 000 under.
5. 1st defendant also provided security, passed under power of attorney dated 28 January 2010, amounting to $1,050,000.00, by way of a Surety Mortgage Bond, registered against Stand 9064 Salisbury Township Lands held under Deed of Transfer number 8776/03 dated 31 October 2003, with respect to Stir Crazy Investments (Private) Limited.

The plaintiff issued summons on 9 January 2014 against the defendants, as sureties and co-principal debtors, for payment of outstanding capital and interest arising out of advances made on 30 March 2009, 22 February 2010, 27 October 2010 and 3 August 2011, to Stir Crazy Investments(Private) Limited, which had gone into voluntary liquidation. The summons was served on 17 January 2014.

The plaintiff itself was subsequently taken over by Afrasia Bank Limited which has, after the commencement of this litigation, also since gone into liquidation. A notice of substitution in these proceedings was filed for Afrasia Bank Limited (in liquidation).

Three preliminary points of law arising out of these facts were raised and argued before me as follows:

1. Whether plaintiff's claims have prescribed:
2. Whether plaintiff has *locus standi* in view of the fact that it went into liquidation after the close of pleadings viz-a-vis the provisions of s 221(2) of the Companies Act [*Chapter. 24.03*];
3. Whether plaintiff has a cause of action in view of the fact that of the guarantees and surety mortgage bonds that it relies on are premised on loan agreements with Stir Crazy Group of Companies, a non-legal entity.

To its credit, the plaintiff did not contest that these points were properly taken. Rather, it confined its arguments to the fact that they lacked merit. Indeed, it is trite that points of law can be raised at any stage of the proceedings, provided that they go to the root of the matter and were not required to be specifically pleaded. See *Muchakata* v *Netherburn Mine* 1996 (1)

ZLR 153 (S) at 157A, *Muskwe* v *Nyajina & Ors* SC 17-12**,** and *Gold Driven Investments (Private) Limited* v *Telone (Private) Limited & Anor* SC9-13.

I will deal first with the issue of *locus standi*, because if the plaintiff has no standing before the Court, it will not be necessary to determine whether it has a valid cause of action or whether its claims have prescribed, except for purposes of tying up all loose ends.

DOES PLAINTIFF HAVE *LOCUS STANDI* BEFORE THE COURT?

The defendants argued that legal proceedings on behalf of a company in liquidation must be brought by the liquidator with leave of the Court, the absence of such leave being a bar to the proceedings. Where a company went into liquidation after the commencement of the legal proceedings, the liquidator must associate himself with the proceedings and asserts that he continues with them himself, with the appropriate authority, which is the leave of the court. In the absence of the liquidator's express association with the proceedings, supported by the proper authority, the matter ought to fail. That the directors or anyone else may have filed a notice of substitution in terms of r 85, or the Master may have authorised continuation of litigation does not dispense with the requirement for the leave of the Court in these particular circumstances. They concluded by arguing that the provisions of s 221 (2) of the Companies Act are peremptory, and create no exception.

For its part, plaintiff argued that s 221 does not apply to the continuation of litigation that is pending, but only to the "bringing or defending" of fresh proceedings. Rather s 213 (a) is applicable and in any event, since para 3 of the order of the court placing the plaintiff in liquidation authorised the liquidator to bring and defend legal proceedings, it was not necessary to seek leave of the Court again. The plaintiff further averred that even assuming that s 221 (2) also encompasses the continuation of pending proceedings, the winding up order suffices to give authority to continue with litigation. In any event, since it filed a notice of substitution which the defendants did not object to, the liquidator was properly joined to the proceedings. At any rate, the plaintiff asserted, the Master did authorise the continuation of legal proceedings at a creditors' meeting, rendering it unnecessary to go back to Court to seek leave.

The law

Section 221 (2) provides as follows:

"(2) The liquidator shall have power, with the leave of the court or with the authority mentioned in subsection (4) or in paragraph (*a*) of subsection (4) of section *two hundred and eighteen*—

(*a*) to bring or defend in the name and on behalf of the company any action or other legal proceeding of a civil nature and, subject to any law relating to criminal procedure, any criminal proceeding:
Provided that immediately upon the appointment of a liquidator or a provisional liquidator the Master may authorize upon such terms as he thinks fit legal proceedings for the recovery of any outstanding accounts, the collection of which appears to him to be urgent;

For its part S221 (4) provides that

"(4) He may, with the authority of a resolution of creditors and contributories, duly passed at a joint meeting thereof, do any act or exercise any power for which he is not by this Act expressly required to obtain leave of the court."

