IN THE HIGH COURT OF SOUTH AFRICA

(WITWATERSRAND LOCAL DIVISION)

CASE NO: 2000/23938

In the matter between:

LYNN & MAIN INCORPORATED	Plaintiff
and	
KRUGER, JOHAN DAVID	First Defendant
BEUKES, JOHANNES GEORGE FREDERIK	Second Defendant
BEUKES, SANDRA VERONICA	Third Defendant

J U D G M E N T

BLIEDEN, J:

The plaintiff is the cessionary of various claims which were ceded to it by Nedbank Ltd (Nedbank). Amongst these claims is one based on monies due

to Nedbank as a result of overdraft facilities granted by it to Kruger Glass and Aluminium CC (the CC). This debt was claimable by Nedbank on demand.

For the purposes of the present hearing it is common cause between the parties that:

1. Nedbank demanded payment from the CC in and during December 1995.

2. The last payment by the CC to Nedbank in terms of its overdraft liability was on 4 September 1997.

3. The CC was deregistered in terms of section 26 of the Close Corporation Act, No. 69 of 1984 (the Act) on 30 July 1999.

4. At the time of its deregistration the first defendant was a member of the CC.

5. Summons was served on the first defendant on 30 October 2000. In this summons the alleged indebtedness of the CC to Nedbank was claimed to be due and payable by the first defendant, *inter alia* as a consequence of the provisions of section 26(5) of the Act.

In a special plea the first defendant has pleaded that Nedbank's claim against him has prescribed. The parties have agreed that the present hearing is to determine this issue alone. If it is found that the claim has prescribed against the first defendant that is the end of the matter against him. On the other hand if it is found that the claim has not prescribed the matter has to be postponed *sine die* as there are other defences raised by the first defendant which are yet to be adjudicated upon.

THE DEFENDANT'S CASE

A. In terms of section 11(d) of the Prescription Act, No. 68 of 1969 (the Prescription Act) the period of prescription for a debt such as the present is claimed to be, is 3 years.

B. Section 12 of the Prescription Act provides that prescription commences to run as soon as the debt is due. A debt is however not deemed to be due until the creditor has knowledge of the identity of the debtor and the facts from which that debt arises.

C. It is not disputed that prescription of the debt against the CC started running from 4 September 1997, that date being the date on which the CC last made payment to Nedbank. As at the date of deregistration of the CC i.e. 30 July 1999, the debt had not prescribed. However, by the

date summons was issued against the first defendant, i.e. 30 October 2000, the debt against the CC had prescribed.

D. The indebtedness of the first defendant to Nedbank is one subsidiary to that of the CC, and therefore if the debt against the CC has prescribed so has the indebtedness of the first defendant. There cannot be two different periods of prescription over the same debt.

THE PLAINTIFF'S ANSWER TO THE DEFENDANTS' CASE

On behalf of the plaintiff it was submitted that in terms of section 26(5) of the Act, Nedbank's claim against the first defendant only became due when the CC was deregistered on 30 July 1999, and therefore the plaintiff's summons was served on the first defendant within the three year prescriptive period.

Section 26(5) of the Act reads:

> "*26(5) If a corporation is deregistered while having outstanding liabilities, the persons who are members of such corporation at the time of deregistration shall be jointly and severally liable for such liabilities.*" (my underlining)

The jurisdictional facts necessary for liability in terms of section 26(5) of the Act are therefore:

1. The deregistration of the close corporation;

2. At the time of deregistration the close corporation must have outstanding liabilities;
3. The person/s sought to be held liable must be member/s of the close corporation at the time of its deregistration.

As is plain from what is said about section 26(5) above, the section creates a liability for a member of a close corporation purely by reason of his membership of that corporation, which liability such member did not have up to the deregistration of the close corporation. This liability has been described as a civil penalty.

