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IN THE HIGH COURT OF SOUTH AFRICA

(GAUTENG DIVISION, PRETORIA)

DELETE WHICHEVER IS NOT APPLICABLE
(1) REPORTABLE: ~~YES~~/NO.
(2) OF INTEREST TO OTHER JUDGES: ~~YES~~/NO.
(3) REVISED.

25/1/18 DATE ..... SIGNATURE

CASE NUMBER: 66664/2016

In the matter between:

PROMAC PAINTS PROPRIETARY LIMITED	**APPLICANT**
And	
SUSCITO INVESTMENTS PROPRIETARY LIMITED	**FIRST RESPONDENT**
DOGGERED INVESTMENTS PROPRIETARY LIMITED	**SECOND RESPONDENT**
THE COMMISSIONER FOR THE SOUTH AFRICAN REVENUE SERVICE	**THIRD RESPONDENT**
CLOETE MURRAY N.O.	**FOURTH RESPONDENT**
ZEENATH KAJEE N.O.	**FIFTH RESPONDENT**
ALBERT IVAN SURMANY N.O.	**SIXTH RESPONDENT**
TSHIFIWA PERSEVERANCE MUDZUSI	**SEVENTH RESPONDENT**

JUDGMENT

TLHAPI J

INTRODUCTION

[1] In this application the applicant seeks orders in the following terms:

> "1. Declaring that the debts arising from the loan made by the first respondent to the applicant in the sum of R5 397 931 during 2008 ('**the loan**') has become prescribed in terms of sections 10, 11 and 12 of the Prescription Act 38 of 1969 (as amended) ('The Act') on or about 1 December 2012; and
>
> 2. By reason of **the loan** having prescribed on or about 1 December 2012 it is declared that, on a proper interpretation of the Court Orders made on 6 August 2014 under case number 55517/2014.....and on 4 August 2015 under case number 19016/2015 ...all references to "the assets" in those orders do not include **the loan;**
>
> 3. The applicant is not obliged to pay **the loan** or any part thereof to any of the respondents"

FACTUAL BACKGROUND

[2] The founding affidavit was deposed to by Mr JFS Joubert, ("Joubert")a director of the applicant. The first and second respondents referred to herein as "Suscito" and "Doggered" respectively are controlled by Rees Trustees, both companies having as sole shareholder one Mr Dean Gillian Rees, ("Rees").

[3] During 2008 the applicant represented by Joubert and the first and second respondent by Rees entered into an agreement whereby Doggered acquired 30% shares in the applicant for a sum of R5,4 million. Also during that time a sum of R6m paid to the applicant from Suscito's

bank account and a further R2m was paid by Rees using an IBL credit card and copies of proofs of payment were annexed as JJ6.1 – JJ6.4. There were other smaller payments by Rees and these were allocated to the Suscito loan account. Furthermore, Joubert and Rees agreed at the time the payments were made that the monies would be allocated as follows (a) R565 172.00 as a shareholder's loan to Promac from Doggered and (b) R7, 593 151.00 in an unsecured loan to Promac from Suscito. It was also part of the agreement that the loans would bear no interest and that they would be payable on demand. The loan was reflected in all the Annual Financial Statements of Promac and copies of Promac's statements are annexed from the year February 2009 – February 2016. During 2009 Suscito's loan account in Promac was reduced by R2 195 220 and it therefore stood at R5 397 931.