S218 (4) (a) provides as follows:

(4) Where no name of any person has been submitted to the Master for appointment as liquidator as a result of the summoning of a meeting of creditors or contributories in terms of section *two hundred and twenty-one* the Master may—
(*a*) appoint any fit person as the liquidator of the company and may authorize such liquidator to exercise such of the powers set out in subsection (2) of section *two hundred and twenty-one* as the Master may think fit;

Section 213 (a) provides that:

In a winding up by the court-

(*a*) no action or proceeding shall be proceeded with or commenced against the company except by leave of the court and subject to such terms as the court may impose;
According to M.S. Blackman et.al in the *Commentary on the Company's Act Volume 3* @ p.14:

"It is clear that a company being wound up never has standing, the *locus standi* is always conferred on the liquidator who litigates on the company's behalf."

To my mind, these provisions infer that there must always be a conscious and deliberate decision by the liquidator to pursue legal proceedings. In my view, distinction must be made between the issue of *locus* and that of citation, i.e. how a party is named in legal proceedings. The position with regard to citation is aptly summed up in Herbstein & van Winsen's *The Practice of the High Courts in South Africa* 5th Ed Volume 1 p.179 which states:

"When a company is in liquidation and the liquidator sues on the company's behalf for debts owing to the company, the company should be cited by its name with the subjoined expression 'in liquidation'. However, where the liquidator is enforcing rights as liquidator, then the name of the liquidator should be cited as nominee offices."

In *casu*, I understand the main argument of the defendant to be that the liquidator, in exercising his power to sue on behalf of the company, did not seek the leave of the court as required by law. The secondary argument is that in seeking to substitute the plaintiff in

liquidation, such substitution cannot be a unilateral act by the plaintiff, but a decision of the liquidator. Consequently, the plaintiff lacks *locus standi.*

In my view therefore, there is thus no issue raised by the defendants regarding citation.

Application of the law to the facts

I am of the view that the purport of the provisions of the Companies Act are that nothing can be done for, and on behalf of a company in liquidation by the liquidator unless the leave of the Court has been obtained. Alternatively where the leave of the Court is not expressly required, the creditors and contributories must have resolved that the liquidator should carry out any act or exercise any power for and on behalf of the company. Further, where the meeting of creditors or contributories has not led to the submission of the name of any person for appointment as a liquidator, the Master is at liberty to appoint any fit person as liquidator and authorize him to exercise the powers set out in s 221 (2).

In casu, it is not necessary to concern myself with the provisions of s 221 (4) as this provision deals only with situations where the leave of the Court is not required. Nor is it necessary to deal with the provisions of s 218 (4) (a) as it has not been argued that the liquidator was appointed in terms thereof by the Master. According to para 5 and 8.5.1 of plaintiff's heads of argument, it seems that this was a liquidation ordered by the Court.

In so far as s 213 (a) is concerned, I do not agree with plaintiff that it is at all relevant as this section prescribes situations where litigation is being brought <u>against</u> a company in liquidation, rather than the circumstances of this case where a company in liquidation is bringing legal proceedings. I align myself fully with the views of Muremba J in *Zimbabwe Allied Bank Limited* v *Caleb Dengu & Anor* HH 583-15 @ p 3 when she stated:

> "The import of this section is that a company which is in liquidation cannot be sued without the person seeking to sue it first obtaining leave of the court. Even if proceedings are commenced before the defendant company is placed under liquidation, once it is placed under liquidation those proceedings cannot continue without the plaintiff first obtaining the court's leave. "

She went on to quote Uchena J (as he then was) in *Thirdline Trading (Pvt) Ltd & Anor* v *Boka Investments (Pvt) Ltd & Anor* HH 130-11 when he said:

> "There is no doubt in my mind that s 213 (a) of the Companies Act deals with the proceedings with or commencement of actions against the company. This means actions by the company itself are not covered under s 213 (a)."

