THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Case No: 168/09

In the matter between:

DUET AND MAGNUM FINANCIAL SERVICES CC (IN LIQUIDATION) Appellant

and

J H KOSTER Respondent

Neutral citation: *Duet and Magnum Financial Services v Koster* (168/09) [2010] ZASCA 34 (29 March 2010)

Coram: NUGENT, HEHER and VAN HEERDEN JJA and THERON, SERITI AJJA

Heard: **15 MARCH 2010**

Delivered: **29 MARCH 2010**

Summary: Insolvency – dispositions – liquidator's right to apply for setting aside under ss 26, 29 and 30 of Insolvency Act 24 of 1936 – when extinctive prescription begins to run.

ORDER

On appeal from: North GautengCourt, Pretoria (Preller J sitting as court of first instance):

The appeal is dismissed with costs.

JUDGMENT

NUGENT JA (HEHER and VAN HEERDEN JJA, THERON and SERITI AJJA):

[1] The question in this appeal is whether a claim by a liquidator under s 32 of the Insolvency Act 24 of 1936 to have a court set aside an impeachable transaction, and to make a declaration that the liquidator is entitled to recover the alienated property, prescribes under the Prescription Act 68 of 1969, and if so, when prescription starts to run against the claim.

[2] Duet and Magnum Financial Services CC carried on business as a micro-lender. An order for its winding up[1] was made on 17 May 2001 and the liquidators, the present appellants, were appointed on 18 July 2001.

1 Section 66 of the Close Corporations Act 69 of 1984 read with s 340(2)(a) of the Companies Act 61 of 1973.

[3] On 12 July 2005 the liquidators caused a summons to be served on Mr Koster, the respondent, in which they alleged that certain dispositions had been made by the close corporation that fell within the ambit of either s 26(1)(b) or s 30(1) or s 29(1) of the Insolvency Act. They claimed an order setting aside the dispositions, and an order declaring Mr Koster obliged to pay to them certain moneys that were alleged to have been alienated under the dispositions from September 2000 until the date of the winding-up order. (Different amounts were claimed in the alternative but that is not material for present purposes.)

[4] Mr Koster filed a special plea of prescription and pleaded over on the merits. Only the plea of prescription is relevant here. Mr Koster pleaded that, in respect of each of the dispositions relied on by the liquidators, prescription commenced to run from a date before 12 July 2002 (which was three years before the summons was issued) and averred that the liquidators had knowledge of the relevant facts before that date, or could have acquired such knowledge by exercising reasonable care. In the premises, so the plea ran, the claim has expired.

[5] In a replication the liquidators raised two answers to the special plea. They pleaded that, because the liquidators were not entitled to recover the disposition until the court made the order sought by them, there was no present ‘debt’ as contemplated by s 11(d) of the Prescription Act, and thus prescription has not commenced to run. In the alternative, the liquidators pleaded that they obtained knowledge of the facts upon which the claim was based at an enquiry held in terms of s 152 of the Insolvency Act on 4 August 2003, having acted reasonably and with due

care, and that the running of prescription was thus delayed until that date under s 12(3) of the Prescription Act.

[6] The matter came to trial before Preller J in the Pretoria High Court. The court ordered, under Rule 33(4), that the only question to be tried initially was whether 'the plaintiff's claims as formulated in the particulars of claim constitute a "debt" as contemplated in sections 10, 11 and 12 of [the Prescription Act]' in which event the parties agreed that the claims had become prescribed.

[7] After hearing argument the learned judge upheld the special plea with costs. In doing so he declined to follow *Barnard and Lynn NNO v Schoeman*,[2] which concerned a similar claim, and adopted the contrary conclusion reached by Nel J (Potgieter AJ concurring) in *Burley Appliances Ltd v Grobbelaar NO*[3] and by Goodey AJ in *Barnard NO v Bezuidenhout*,[4] in relation to analogous claims. In view of the conflict between those decisions Preller J granted the appellant leave to appeal to this court. During April Mr Koster's attorneys of record withdrew. We were advised by Mr Koster in a letter received by the registrar of this court on 12 March 2010 that he would not be represented at the appeal, citing lack of funds to employ counsel.