[4] Joubert averred that Doggered was at all times a silent shareholder in Promac and did not appoint a director to the applicant. Doggered did not attend any one of the Annual General Meetings from the time of purchase of the shares and this is reflected in the minutes of the Annual General Meetings, copies annexed as JJ10.1 – JJ10.8

THE DEMAND

[5] On 30 November 2009 Doggered addressed a letter to the applicant in terms of section 345 of the 1973 Companies Act, served by Sherrif on 1 December 2009. Payment was demanded of an amount of R5 963 103.00 by no later than 17 December 2009, failing which winding up proceedings would be launched against the applicant. The applicant contends that this letter constitutes a demand and that prescription began to run from the date of service, 1 December 2009. It is contended that this letter constitutes a demand for payment due to Doggerred and Suscito by the applicant for the amount owing in respect of the R5 397 931 (Suscito) and the R 565 172 (Doggered) and, that Doggered was acting as agent for Suscito in making this demand. The letter was addressed to the applicants by attorneys on behalf of the second respondent and the relevant paragraphs read:

"DEMAND FOR PAYMENT IN TERMS OF SECTION 345 OF THE COMPANIES ACT, 1973

We address you at the instances of our client Doggered Investments Limited, a 30% shareholder of your company, who instructs us as follows:

1. **You are indebted to our client in the amount of R5, 961, 103.00 in respect of monies loaned and advanced to you on loan account at your instance and request in and during 2008.....**
2. **A further term of the loan was that same was repayable to our client on demand, as confirmed and conceded by your director Mr. J Joubert in email correspondence to our client's Mr Rees on 7 September 2009;**
3. **Our client accordingly hereby demands repayment of the aforesaid sum of R5, 961, 103.00.....**

Winding up proceedings under case number 5430/2010 against the applicant were later launched by Doggered and the applicant opposed the said application. Doggered did not follow through with this application after an order dated 2 August 2010 and after failing to provide security as ordered.

RELATED LITIGATION AND COURT ORDERS

[6] Gainsford N.O. Gavin Cecil and Others v Rees Dean Gillian and Others (case 29490/2011):

On 6 June 2014 it was ordered by Mbha J that Rees owed the liquidated estate of one Mr Barry Deon Tannenbaum with whom he was involved in a 'Ponzi Scheme, an amount of R158 938 209.63 and, that the assets of Doggered which were declared assets of Rees be executed to pay the judgment debt. On 29 July 2014 a writ of execution followed which according to the applicant erroneously listed Doggered's loan account as amounting to R5 961 103 which also included the Suscito's loan account. The Trustees of Tannebaum did not attach Doggered's shares nor the Suscito's Loan Account in Promac. On 21 November 2011 the applicant settled Doggered's loan account in the amount of R565 172.00 by making payment to the Sheriff.

The Commissioner for South African Revenue Service v Dean Gillian Rees and Others (case 55517/2014): On 6 August 2014 a preservation order in terms of section 163 of the Tax Administration Act 28 of 2011 was granted that Cloete Murray was to act as Curator Bonis for Rees' assets " including but not limited to, any shareholding, loan accounts, member's interest, movable and immovable assets".

A further application under the same case number to exclude the Doggered's shares from the preservation order was dismissed

Cloete Murray N.O. v Suscito Investments (Pty) Ltd and Others (case 19016/2015): It was confirmed herein that the assets of Suscito were those of Rees and that they fell within the preservation order under case 55517/2014.

[7] The applicant contends that were it not for the intervention of prescription which preceded the grant of the orders in the above matter the loan owed by the applicant to Suscito would have been included in the orders. Even though the effect of the orders were that the Assets of Suscito and Doggered were that of Rees, the right to payment of the loan in respect of Suscito had prescribed three years after the date of demand on 1 December 2009 being three years before the orders were given. Furthermore, the applicant contends that the liquidation application launched by Doggered against the applicant was not a judicial process for the recovery of debt and therefore did not interrupt the running of prescription. Also, prescription has not been interrupted by an admission of liability by the applicant to Suscito, therefore the loan by Suscito prescribed on 1 December 2012.

[8] Ms Zeenath Kajee, the fifth respondent (one of the joint trustees) deposed to the opposing affidavit on behalf of the first and second respondents and the joint trustees (fourth to the seventh respondents). There was also a counter application by the joint trustees for an order that the applicant make payment to the joint trustees of the estate of Dean Gillian Rees an amount of R5 397 931.00. This counter application is launched on the basis of the applicant's

admission contained in its financial statements for the period 2009- 2015 and as confirmed by Joubert in the founding affidavit.