I will also make short shrift of the argument that, since the Master, at a meeting of creditors, authorised the liquidator to continue with legal proceedings it was not necessary to

seek leave of the court. It is trite that the Master is not a court nor does he sit as a judicial officer. He can never be substituted for a court, where the leave of the Court is required. This is why the legislature made separate provisions for when the Master may make decisions and give directions, and reserved certain areas for the leave of the court to be obtained.

Ergo, the Master and the court are not interchangeable where leave of the court is required. By making provision requiring leave of the court to be obtained, the legislature must have intended this to refer to a judge or magistrate, as these are the only persons authorised to preside in court. I am of the view that reference to leave of the court meant that the legislature intended that the court should retain its general power to authorise litigation to protect creditors and any other party, entity or person dealing with an entity in liquidation. (See also *Millman & Sternub NO* v *Koetter*, 1993 (2) SA 749).

By a process of elimination therefore, the only provision which deals with proceedings brought by a company in liquidation which remains to be resolved can only be s221(2). While it seems clear on the face of s 221 (2) that whenever the liquidator intends to comments legal proceedings on behalf of a company under liquidation, he must obtain the leave of the court, the question that arises is, when Afrasia Bank went into liquidation, was it necessary for the liquidator to obtain the leave of the Court to proceed with the litigation?

The plaintiff argues that the order placing the plaintiff into liquidation, in para 3 thereof, granted the liquidator the power to bring and defend legal proceedings. In that regard, it was not necessary to go back to Court to seek leave to continue with this particular litigation.

I note however, that the order placing plaintiff into liquidation was not discovered, nor was the case reference provided. It is therefore unclear on the record when Afrasia Bank went into liquidation, but I surmise that it was subsequent to the pre-trial conference. At any rate it was before the heads of argument were filed, hence the point of law on *locus standi* raised therein remains valid.

I understand the defendants argument to be that, a general order authorising the liquidator to bring or defend proceedings is not enough for purposes of s 221 (2), but that the liquidator must expressly associate himself with proceedings that commenced before his appointment and secondly, he must have the specific leave of the Court to continue with such litigation. In that regard, they argue that a unilateral "Notice of substitution" is not adequate to show that the liquidator expressly associates himself with the litigation and has obtained the leave of the Court to continue therewith, as it is not clear who authorised such notice of

substitution: the directors, whose power terminated upon the granting of the winding up order, or the liquidator who has not sought the requisite authority of the Court.

In answering the question whether or not the liquidator requires leave to proceed with litigation which commenced prior to litigation, I cannot do better than to quote Muremba J in the *Zimbabwe Allied Bank Limited* case (*supra*) at p 6-7 when she said:

> "….one has to consider that the effect of a liquidation order is to freeze the affairs of the company with a view to preserve its assets. Any disposal of the assets of the company without the leave of the court is void (s213 (c) of the Companies Act). When the affairs of the company have been frozen it means that that they have been stopped or rendered motionless. The assets of the company are prevented from being used for that time. So when a liquidator is appointed, he starts running the affairs of the company. I believe that if he wants to bring any legal proceedings to court on behalf of the company, be they fresh legal proceedings or proceedings which commenced before liquidation he has to seek the leave of the court. In my view the whole idea for seeking the court's leave even in proceedings which commenced before liquidation is to protect the company assets and prevent unnecessary expenditure of what would otherwise be available to satisfy the demands of the creditors. As correctly submitted by Advocate *Matinenga*, litigation involves costs and sometimes the costs that are involved can be disproportionate to the company's resources. Some legal proceedings may even result in prejudice to creditors. As such I do not believe it was the intention of the legislature to let the liquidator simply proceed with actions which commenced before liquidation without obtaining leave of the court."

I am thus not persuaded by the plaintiff's argument that s 221(2) only applies to fresh proceedings rather than proceedings commenced by a company before it went into liquidation when it argues that to read the words "continue", "complete" or "proceed" is tantamount to the court usurping to itself legislative powers. It is elementary that the status of entering into liquidation has the effect of putting a company into suspended animation. Everything freezes until the liquidator sets all the acts of the company into motion once again.

