



**THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE DIVISION, CAPE TOWN)**

In the matter between

Case No: A325/2015

**AEH VAN DEVENTER
ESME VAN DEVENTER**

**FIRST APPELLANT
SECOND APPELLANT**

And

NEDBANK LTD

RESPONDENT

Coram: ROGERS J & NUKU AJ

Heard: 18 MARCH 2016

Delivered: 30 MARCH 2016

JUDGMENT

ROGERS J (NUKU AJ concurring):

[1] The appellants were the defendants and the respondent the plaintiff in the court a quo. I refer to them as such. The appeal is against the dismissal of the defendants' application to rescind a default judgment. The first appellant appeared in person for the appellants. Mr Baguley appeared for the respondent.

[2] In August 2006 the defendants signed suretyships on behalf of a close corporation, J and B Biltong CC ('JBB'). During March 2008 JBB was placed in liquidation. The plaintiff issued summons against the defendants as sureties in July 2012. The summons was duly served at the domicilium citandi et executandi on 13 July 2012. Because the defendants had left that address they were unaware of it. The plaintiff obtained default judgment on 13 December 2012 on claims of R65 249,77, R294 788,89 and R163 277,08 together with interest from 5 March 2012. It appears from the letters sent to the defendants in terms of s 129(1) of the National Credit Act 34 of 2005 that the first two amounts arose from instalment sale agreements and the third amount from an overdraft.

[3] The defendants allege that they learnt of the default judgment during a meeting between the first defendant and a representative of the bank on 17 September 2013. On 30 September 2013 they delivered a rescission application for hearing on 20 November 2013. It appears that the plaintiff did not react to the application. However the magistrate of his own accord removed the matter from the roll because of a typing error in the notice of motion. A second rescission application followed on 21 November 2013, identical to the first. Answering and replying papers were filed. On 6 August 2014 the magistrate dismissed the second application on a point in limine relating to the attestation of the founding papers.

[4] On 30 August 2014 the defendants launched their third rescission application. Again there were answering and replying papers. On 9 January 2015 the magistrate dismissed the three points in limine taken by the plaintiff. The merits of the rescission application were argued on 17 March 2015. The defences which the defendants alleged were (i) that the plaintiff's claims against them had prescribed; (ii) that the plaintiff had failed to mitigate its loss, permitting goods which were subject to the instalment sale agreements to be sold for well below their true value.

On 24 April 2015 the magistrate dismissed the application on the basis that the defendants had not disclosed a bona fide defence.

[5] The rescission application was brought in terms of rule 49(1) of the Magistrates' Courts Rules. In terms thereof a default judgment may be rescinded 'upon good cause shown' or if the court is satisfied that there is 'good reason to do so'. In general, the showing of good cause or good reason requires the applicant (i) to present a reasonable explanation for his default; (ii) to show that his application is bona fide; (iii) to show the existence of a bona fide defence, ie one that has some prospect of success (*Chetty v Law Society, Transvaal* 1985 (2) SA 756 (A) at 764J-765D; *Colyn v Tiger Food Industries Limited t/a Meadow Feed Mills (Cape)* 2003 (6) SA 1 (SCA) para 11).

[6] Mr Baguley for the plaintiff accepted that the defendants had presented a reasonable explanation for their default. The critical question was whether they had disclosed a bona fide defence.

[7] The defendants' allegation that the plaintiff failed to mitigate its loss was so baldly advanced that it cannot be regarded as disclosing a bona fide defence, even if in law the plaintiff owed the defendants a duty to mitigate. I simply observe, in passing, that the suretyships expressly permitted the plaintiff to release any security it held in whole or in part without prejudicing its rights against the sureties.

[8] Although the prescription defence was likewise tersely alleged, it may have passed muster in the absence of a response from the plaintiff. The defendants alleged that the debts arose at the time of JBB's liquidation in March 2008 and that summons was only issued in July 2012, more than three years later.

[9] In its opposing papers the plaintiff alleged the following additional facts. On 14 November 2008 it lodged its claims against JBB (this would have been in terms of s 44(4) of the Insolvency Act 24 of 1936 read with s 366 of the Companies Act 61 of 1973 and s 66(1) of the Close Corporations Act 69 of 1984). On 26 October 2009 the claims were duly proved in terms of s 44(3) of the Insolvency Act at a special meeting of creditors. When summons was issued the first and final liquidation and

distribution account had not yet been approved by the Master. The plaintiff contended, on the strength of these facts, that the completion of prescription against JBB, and thus against the sureties, had been delayed in terms of s 13(1)(g) of the Prescription Act 68 of 1969 and was not yet complete when summons was issued.