[9] The respondents deny that the loan has become prescribed or that the letter dated 30 November 2009 constituted a demand by Doggered acting as an agent for Suscito for the money owed to it by the applicant. They contend that Joubert's versions as to the true meaning and purpose of the letter amounted to contradictions, mutually destructive versions, speculation and which versions are not supported by confirmatory affidavit. In its clear and unambiguous language it was clear that Doggered demanded payment for itself. The respondents also referred to the contradictory version of Joubert as to when the debt would become due in a confirmatory affidavit in another application under case 35314/ 2009.

[10] The respondents contend and concede that Doggered did not have *locus standi* to institute liquidation proceedings against the applicant, and did so under the mistaken belief that it was owed R5 397 931.00 and that the demand of 30 November 2009 was not a proper demand by Doggered to the applicant. Also the trustees of Tanenbaum and the South African Revenue Service labored under the incorrect assumption about the loan account The first demand was made by Cloete Murray N.O acting as *curator bonis* on 21 August 2015; that even if the debt had prescribed the repeated acknowledgment to Mr Murray "in court papers; in email, correspondence and verbally") sufficed as being made by applicant to its creditor Suscito and each incident constituted a new and separate cause of action. Joubert stated that it was agreed that the loan was repayable on demand and correctly conceded that prescription commenced to run when such demand is made. However, the applicant's stance taken in the 2016 Annual Financial Statements that the repayment of the loan had prescribed was a contrived afterthought because applicant had always believed that it was repayable.

[11] In as far as a new cause of action arising in each acknowledgment of debt "(in alternative to a loan cause of action)" made within the 3 years of such admission it was contended that the contents of Mr Murray answering affidavit in the Tannenbaum's application to exclude Doggered's shares from the preservation order under case 5551/2014 set out the

following chronological sequence in CM1A were relevant:

> "6.1 I met with the representatives of Promac Paints (Pty) Ltd (Promac) (Messrs Johan Jouberts and Vern Prost, respectively the company's financial and managing directors) on 11 August 2014 to discuss the loan account and shares held in Doggered and Suscito. It was confirmed by the representatives of Promac that neither the loan account in the name of Suscito nor the shares held by Doggered had been attached by the Sheriff. The contents of the provisional preservation order were explained to the representatives and they agreed that the shares could be transferred to me in terms of the order"

[12] Joubert not only confirmed the contents that the loan account was owing by the applicant to Suscito, Joubert in response to the letter of demand that followed did not raise prescription but instead made certain without prejudice proposals which cannot be disclosed. Again Joubert forwarded management accounts for the applicant for the period ending 31 August 2015 which were signed by Joubert and the Auditor in which the indebtedness is admitted. This contends the respondents lends itself to a separate alternative cause of action, being the acknowledgement of debt in the management accounts, which stands apart from the loan account cause of action. According to the respondents the applicant had failed to demonstrate that the loan account due to Suscito had prescribed.

[13] The third respondent was appointed as a result of the order of court of the 4 August 2015 (Case number 19016/2015). It is denied that the debt became due on 30 November 2009 as a result of the section 345 letter of demand served by Doggered on the applicant. If indeed so, then it is contended that prescription was continuously interrupted up to 20 February 2015 by the applicant's express acknowledgement of debt in its Financial Statements. It was further contended that Joubert not being the author of the letter, he correctly pointed out the error in such letter that Doggered was owed an amount of R5 963 103.00 by the applicant. It was pointed out that Joubert contradicted himself by holding that the demand letter was written on behalf of Suscito, there being an understanding by him that the loan due to Suscito would only become payable on demand, therefore such demand had to come from Suscito and not

Doggered. This is confirmed by an email dated 7 September 2009 by Joubert to in which reference was made to "Loan Account – Suscito/Doggered, R5 963,103.00. This was followed by the 345 demand issued by Doggered's attorneys Eversheds. It is contended that the applicant's attorneys Strydom and Bredenkamp did not correct such erroneous assumption.

