

Promise to pay – prolonging prescription

By Lalena Posthumus

There is a significant intersection between the Bills of Exchange Act 34 of 1964, the Prescription Act 68 of 1968 and acknowledgments of debt.

Many attorneys regularly draft and use acknowledgments of debt in their practices. A claim arising from an acknowledgment of debt will prescribe in three years as it is an ordinary debt in terms of the Prescription Act.

However, it may be possible to draft an acknowledgment of debt in such a way that it becomes a negotiable instrument, thus extending the period of prescription.

This may be the difference between a client being able to collect on a debt or not.

Acknowledgments of debt

There are acknowledgments of debt that are only acknowledgments of debt; and others that amount to both an acknowledgment of debt and a promissory note.

The relevance of this distinction lies in s 11 of the Prescription Act, which provides:

‘Periods of prescription of debts

The periods of prescription of debts shall be the following:

...

(c) six years in respect of a debt arising from a bill of exchange or other negotiable instrument or from a notarial contract, unless a longer period applies in respect of the debt in question in terms of paragraph (a) or (b);

(d) save where an Act of parliament provides otherwise, three years in respect of any other debt.’

Whereas a debt arising from an acknowledgment of debt will prescribe in three years, a promissory note is a negotiable instrument, and a debt arising from a promissory note will prescribe after six years.

The question then is: When does an acknowledgment of debt amount to a promissory note?

A promissory note?

Section 87(1) of the Bills of Exchange Act contains the following definition of a ‘promissory note’:

‘A promissory note is an unconditional promise in writing made by one person to another, signed by the maker, and engaging to pay on demand or at a fixed or determinable future time, a sum certain in money, to a specified person or his order, or to bearer.’

There is no definition of ‘negotiable instrument’ in the Bills of Exchange Act. However, it is not disputed that a promissory note is a negotiable instrument.

All of the provisions of the Bills of Exchange Act apply to promissory notes, save for the sections mentioned in s 93(3) of the Act.

As negotiable instruments, they will fall within the prescription period specified in s 11(c) of the Prescription Act.

The elements identified in the above definition are important for recognising a promissory note, and for drafting one. The definition of a promissory note is substantially similar to that of a bill of exchange and the case law on the above elements may be of assistance when drafting a promissory note.

What then constitutes the elements that determine what is required for a document to qualify as a promissory note?

These are discussed below.

- **Unconditional:** In order for a note to be negotiable, it must be unconditional. A condition is a term that makes an obligation to perform dependent on whether or not an uncertain future event happens (Dale Hutchinson (ed) *The Law of Contract in South Africa* (Cape Town: Oxford University Press South Africa Pty Ltd, 2009) at 448). For examples of where a note will be unconditional, see ss 2(3) and 9(2) of the Bills of Exchange Act.
- **Promise:** A promise is an undertaking to pay and cannot be anything less. It must be in the imperative form. In *LAWSA 2ed* (Durban: LexisNexis) vol 19 at para 17 it states: 'A promissory note should read "I promise to pay", "I agree to pay", "I undertake to pay" and so on.'

An undertaking to pay will not be implied, as seen in *Nawab Major Sir Mohammad Akbar Khan v Attar Singh* 1936 2 All ER 545 (PC).

It is this element that will change an acknowledgment of debt into a promissory note and, thus, close attention must be paid to ensuring that this element is complied with in order for an acknowledgment of debt to become a promissory note.

- **In writing:** According to s 3 of the Interpretation Act 33 of 1957, writing includes 'all ... modes of representing or reproducing words in visible form'.
- **Addressed by one person to another:** According to s (4)1 of the Bills of Exchange Act, the person to whom the promise is made must be named or indicated with reasonable certainty. It may be addressed to more than one person, but not in the alternative (s 4(2) of the Bills of Exchange Act).
- **Signature of the promissory:** The Bills of Exchange Act does not prescribe any particular form of signature, but the relevant case law gives some indication in this regard. Any mark that identifies the promissory will be sufficient.
- **On demand:** A note is payable on demand if it is expressed to be so, if it is payable at sight, if it is payable on presentation, or if no time for payment is expressed in it (s 8(1)).
- **A fixed future time or a determinable future time:** A note is payable at a fixed future time if it is expressed to be payable at a fixed period after the date or on or at the expiration of a fixed period after the occurrence of a specified event that, even though the time of happening may be uncertain, it is certain that it will happen (s 9(1)(a)).
- **A certain sum:** The amount must be certain or ascertainable *ex facie* the instrument. If it is necessary to look outside the document for the amount due, then the document is not a negotiable instrument (see *Hamman v Van der Merwe* [1947] 1 All SA 369 (SWA)).