Therefore any acts that are done by the liquidator are being done after he has decided that in his considered opinion they are necessary and in the best interests of the company and its creditors. In that respect they are his fresh decisions, be it to commence new proceedings or to continue with proceedings that started before liquidation. For this he requires the leave of the court, otherwise there is no *locus standi*. See also *Trade Bank Ltd & Anor* v *Elysium Ltd & 2 Ors* (2012) eKLR based on s 241 (1) of the Kenya Companies Act, which is worded similarly to s 221 (2) where the court held that

> "The liquidator …….has not provided any evidence to this court to show or prove that he secured the leave of the court to commence **or to continue**, **with these proceedings** in the name of the company. (the emphasis is mine) That being so ……..the plaintiff lacked the capacity to bring this suit."

In so far as the Notice of Substitution is concerned, I am inclined to agree with the defendants, that the notice is in itself not sufficient to show that the liquidator expressly associated himself with the proceedings or that he has the leave of the court to continue therewith. As I have already stated above, a notice of substitution merely goes to show the change in the status of the company: that it is now under liquidation, rather than that there is authority for the liquidator to continue with legal proceedings.

On the record before me, it is not clear when Kingdom Bank became Afrasia Bank. What is apparent is that Afrasia Bank went into liquidation (see para 8.5.1 of plaintiff's heads of argument) by or before 14 October 2015 (see paragraph 1 of 3rd defendant's heads of argument), when plaintiff filed a Notice of Substitution to Afrasia Bank Zimbabwe Limited (in Liquidation), well after the close of pleadings. Nothing on the record shows that the leave of the Court was sought or obtained to continue with the litigation, nor is there anything to show that the liquidator associated himself with the legal proceedings.

The liquidation order that was obtained, while authorising the liquidator to bring legal proceedings on behalf of the company in general, did not allow the court the opportunity to exercise its judicial discretion whether or not to allow the continuation of these particular proceedings. (See *Millman supra*). In fact, I would not be surprised if the judge who granted the liquidation order had no idea at all that there were pending legal proceedings, and did not give a thought as to the "amount and seriousness of the claim; the degree and complexity of the legal and factual issues involved; the stage to which the proceedings may have progressed; whether the claim has arguable merit; and whether the proceedings will result in prejudice to the creditors among other factors" (per Muremba J in *Zimbabwe Allied Bank Limited (supra)'*

In any event that liquidation order was not sought by the liquidator. The process to put the company into liquidation precedes the appointment of the liquidator. Therefore, any authority in such an order for a liquidator to "bring and defend legal proceedings" does not, in my view, render unnecessary the requirement for the liquidator, once he is appointed, to comply, in his own name and right, with s 221 (2), and for the court to maintain its judicial supervisory role to protect the creditors or any other party from unnecessary litigation.

In the result I uphold the point *in limine* that that the plaintiff lacks *locus standi.*

DOES PLAINTIFF HAVE A CAUSE OF ACTION?

In the event that I am wrong in finding that plaintiff lacks the *locus standi* to be before the court, it is necessary to consider the second point of law: that the plaintiff does not have a cause of action.

The first and second defendants asserted that:

> "The allegations apparent throughout the pleadings are that the guarantee upon which the Plaintiff sued was executed by and on behalf of a non-existent entity who is not before the Court." (See paragraph 7 of their heads of argument).

The third defendant on her part submitted that:

> "…the plaintiff must in any event fail on the merits because it bases its claim against her on an invalid guarantee." (See paragraph 6 of her heads of argument).

The defendants base their positions on the fact that the plaintiff asserts that the principal debtor is Stir Crazy Investments (Private) Limited, in circumstances where the loan agreements and some of the guarantees upon which the plaintiff's claims are based are all in favour or in the name of Stir Crazy Group of Companies.

The factual position with these documents is as follows*:*

a. *Loan Agreements:* they are all in the name of Stir Crazy Group of Companies.

b. *Unlimited guarantees:* There is none by 1st defendant. 2nd defendant's is in favour of Stir Crazy Investments (Private) Limited. 3rd defendant's is in favour of Stir Crazy Group of Companies

c. *Surety Mortgage Bonds:* They are all in favour of Stir Crazy Investments (Private) Limited.

d. *Company Resolutions to take up the plaintiff's loan offers:* They were all on behalf of Stir Crazy Group of Companies

e. *Powers of Attorney to pass security mortgage bonds:* They were all in favour of securing the loans advanced to Stir Crazy Group of Companies

The plaintiff does not deny that all the loan agreements state that the principal debtor is Stir Crazy Group of Companies, but avers that this was a non-material error common to the parties and which does not vitiate their consensus. Further, the defendants are the authors of the error and cannot use it to their own benefit and in any event, one Ronald John Coumbis who signed the agreements had the express authority of Stir Crazy Investments (Private) Limited to do so.