THE ISSUES

[14] These have been summarized by the applicant as follows:

- Whether the debt arising from a loan made by first respondent to the applicant has prescribed;
- Whether prescription was interrupted by an acknowledgement of debt by the applicant of the debt;
- Whether prescription was interrupted by judicial process;

THE LAW

[15] The extinction of debt is provided for in the Prescription Act 68 of 1969 ('the Act') and only those sections which are relevant to the determination of the issues are referred to herein:

(a) In section 10 is provided that a debt shall be extinguished after the lapse of a period.

(b) In this instance the relevant period of three years is provided for in section 11(d) of the said Act.

(c) Section 12 (1) provides that prescription shall commence to run when the debt becomes due. It was agreed that the loan would become due on demand by Suscito.

This fact is acknowledged by Joubert in the founding affidavit and also as financial director and signatory to the financial statements.

(d) Section 14(1) provides for the interruption of the running of prescription which shall be in the form of an express or tacit acknowledgment of liability by the debtor.

(e) Section 15 provides for the interruption of the running of prescription, subject to subsection (2), by the service on the debtor of a judicial process whereby the creditor claims payment of the debt;

Acknowledgment of Liability in the Financial Statements

[16] Joubert was financial director of the applicant and together with the other directors, was a signatory to all the financial statements of the applicant, for the years 2009 – 2015. I am not persuaded that the confirmation of the applicant's indebtedness to Suscito in the statements constitutes an acknowledgment of liability that usually occurs when there is a demand for payment to the debtor by the creditor which would result in an undertaking or agreement to pay the debt according to stipulated terms. In my view, and taking into consideration the purpose for which audited financial statements are prepared, it is rather just a statement which confirms the existence of the liability.

[17] It was contended for the applicant that the mention of the liability to Suscito in the financial statements could not be viewed as an unequivocal acknowledgement of liability, made by a debtor (applicant) to the creditor (Suscito), sufficient to interrupt prescription; that the acknowledgment of liability was not communicated to Suscito or its representative. Both Suscito or its representative and Doggered had never attended any annual general meetings as the minutes reflect. The third respondent contends that the investment by Suscito represented by Rees was such that it could be inferred that the financial statements of the applicant could have been furnished to Suscito thereby interrupting prescription at every turn such statements were published. In my view the relevance of the acknowledgment of liability is to be found in the

determination of whether there was a section 345 demand on behalf of Suscito by Doggered to the applicant, which is discussed below.

Has the Suscito debt prescribed:

[18] It is common cause that the financial statements confirm the standing of the shareholder's loan account of Doggered at R 565 172.00 and of Suscito at R 5, 397, 931.00. It is also common cause that Mr Cloete Murray was appointed *curator bonis* of the assets of Rees on 6 August 2014 and that effect of the court orders dated 4 and 26 August 2015 were that the assets of Suscito and Doggered were declared to be assets in the estate of Rees, who was the sole shareholder in the companies Doggered and Suscito.

[19] It was submitted for the applicant that a proper construction of the section 345 demand letter of 30 November 2009 the companies having been in control of Rees, who in as far as the loans were concenred 'plainly treated them as one debt', that the demand by Doggered for the payment of the amount of R 565 172.00 plus R 5, 397, 931.00 (R 5, 963, 103.00), was in fact Doggerred making the demand as agent for or on behalf of Suscito. Furthermore, that the orders referred to above did not include the loan account held by Suscito since the debt had prescribed prior to the orders being made.