[8] In support of their contention that their claim has not prescribed counsel for the liquidators submitted that because Mr Koster is not yet liable to repay the moneys that are now claimed, no 'debt' as envisaged

2 2000 (3) SA 168 (N).
3 2004 (1) SA 602 (C).
4 2004 (3) SA 274 (T).

by the Prescription Act is in existence. A similar submission[5] was made in *Burley* and rejected. Upon being asked during argument in this case when the cause of action that has been pleaded will arise counsel for the liquidators said that it will arise only once judgment setting aside the effective dispositions is entered in favour of the liquidators. The notion that a claim can be founded upon a cause of action that arises only once a court has given judgment on the claim is not one that appeals to me.

[9] It seems to me that the liquidators misunderstand their own claim. Prescription is about rights that have come into existence but have ceased to exist by the passage of time. If a right has not come into existence then there is nothing that is capable of expiring. That is why prescription is raised in a plea. If no existing right has been alleged in the particulars of claim then the particulars of claim are excipiable and will not attract a plea. It is only once facts have been alleged that establish the existence of a right that the question whether that right has expired is capable of arising.

[10] It is perfectly correct, as counsel for the liquidators submitted, that Mr Koster has no present obligation to pay the moneys that are claimed. It is also perfectly correct that Mr Koster will become obliged to pay the money only once a court has made a declaration to that effect. But the claim of the liquidators is not founded upon a present right to be paid by Mr Koster.

[11] Orders that are made by courts generally declare that a debt then

5 At 607D.

exists and allow for its enforcement by the ordinary process of execution. But the declarations that are sought in this case are declarations of an altogether different kind. They are declarations that have the effect of bringing into

existence a debt that did not exist before. The liquidators become entitled to obtain such a declaration once certain events have occurred and that is the right that they now seek to enforce. They do not ask the court to declare Mr Koster to be an existing debtor. They ask the court to make Mr Koster into a debtor when he was not a debtor before. If they were to show that the events alleged in the particulars of claim have occurred then they are entitled to a declaration of that kind and that is the existing right upon which they rely.

[12] The sections of the Insolvency Act with which we are concerned are not merely a novel procedure for enforcing existing debts. They create for liquidators a remedy in addition to any remedies that might be available at common law. It might be that the liquidators have a claim against Mr Koster for recovery of a present debt under the common law remedies for fraud, or under the *actio Pauliana*,[6] but they are not pursuing remedies of that kind. In addition to those remedies the Insolvency Act creates a different and wider remedy that is given to liquidators to recover assets that have been removed from an estate before insolvency. A similar remedy is given to liquidators[7] by s 424(1) of the Companies Act, in addition to any common law remedies that creditors might have, to recover loss that has been brought about by those who carry on the business of a company recklessly or with intent to defraud creditors.

[13] In both cases a liquidator is entitled to have a declaration made by a court that brings a debt into existence once it has been shown that a

6 *Mars: The Law of Insolvency in South Africa* 9 ed (eds) Eberhard Bertelsman et al (eds) p 138.
7 The remedy is available to others as well but I confine myself now to the position of liquidators.

particular event has occurred. In the case of the Insolvency Act that event is a disposition of property that falls within the terms of ss 26 to 31. Once it is shown that such a disposition has occurred then s 32(3) entitles the liquidator to ask a court to set aside the disposition and to declare that the liquidator is entitled to recover the property or its value. In the case of s 424(1) of the Companies Act, once it is shown that the business of a company has been carried on recklessly or with intent to defraud creditors, the liquidator is entitled to ask a court to declare 'any person who was knowingly a party to the carrying on of the business' in that manner to be 'personally responsible for all or any of the debts or other liabilities of the company as the Court may direct'. In both cases the declaration that is made by the court brings into existence debts that did not exist before and simultaneously enables the debts immediately to be enforced through the ordinary process of execution.