Except by extension of its argument that this was a mistake common to all the parties the plaintiff does not advance any explanation why the guarantee by the third defendant was

in favour of Stir Crazy Group of Companies, or why surety mortgage bonds were registered on behalf of Stir Crazy Investments (Private) Limited on the strength of resolutions and powers of attorney in favour of Stir Crazy Group of Companies.

It is trite that a party must have a cause of action against the party it seeks judgment against. Case law has settled that cause of action pertains to those facts that a plaintiff must prove to support its right to judgment by the court. (See *Peebles* v *Dairibord Zimbabwe (Private) Limited* 1999 (1) ZLR 41(H).

I must point out that the first and second defendants are obviously wrong, on the facts, when they assert that **"the guarantee upon which the Plaintiff sued was executed by and on behalf of a non-existent entity who is not before the Court.**" The first defendant did not in fact execute any guarantee at all, and the second defendant executed a guarantee against an existing entity: Stir Crazy Investments (Pvt) Ltd.

However, the plaintiff's cause of action is still fraught with challenges. Firstly, it arises out of the loan agreements it entered into with Stir Crazy Group of Companies, an entity which does not exist. It then executed guarantees and surety mortgage bonds to secure its cause as circumscribed by those loan agreements. Some of the guarantees are in favour of the non-existent entity (for 3rd defendant). Other guarantees (for 2nd defendant) are in favour of an existing legal person which is not party to the loan agreements. And the security mortgage bonds are in favour of an existing legal person which is not party to the loan agreements. All these issues raise real questions as to the validity of these security documents.

If a principal debtor does not exist or has never existed, the principle debt cannot arise as against the surety. In my view therefore, the guarantee and any security mortgage bond based thereon is invalid. (See *Muchabaiwa* v *Grab Enterprises (Pvt) Ltd* 1996 (2) ZLR 691 (S). See also CF Forsyth and JT Pretorius, *Caney's Law of Suretyship* (4ed) p.36).

It cannot be denied that, on the face of the documents in the record, the loan agreements were between plaintiff and the non-existent Stir Crazy Group of Companies. I did not see on the record, or hear a denial by the plaintiff that it was not solely responsible for drawing up all the documents pertaining to these loan agreements. This was therefore not a matter of an innocent misrepresentation by the directors of Stir Crazy Investments (Pvt) Ltd.

Now, plaintiff has sued on a principal debt it alleges is owed by Stir Crazy Investments (Pvt) Ltd, contending that by an error common to the parties, the loan agreements and all security documents referring to Stir Crazy Group of Companies, ought

instead, to have referred to Stir Crazy Investments (Pvt) Ltd. In my view, what the plaintiff seeks this court to do is to amend the agreements between itself and Stir Crazy Group of Companies to refer to Stir Crazy Investments (Pvt) Ltd.

Christie: *The Law of Contract in South Africa* (5ed) at p. 366 has this to say on the powers of a court to amend contracts between parties:

> "The fundamental rule that the court may not make a contract for the parties is a salutary one, the principle of which has probably never been seriously questioned. It is unthinkable that the courts should not only tell the parties what they ought to have done but then makes them do it by enforcing the court's idea of what the contract ought to have been".

The question then is whether the court should tell the parties that the loan agreements ought to have been between plaintiff and Stir Crazy Investments (Pvt) Ltd, and all the security documents, also ought to have referred to that company and order the parties to so change the documents.

The plaintiff seems to suggest so, while the defendants say no. I am inclined to agree with the defendants, as ordering such correction of the documents would in my view amount to making of a contract for the parties. It would seem to me the defendants were presented with papers by the plaintiff and instructed where to sign, which they did. For all the court knows, the defendants may have intended to group all their companies under a yet to be formed Stir Crazy Group of Companies. Nor is it far-fetched even to consider that they may have noticed the plaintiff's error and decided to go ahead with a view to doing exactly what they are doing now: claim that plaintiff had no cause of action against them as it dealt with a non-existent company.