[20] In argument reliance was placed on the rules of interpretation as discussed in *Natal Joint Municipal Pension Fund v Endumeni Municipality* [2012] 2 All SA 262 (SCA), ("Endumeni"). The process of interpretation should be entirely an objective one without placing reliance on the subjective, being the intention of the writer: (a) *"having regard to the context ….in the light of the circumstances attendant upon its coming into existence…….A sensible meaning is to be preferred to one that leads to insensible or unbusinesslike results or undermines the apparent purpose of the document"* (para 18); (b) Courts are warned not to impose *"their own views of what it would have been sensible for those others to say,"* Interpretation is not to seek what the intention behind the document is or was or what "the intention of the parties was", but it is to determine what the language used in the document means; "*the proper approach ….is from the*

outset to read the words used in context of the document as a whole and in light of all the relevant circumstances; Even if there is no ambiguity in the language used it is a *"misnomer"* to adhere to the ordinary grammatical meaning as " *most words can bear several different meanings or shades of meaning and to try to ascertain their meaning in the abstract, divorced from the broad context of their use, is an unhelpful exercise" (paragraphs: 22, 24 and 25).*

[21] It was argued for the first, second, fourth to seventh respondent's including the third respondent that the jurisdictional prerequisite for the section 345 demand in this instance and in respect of Suscito was that it had to be made by Suscito as creditor; that Joubert was not the author of the letter and was therefore not in a position to provide facts that it was also written on behalf of Suscito.

[22] I am not certain that in this instance the section 345 letter of demand is the type of document that should be interpreted according to the principles in Endumeni *supra.* There is no clarity as to the context and surrounding factors in which such demand was made by attorneys Eversheds on behalf of Doggered. The process of interpretation according to those principles demand that in the determination of the meaning of the letter that the context and surrounding factors should be simultaneously examined I am in agreement with the submissions on behalf of the respondents that Joubert was not in a position in the absence of a confirmation from Rees to state that the demand was also made on behalf of Suscito. Should such contention be accepted that the demand was also made on behalf of Suscito, on the basis of it being contended that Rees was 'the controlling mind of both Doggered and Suscito', then indirectly is introduced or imposed the intention for which the letter was written, and this is the very reason such process of interpretation is discouraged.

[23] I am of the view that there has not been a demand by Suscito to the applicant for payment of the loan account. It is conceded by the applicant that the loan account was payable on demand by the creditor and, to prove on a balance of probabilities that the demand was not accepted or understood as one on behalf of Suscito, the applicant acted positively to the demand in as far as it related to Doggered by settling the R565, 172.00 with the sheriff. In as far

as the winding up application against the applicant by Doggered is concerned the explanation that it was launched under an erroneous impression that the debt was owing to it, as also reflected in the writ of execution must be accepted.

[24] Having determined that the letter of the 30 November 2009 was not a section 345 demand by Suscito, therefore prescription did not commence to run, it becomes necessary to revisit the acknowledgement of liability to Suscito as reflected in the Financial Statements. My understanding is that as soon as the court orders declared that the assets of Suscito and Doggerred were those of Rees, then the financial statements came to the knowledge of creditors and the Trustees of the insolvent estate of Rees. The acknowledgement should be considered in these circumstances as an unequivocal acknowledgment of liability in light of the purpose for which the audited statements were published, especially where the third and fourth respondents are concerned, and the trustees (fifth to the seventh respondents) in as far as they have an obligation towards the creditors of the insolvent estate of Rees. The applicant and Joubert the financial director cannot now seek to evade such acknowledgement of liability. It is for these reasons that I am of the view that the application should fail.

[25] In the result the following order is given:

1. The application is dismissed with costs.

TLHAPI VV

(JUDGE OF THE HIGH COURT)

MATTER HEARD ON	:	**16 MAY 2017**
JUDGMENT RESERVED ON	:	**16 MAY 2017**
ATTORNEYS FOR THE APPLICANTS	:	**ADAMS ATTORNEYS**
ATTORNEYS FOR THE RESPONDENTS	:	**MACROBERT INCORPORATED**