[14] Those special remedies originate from comparable English legislation that has been exported to other countries as well. In *Burley*, to which I will return, Nel J referred to the decision of the Court of Appeal of New Zealand in *Re Maney and Sons De Luxe Service Station Limited; Maney v Cowan*,[8] which I have found to be helpful. That case concerned s 320 of the Companies Act 1955 of that country, which is comparable to s 424(1) of our Companies Act. The decision is not directly in point because nobody was so bold as to suggest in that case that the cause of action arose only once the declaration of liability was made. But it is nonetheless instructive for the basis upon which the case was argued and decided.

8 [1969] NZLR 116.

[15] The question under consideration was whether the limitation period provided for in s 4 of the Limitation Act 1950[9] commenced to run when the delinquent act occurred, or whether it commenced only when the company was placed under winding-up. It was argued in support of the former that the section created no new rights, but merely provided for a summary procedure, available to a liquidator upon winding-up, to recover an existing indebtedness that arose when the delinquent act occurred, and thus the cause of action accrued at that date.[10] North P rejected that submission in the following terms:

'In my opinion it is plain that s 320 does create a new cause of action for it confers on a liquidator, a creditor or a contributory on liquidation the right to ask the Court, in the circumstances stated, to require the offending party to pay the debts or other liabilities of the company. This is surely a new liability and a new right not previously known to the law…. I am accordingly of the opinion that the liquidation is a material part of the cause of action and therefore the period of limitation does not begin to run until the commencement of the winding up and perhaps not until the appointment of a liquidator (a distinction which is of no importance in the present case).'

[16] In *Burley* Nel J also referred to what was said by the authors of a standard English work on company law, *Gore-Browne on Companies*, in relation to s 214 of the Insolvency Act 1986 of that country. Under that section a court may, on the application of the liquidator of a company, 'declare [a director or former director of the company] to be liable to make such contribution…to the company's assets as the court thinks

9 The effect of s 4 of the Limitation Act 1950 was that 'actions to recover any sum recoverable by virtue of any enactment … shall not be brought after the expiration of six years from the date on which the cause of action accrued'.
10 At 123 lines 20-30.

proper.’ In the current edition of that work the authors say the following:[11]

11 Alistair Alcock, John Birds and Steve Gale (eds) *Gore-Browne on Companies* Vol. 2 Part XIII (update 76) para 21B.

'Proceedings under s 214 must be commenced within six years of the company's going into insolvent liquidation, which is the date when the "cause of action" accrues for purposes of s 9 of the Limitations Act 1980.'

[17] One of the cases cited by the authors in support of that statement is the decision of the Court of Appeal (Civil Division) in *Re Farmizer Ltd.*[12] It was argued in that case that the limitation period under s 9(1) of the Limitation Act 1980[13] never commences to run against actions under s 214 of the Insolvency Act, though for reasons different from those that were advanced before us. In the Chancery Division Blackburne J rejected the submission in the following terms, and the Court of Appeal agreed:

'In my view it is clear that the facts which a liquidator must prove to establish a claim for wrongful trading are those set out in subs. (2) of the section and no others. The statutory cause of action created by the section accrues on the occurrence of the latest of the matters to which the subsection refers: that is self-evidently when the company in question goes into insolvent liquidation'.

[18] In both those cases it was recognized by the respective courts that the relevant legislation gave to liquidators a new right in addition to any rights that they or creditors might otherwise have – which was the right to have a debt created where no debt might have existed before. The provisions of the Insolvency Act give to liquidators a similar right and that is the right that the liquidators now seek to enforce.

[19] That was also recognized by Nel J in *Burley.* In that case a creditor of a close corporation claimed declarations under ss 64(1) and 65 of the Close Corporations Act 69. Section 64(1) is in much the same terms as

12 [1995] 2 BCLC 462.