In either case, I do not think that this is a case where I can safely agree that there was a mistake common to the parties and amend the various loan agreements plaintiff entered into. In reaching this conclusion, I am mindful of the settled principle that the court cannot correct an agreement between parties as if it were pleadings, as that would amount to making a contract for the parties. (See also *Dr Jane Mutasa* v *Telecel International and Anor* HH 331-14; *Delta Operations (Private) Limited* v *Origen Corp (Private) Limited* 2007 (2) ZLR 81 (S) 86 F-G*; Ballantyne Butchery (Private) Limited* v *Chisvinga & Ors* SC 6-15.)

Rather, it seems to me that plaintiff was grossly negligent in the manner that it prepared its documentation for the loans it advanced.

My disinclination to amend the loan agreements, and all subsequent security documents to guarantee these loans is further influenced by the fact neither Stir Crazy Group of Companies, nor Stir Crazy Investments (Pvt) Ltd are before me. Therefore for me to

interfere in agreements wherein I have not heard some of the parties involved is not, in my view, proper.

I do not find that the fact that Stir Crazy Investments (Pvt) Ltd is suing plaintiff on the same agreements in HC10569/14 is a bar to the sureties and guarantors to raise the defences that they have, particularly, since the defendants in this case are not party to the action between plaintiff and Stir Crazy Investments (Pvt) Ltd. These are separate legal entities mandated to protect their separate interests.

In any event, that Stir Crazy Investments (Pvt) Ltd may have established a cause of action against plaintiff, does not directly translate to a cause of action by plaintiff against the defendants in this case. Plaintiff must establish its own cause of action against the defendants, which, in my view, it has failed to do.

WHETHER PLAINTIFF'S CLAIMS HAVE PRESCRIBED

Whether or not I am wrong on *locus standi* and cause of action, the plaintiffs claim must still satisfy the requirements for prescription.

Plaintiff alleged that payment was due to it as follows:

a. Claim 1 – 11 December 2009
b. Claim 2 – 19 May 2010
c. Claim 3 – 15 January 2011, and
d. Claim 4 – 31 January 2012 and 31 July 2012.

The defendants argued that, plaintiff's claims being for debts, they were subject to extinction three years after they became due in accordance with ss 14 and 15 of the Prescription Act [*Chapter 8:11*] ("the Act").

The third defendant therefore argued that, based on the allegation in the summons, plaintiff's Claims 1-3 were destroyed by reason of prescription, as three years had elapsed from the date they became due to the date of service of summons, in accordance with s 15 (d) of the Act.

The first and second defendant took the argument further to argue that all four claims had prescribed as they became due from the dates the loans were agreed on, that is on 30 April 2009, 19 May 2010, 27 October 2010 and 3 August 2011. For this assertion, they relied primarily on *Chiwawa* v *Mitzuris & Ors* 2009 (1) ZLR 72**,** where Makarau JP (as she then

was) held that the date of the agreement from which obligations arose is the date upon which the cause of action arises.

The plaintiff, on the other hand, argued that its claims had not prescribed because:

i. They were secured by mortgage bonds registered in favour of the plaintiff by first defendant and another judgment debtor, which prescription period is thirty (30) years, in accordance with s 15(a) of the Act

ii. Alternatively, the principal debtor was not *in mora* prior to liquidation due to indulgencies the plaintiff granted to it, which therefore precluded pursuance of the claims against guarantors, (per *Millmann and Another* v *Masterbond Participation Trust Managers (Pty) Ltd (Under curatorship) and Others* 1997(1) SA 113); or

iii. Alternatively, the principal debtor fell *in mora* upon entering into liquidation, and such placement into liquidation of Stir Crazy Investments (Pvt) Ltd on 19 September 2012 interrupted prescription as provided for in s 17 (1) (d) of the Act; or

iv. Finally, the issuance and service of summons in HC 589/13, though withdrawn against some of the defendants, interrupted the running of prescription. Reliance for this averment was put on *Union Government* v *Willemse* 1922 OPD 14 at 17**.**

The Law

It is trite that the general prescription period for all debts is three years in accordance with s 15(d), while that for debts secured by mortgage bonds is 30 years it terms of s 15 (a). It is also trite that the completion of prescription is delayed where debts are against a company which has entered into liquidation (see s 17(1) (d) of the Act). Finally, it is settled law that prescription can also be interrupted by judicial process (see s 19 of the Act).