According to s 7(1), an amount is certain although it is payable with interest, by stated instalments, where, on default in payment of any instalment, the whole amount becomes due by provision in the note, or according to a rate of exchange to be indicated or to be ascertained by the note.

- **Money:** The promise to pay must be for a sum of money and no other thing of value. Should there be any other thing of value promised, then the document containing the promise is not a promissory note (*LAWSA 2ed* (Durban: LexisNexis) vol 19 at 22).
- **To a specified person:** The person must be named or otherwise indicated in the bill with reasonable certainty (s 5(1)) (see *Barlow Rand Ltd t/a Barlow Noordelik Masjinerie Maatskappy v Self-Arc (Pty) Ltd* 1986 (4) SA 488 (T)).

According to s 5(2), an instrument can be payable to two or more payees jointly or in the alternative.

- Or his order: A note will be payable to order if it is expressed to be so, or if it is expressed to be payable to a particular person and does not prohibit transfer or transferability of the note (s 6(3)).
- Or to bearer: A note is payable to bearer if it is expressed to be so or if the last endorsement is an endorsement in blank.

Case law: Future or determinable time

In *Salot v Naidoo* 1981 (3) SA 959 (NPD) the plaintiff sued the defendant via a provisional sentence summons based on a document described as an acknowledgment of debt, in terms of which the defendant undertook to pay the plaintiff a certain sum of money 'on or before' a certain time. The defendant pleaded prescription as a defence but the plaintiff argued that the acknowledgment of debt was a promissory note, was thus a negotiable instrument and had not prescribed in terms of s 11 of the Prescription Act.

The case was decided on the authority of the English case *Williamson and Others v Rider* (1962) 2 All ER 268, in which an agreement to pay 'on or before' a certain date was not considered to be a promissory note as defined in the English Bills of Exchange Act 1882 (which contained the same definition of 'promissory note' as the equivalent section in the South African legislation) because the money was not payable at a fixed or determinable future time. The reasoning was that the time in which the money was to be paid was limited, but not fixed.

The judge in the *Salot* case agreed with this reasoning and ordered that, because the acknowledgment of debt was not a promissory note, the claim had thus prescribed.

The court in *Weszak Beleggings (Edms) Bpk v Venter* [1972] 2 All SA 124 (T) also concluded that a document promising to pay 'on or before' or 'within' a certain date only limited the time when payment must be made, but did not fix it. Thus, the document did not fall within the definition of a promissory note.

Contrary to these cases is *Allwright v Gluck* 1962 (1) SA 562 (W), in which an acknowledgment of debt with a promise to pay 'not later than' a certain date was held to be a promissory note.

This case is difficult to distinguish from the cases mentioned above and the law is therefore not entirely clear on this issue.

It is advisable to avoid this type of language with regard to determining a time for payment.

Conclusion

When will an acknowledgment of debt qualify as a promissory note?

As FR Malan states:

'A promissory note is a promise. A promise is an undertaking to pay and involves more than an acknowledgment of debt with an implied undertaking to pay An acknowledgment of debt is not a promissory note but, coupled with an express undertaking to pay, it could be' (FR Malan *Malan on Bills of Exchange, Cheques and Promissory Notes* 4ed (Durban: Butterworths 2002) at 464 – 465).

The key is the wording of the acknowledgment of debt. An acknowledgment of debt must specifically comply with the definition of a promissory note in s 87(1) of the Bills of Exchange Act in order to be a promissory note, which means that it must contain the elements mentioned above.

An acknowledgment of debt will normally comply with most of these elements and very little adjustment is needed to draft a promissory note.

It is thus easy to convert an acknowledgment of debt into a promissory note.

When acting for a creditor, it is advisable when drafting acknowledgments of debt to consider including the elements required for a promissory note. This should obtain for your client three extra years before the claim will prescribe.

No attorney would like to be in the position of having to respond to a client's accusation of negligence for failing to ensure that the client's interests were best served by obtaining six years, instead of a mere three, before any claim under the document drafted by the attorney prescribes.

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