13 'An action to recover any sum recoverable by virtue of any enactment shall not be brought after the expiration of six years from the date on which the cause of action accrued'.

s 424(1) of the Companies Act. Section 65 entitles a court to declare that a close corporation 'is to be deemed not to be a juristic person' in certain circumstances, which has consequences for the liability of its members.

[20] The plaintiff took exception to a plea of prescription on much the same lines that the plea was resisted in this case. According to the judgment the submission that was made by counsel in support of the exception, echoing what was submitted in this case, was that

'the action instituted by Burley in terms of ss 64 and 65 of the Close Corporations Act is not affected by the provisions of the Prescription Act in that the Prescription Act only applies to "debts", and before a Court "directs" in terms of s 64 or "declares" in terms of s 65, no "debt" exists.'[14]

The exception was dismissed. In a thoughtful and helpful judgment, the learned judge concluded as follows:

'In my view, s 64 of the Close Corporations Act (and the corresponding section in the Companies Act) created a new remedy, or "right" which becomes available to a creditor in the circumstances set out in the section.'[15]

[21] The limitation statutes in England and New Zealand at the time those cases were decided provided for the expiration of the right to bring an action rather than the expiration of the right itself that was sought to be enforced. The same approach was adopted in this country before 1969. Under the Prescription Act 1943 extinctive prescription was 'the rendering unenforceable of a right by the lapse of time', but the right itself remained in existence for a further period, and could thus operate to set-off countervailing debts.[16] But the Prescription Act 1969 operates instead to extinguish the right – referred to in the Act as a 'debt' – with the natural consequence that nothing remains to enforce (or to set-off

14 At 607D.
15 At 612 I-J.
16 The debt itself expired after thirty years.

against countervailing debts).

[22] Under the Act of 1943 every civil action for the enforcement of a right expired at one time or another – if only after expiry of the default period of thirty years. Unless it is to be said that the 1969 Act was intended to remove some rights from the scope of prescription – and I do not think that was the case – then it seems to me that 'debt' under the 1969 Act must be taken to encompass all those rights that were subject to prescription under the 1943 Act, which would include the right that is asserted by the liquidators in this case.

[23] Indeed, it is not unusual when dealing with prescription for courts to ask only when the 'right of action' arose, leaving it to implication that its complement is a 'debt'.[17] Thus in *Mazibuko v Singer,*[18] which has often been cited in this court, Colman J referred to the 'right of action' prescribing, implying that its complement was a 'debt'. Trollip JA said that expressly[19] in *Evins v Shield Insurance Co Ltd,*[20] when he said

'"Cause of action" is ordinarily used to describe the factual basis, the set of material facts, that begets the plaintiff's legal right of action and, complementarily, the defendant's "debt", the word used in the Prescription Act.'

[24] A 'debt' for purposes of the Act is sometimes described as entailing a right on one side and a corresponding 'obligation' on the other.[21] But if

17 *Oertel v Direkteur van Plaaslike Bestuur* 1983 (1) SA 354 (A) at 366C-H; *Sentrachem Ltd v Prinsloo* 1997 (2) SA 1 (A) at 15E-16D; *Standard Bank of South Africa Ltd v Oneanate Investments (Pty) Ltd (In Liquidation)* 1998 (1) SA 811 (SCA) at 826A-G; *Drennan Maud & Partners v Pennington Town Board* 1998 (3) SA 200 (SCA) at 212E-G; *Provinsie van die Vrystaat v Williams NO* 2000 (3) SA 65 (SCA) paras 24-25.

18 1979 (3) SA 258 (W) at 265D-F.

19 See, too, Eksteen JA in *Sentrachem*, above, at 15G-H,

20 1980 (2) SA 814 (A) at 825F-H.