I also agree with the plaintiff, with regard to sureties, that the correct position is as summarised in *Millmann & Anor v Masterbond Participation Trust Managers (Pty) Ltd (under curatorship) & Ors* 1997 (1) SA 113C when Friedman JP and Farlam J said:

> "In our view, the legal position was correctly stated by professor JG Lots in Joubert (ed) The Law of South Africa volume 26 paragraph 161 where the following statement appears: "unless the parties have agreed otherwise, a surety's debt normally becomes enforceable as soon as the principal debtor is in default, subject, however to the surety's right to claim that the principal debtor first be excused. If the surety has bound himself as co-principal debtor, his debt becomes enforceable at the same time as the principal debt."

Application of the law to the facts

From the above legal principles, I am of the view that, as a general principle, in a matter involving a loan or debt with agreed payment terms, as long as the principal debtor is not *in mora* prescription does not begin to run, as the debtor will be complying with the terms of the agreement and there is no cause to bring suit against it. However, where a debt is due to be paid on or from a particular date, and/or instalment payments are not made accordingly, then the principal debtor is *in mora* as at that date and prescription begins to run therefrom as that is the date the cause of action arose.

For instance, where a party enters into a five year loan agreement and makes the required repayments faithfully for the first four years, prescription does not begin to run. But once the party defaults, then the cause of action arises and prescription then runs from that date. I do not understand the provisions of the Prescription Act to mean that prescription runs from the date of the agreement where a party is not *in mora* as that would mean issuance and service of court process to interrupt prescription where there is no cause, thus creating a bane to commerce.

For that reason, it is my view that the position in *Chiwawa v Mitzuris* is distinguishable. There the judge was dealing with a situation where a party's right to transfer was at issue. She correctly held that the plaintiff was entitled to transfer of property from the date the agreement was concluded, and prescription therefore began to run from that date. In the present case, we are concerned with the issue of loan repayments, where a debtor can only be *in mora* from the date he defaults on his repayments.

In casu, it has not been established, on the record, exactly when the principal debtor went into *mora* by dint of defaulting in repayments. The plaintiff claims it was at the time Stir Crazy Investments (Pvt) Ltd went into liquidation, while the defendants claim that it was at the time the loan agreements were entered into.

Now, if the principal debtor is Stir Crazy Group of Companies as appears on the loan agreements, then of course it went into *mora* as at the date of the loan agreements, as that non-existent company never made any payment to plaintiff. And since there are no security mortgage bonds to secure its indebtedness, the plaintiff's claim had prescribed by the time summons were issued. *Chiwawa and Mitzuris* being the case in point.

It is another matter if the principal debtor was Stir Crazy Investments (Pvt) Ltd. If the parties agreed various indulgencies in its favour, (which I assume to be debt rescheduling agreements), as alleged by plaintiff then it only went into *mora* upon entering into liquidation

in 2012. Therefore, regardless of the existence of security mortgage bonds, plaintiff's claim would still have been live as at the date of summons; *Chiwawa* v *Mitzuris*, being inapplicable. However, plaintiff has not produced or proven the existence of these debt rescheduling agreements, leaving it unproven that Stir Crazy Investments was not in *mora* until it went under liquidation.

Therefore, assuming that the principal debtor is Stir Crazy Investments (Pvt) Ltd, the surety's liability in this case did not arise at the inception of the loans, but at the undetermined time that the principal debtor defaulted in meeting the repayment terms, which obviously is after the dates of 30 April 2009, 19 May 2010, 27 October 2010 and 3 August 2011 for claims 1-4, as it is standard practice that loan repayments cannot be due on the dates of the loan advances but subsequently. And from plaintiff's own assertions that indulgencies were granted to Stir Crazy (Pvt) Ltd prior to liquidation, then the dates of defaults were certainly before the date the company entered into liquidation.

Consequently, with regard to Stir Crazy Investments (Pvt) Ltd, I am unable to accept both parties' assertions that prescription began to run from the date of the loan agreements or from the date of liquidation.