The Supreme Court of Appeal in *Mouton v Boland Bank Ltd* 2001 (3) SA 877 (SCA) at 881D-H accepted the proposition that the policy behind section 26(5) is to impose a civil penalty upon a member who allows the Registrar to deregister a corporation which does have liabilities. If a corporation is carrying on business and it is intended to bring its existence to an end, the proper procedures are either winding-up by the court (section 68) or voluntary winding-up (section 67). Creditors will then be entitled to share in the proceeds of the corporation's assets in accordance with the rights which the

law accords them. Misusing deregistration when one of the alternative proceedings is appropriate brings down the penalty upon the head of the errant member. It was further held that generally a member of a relatively small business such as a close corporation should know what it owes and there is reason in policy for attaching personal liability for ignorance and, even more, for deliberate falsehood. As was stated by Schutz JA at 881H:

> "*… looking at the Act as a whole, the corporate veil of a corporation is made of gossamer when contrasted with the strong thread of a company veil.*"

Therefore, in terms of section 26(5) the defendant, being a member of the CC at the date of its deregistration, only became liable for its debts on 30 July 1999. Prior to that date no liability attached to him as a member of the CC.

The Appellate Division in *Deloitte Haskins & Sells (Pty) Ltd v Bowthorpe Hellerman Deutch (Pty) Ltd* 1991 (1) SA 525 (A) at 532H definitively held that prescription cannot begin to run against a creditor before his cause of action has accrued i.e. before he is able to pursue his claim. As was stated by Colman J in *Van Vuuren v Boshoff* 1964 (1) SA 394 (T) at 401D:

> "*… the* (Prescription) *Act was designed to penalise the person who can enforce his claim by action, but does not do so, and not the person who delays taking action because he is not yet able to do so.*"

Although this statement was made with reference to the previous Prescription Act, the principle applies to the present one as well, and is plainly correct.

In my view the complete answer to the defendant's special plea of prescription is contained in the plaintiff's submission that prior to 30 July 1999 Nedbank had no claim against the first defendant purely by reason of the close corporation in question being liable to it for various monies and the first defendant being a member of that close corporation. The deregistration of the close corporation in question had the effect of making the first defendant liable for such debts. This was an essential element in the plaintiff's cause of action. As that essential element only came into existence on 30 July 1999 it was only on that date that Nedbank acquired a complete cause of action against the first defendant for the recovery of the outstanding liability of the close corporation to it. The correctness of this submission is further confirmed by the decisions in *Primavera Construction SA v Government, North-West Province* 2003 (3) SA 579 (B) at 596B-598A and *Unilever Best Foods Robertsons (Pty) Ltd v Soomar* 2007 (2) SA 347 (SCA) at 359G and 360I.

The fallacy in the defendant's argument is that he has construed his indebtedness to Nedbank as that of a surety and co-principal debtor, in which event there can be no doubt that the first defendant could rely on the prescription of the CC's debt. However, in the present case the first defendant is liable to Nedbank because of the provisions of section 26(5) of the Act which has nothing to do with any suretyship undertaking on his part. The first defendant's liability in the context of the special plea only arose when

the CC was deregistered i.e. 30 July 1999 and not before that date. It cannot be construed to be a debt subsidiary to that of the CC, but is a separate debt by the first defendant.

In the circumstances the plaintiff's main claim against the first defendant has not prescribed.

The following order is made:

1. It is declared that the plaintiff's main claim against the first defendant has not prescribed.

2. The action between the plaintiff and the first defendant is postponed *sine die*.

3. The first defendant is ordered to pay the plaintiff's costs insofar as they relate to the special plea.

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P BLIEDEN
JUDGE OF THE HIGH COURT

COUNSEL FOR PLAINTIFF ADV G M E LOTZ

INSTRUCTED BY	LYNN & MAIN INCORPORATED
COUNSEL FOR FIRST DEFENDANT	ADV D L WILLIAMS
INSTRUCTED BY	JAN BEZUIDENHOUT ATTORNEY
DATE OF HEARING	8 OCTOBER 2007
DATE OF JUDGMENT	11 OCTOBER 2007