21 See, for example, *Electricity Supply Commission v Stewarts and Lloyds of SA (Pty) Ltd* 1981 (3) SA 340 (A) at 344F-G; *Joint Liquidators of Glen Anil Development Corporation Ltd (In Liquidation) v Hill Samuel (SA)(Pty) Ltd* 1982 (1) 103 (A) 110A-111E; *Desai NO v Desai* 1996 (1) SA 141 (A) at

'obligation' is taken to mean that a 'debt' exists only when the 'debtor' is required to do something then I think the word is too limiting. At times the exercise of a right calls for no action on the part of the 'debtor' but only for the 'debtor' to submit himself or herself to the exercise of the right. And if a 'debt' is merely the complement of a 'right', and if all 'rights' are susceptible to prescription, then it seems to me that the converse of a 'right' is better described as a 'liability, which admits of both an active and a passive meaning.[22]

[25] Having found that the Close Corporations Act created a new 'right' the learned judge in *Burley* went on to find that the complement of that right was a 'debt' against which prescription commenced to run once the right had accrued. The approach that was taken in that case has the support of the authors of all the standard texts in this country on the law of insolvency and company law[23] and I have pointed out that other jurisdictions that have similar remedies take the same approach. The only case that I am aware of, either in this country or abroad, that supports the proposition that was advanced by the liquidators, is the decision in *Barnard and Lynn NNO v Schoeman*.[24] That case concerned the statutory provisions that are now before us. It was found that the claim by the liquidators was not subject to prescription and four reasons were given for that conclusion. Three of those reasons were convincingly rebutted by

146I-147A.

22 Shorter Oxford Dictionary '1. *Law* The condition of being liable or answerable by law or equity 2. The condition of being subject *to* something'.

23 Eberhard Bertelsmann et al (eds) *Mars: The Law of Insolvency in South Africa* p 249; Justice P.A.M. Magid, Prof Andre Boraine, Jennifer A. Kunst and Prof A. Burdette (eds) *Meskin: Insolvency Law* (Service Issue 31) para 5.31.1; Sharrock, Smith and Van der Linde *Hockly's Insolvency Law* 8ed p 138; Jennifer A. Kunst, Prof Piet Delport and Prof Quintas Vorster (eds) *Meskin: Henochsberg on the Companies Act* (Service Issue 30) pp 914-915.

24 Above.

Nel J in *Burley* and I need not repeat what the learned judge said in that regard. The fourth reason given by the learned judge for his conclusion is little more than a statement of the proposition that is now contended for by the liquidators.

[26] It seems to me that the conclusion that was reached in *Barnard and Lynn* is inconsistent with a considerable body of authority and is inconsistent with the principles underlying every decision of this court on prescription. In my view that case was incorrectly decided and it must be taken to be overruled.

[27] I agree with the conclusion of Nel J in *Burley*, and with his reasons for that conclusion,[25] and in my view they apply as much in this case. I think it is clear that the sections of the Insolvency Act with which we are concerned give a right to a liquidator, in prescribed circumstances, to have a person declared to be a debtor of the estate, and its complement is a 'debt' for purposes of prescription, in that the person concerned is liable to have such a declaration made. This case is distinguishable from *Burley* only in this respect that under the Insolvency Act the right accrues only in a winding-up. Whether the relevant date for the commencement of prescription is the date

25 The same conclusion was reached by Goodey AJ in *Barnard NO v Bezuidenhout*, but for different reasons.

that the winding-up commences, or the date that a liquidator is appointed, is not a matter with which we need concern ourselves – the effect of s 12(3) of the Prescription Act is that that question will never arise. It is sufficient to say that prescription ordinarily commences to run no later than the date upon which a liquidator is appointed. Whether the commencement of prescription has been delayed in this case under the provisions of s 12(3) of the Prescription Act is not a matter that we are called upon to decide.

[28] The fact alone that the particulars of claim are not excipiable is enough to tell one that the liquidators assert an existing right and its complement, a 'debt'. What is required is only to identify the last event that was required to have occurred for the particulars of claim not to be excipiable. There is no merit in this appeal and it is dismissed with costs.

R W NUGENT

JUDGE OF APPEAL

APPEARANCES

APPELLANT: G Wickins

Instructed by Brooks & Brand Inc, Johannesburg;
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RESPONDENT: -