Regarding plaintiff's averment that the running of prescription was judicially interrupted, I take note that plaintiff instituted legal proceedings in HC 589/13. However, such process was withdrawn with respect to the defendants herein after summons had been served. I do not find favour with the plaintiff's argument that the fact of serving the summons was enough to interrupt prescription in terms of s 19. This is because this provision requires that the creditor must successfully prosecute his claim to a final judgment of the court [see s 19(3) (a)], otherwise prescription shall be deemed not to have been interrupted. I have not been referred to nor have I found any authority for the position that if a plaintiff successfully prosecutes his claim against one debtor prescription is interrupted from running as against another. In fact such a principle would render ineffectual the entire purport of the Prescription Act.

Likewise, while it is true that prescription is delayed as against the principal debtor once it is placed under provisional liquidation before any of the plaintiffs' claims prescribed, I do not believe that it necessarily follows that s 17 (1) (d) is always applicable to claims against sureties (see the Law of South Africa, *supra*). On the face of it, s 17 (1) (d) is unambiguous: it provides for delay in completion of prescription where "*the debt … is the subject matter of a claim filed …… <u>against a company in liquidation</u>*" (my emphasis).

In casu, prescription would certainly have been delayed as against the principal debtor, but the defendants are not companies which had entered into liquidation for which prescription could have been delayed. Therefore had the principal debtor defaulted long before it went into liquidation, prescription for the defendants would have started to run as soon as the principal debtor went into default. I do not hold that subsequent liquidation of the principal debtor would have been a factor for the prescriptive period of the defendants.

In so far as the security mortgage bonds are concerned, and assuming the validity thereof, there is no doubt that the first defendant provided a surety mortgage bond to the plaintiff on behalf of the principal debtor to secure its indebtedness to plaintiff. This is clear on the face of the bond at pp 39-42 of the plaintiff's bundle of documents. Consequently, the prescription period for the debts secured by this bond (if valid) is 30 years and thus would not have prescribed at the time that summons was served.

However, it is also clear from the record that the first defendant did not provide any unlimited guarantee. Therefore it seems to me that the first defendant's exposure to the principal debtor's liability is limited to its obligations under the security mortgage bond. At the time that summons were issued, the first defendant was liable to the plaintiff in the amount of $1 050 000 secured by mortgage bond number 8776/03 dated 31 October 2003 over Stand 9064 of Salisbury Township. This is therefore the debt I would have found not to have prescribed had I ruled otherwise on cause of action.

There is no evidence on the record that the second defendant ever provided any security mortgage bond. It however did provide an unlimited guarantee, in favour of Stir Crazy Investments (Pvt) Ltd, which of course, had no effect on the running of prescription. I am, however, unable to find that all claims against the second defendant had prescribed or not, as neither party was able to prove to my satisfaction the exact date when prescription started to run.

It is another matter with regard to the third defendant. She gave an unlimited guarantee in favour of Stir Crazy Group of Companies and provided a surety mortgage bond in favour of Stir Crazy Investments (Pvt) Ltd valued at $300 000. However, I accepted her argument, on determining the question of cause of action, that the unlimited guarantee which she provided was in favour of a non-existent company, and was consequently a nullity. By extension therefore, I am unable to fault the logic that nothing can stand on nothing: once the unlimited guarantee is a nullity, then it cannot validly ground the mortgage bond. And since I was not inclined to amend the loan agreements between plaintiff and Stir Crazy Group of

Companies to refer to Stir Crazy Investments (Pvt) Ltd, there is no causal connection between the loan agreements and the security mortgage bond that the third defendant provided. Therefore I cannot find that the prescription period ought to be 30 years. Consequently, I cannot hold that the plaintiff's claim against the third defendant had not prescribed.

In the event, I cannot agree with the plaintiff that the defence of prescription was wrongly taken.

DISPOSITION

In the result, it is ordered that:

1. The plaintiff 's claim is struck off for failure to establish its l*ocus standi* to bring this action;

2. The plaintiff's claim is, in any event, dismissed for want of a cause of action against the defendants;

3. The defendants defence of prescription is upheld;

4. The plaintiff shall pay the defendants' costs of suit.

Sawyer and Mkushi, plaintiff's legal practitioners
Wintertons, 1st & 2nd defendants' legal practitioners
Atherstone & Cook, 3rd defendant's legal practitioners