[10] In their replying papers the defendants did not contest the facts underlying the plaintiff's conclusion (ie the dates on which the plaintiff's claims were lodged and proved and that the first and final account had not yet been approved when summons was issued). They alleged, however, that the debts against them had arisen more than three years prior to 14 November 2008, so that s 13(1)(g) did not avail the plaintiff. They also alleged, without amplification, that more than one year had elapsed since the relevant impediment had ceased as contemplated in s 13(1)(i) of the Prescription Act.

[11] Section 13(1) of the Prescription Act reads in relevant part as follows:

‘(1) If

...

(g) the debt is the object of a claim filed against the estate of a debtor who is deceased or against the insolvent estate of the debtor or against a company in liquidation or against an applicant under the Agricultural Credit Act, 1966;

...

(i) the relevant period of prescription would, but for the provisions of this subsection, be completed before or on, or within one year after, the date on which the relevant impediment referred to in paragraph (a), (b), (c), (d), (e), (f), (g) or (h) has ceased to exist,

the period of prescription shall not be completed before a year has elapsed after the date referred to in paragraph (i).’

[12] The precise event which causes a debt to become the object of a filed claim for purposes of s 13(1)(g) is yet to be determined by our highest courts (cf *Betterbridge (Pty) Ltd v Masilo & Others* NNO 2015 (2) SA 396 (GP), where Unterhalter AJ held that the relevant event was the decision of the presiding officer in terms of s 44(4) of the Insolvency Act to allow the claim to go forward to proof at a

meeting of creditors). We were not addressed on this question and it is unnecessary to decide it. What can be said is that, if s 13(1)(g) applies at all to close corporations (as to which see below), the debts in the present case became the object of filed claims by not later than 26 October 2009 when they were proved at a special meeting of creditors.

[13] On this assumption, s 13(1)(g) would not assist the plaintiff if the debts prescribed before 26 October 2009. Although the defendants in their replying papers baldly stated that the debts arose more than three years before 14 November 2008, that allegation is inconsistent with the assertion in their founding papers that the debts arose at the time of liquidation in March 2008. It was for the defendants to allege and prove when prescription began to run (see *Gericke v Sack* 1978 (1) SA 821 (A) at 827B-828A; *Van Zijl v Hoogenhout* [2004] 4 All SA 427 (SCA) para 41). To render s 13(1)(g) irrelevant on the facts, they had to show that prescription began to run against JBB, and thus against them, prior to 26 October 2006. They have not alleged any facts in support of such a conclusion (even allowing for the fact that in rescission proceedings they do not need to present all the evidence available to them).

[14] The impediment contemplated in s 13(1)(g) ceases to exist, for purposes of s 13(1)(i), when the filed claim is rejected or, if it is accepted, when the final liquidation and distribution account is confirmed by the Master (*Kilroe-Daley v Barclays National Bank Ltd* 1984 (4) SA 609 (A) at 621-622; *Nedcor Bank Ltd v Rundle* 2008 (1) SA 415 (SCA) para 10). The plaintiff's claims were duly proved, not rejected. When summons was issued on 5 July 2012 a final liquidation and distribution account had not yet been approved (indeed no account had yet been approved). During argument the magistrate permitted the plaintiff's attorney to submit a letter from the Master stating that the first and final liquidation and distribution account was confirmed on 5 June 2013. The defendants argued that this informal evidence should not have been allowed. I am prepared to assume in their favour that the magistrate should not have had regard to the letter. Even so, on the evidence before the magistrate a final account had not been approved as at 5 July 2012, from which it would follow that prescription could not conceivably have been completed earlier than one year later, ie 5 July 2013. Since summons was duly

served on 13 July 2012, prescription would have been interrupted prior to its completion. (I may add that the onus to prove that the impediment had ceased probably rested on the defendants, not the plaintiff.)

[15] It is now settled that the timeous interruption of prescription of the principal debt, or a delay in the completion of prescription of the principal debt, also interrupts or delays prescription in respect of a surety's obligation (*Jans v Nedcor Bank Ltd* 2003 (6) SA 646 (SCA)).

[16] This leaves the question foreshadowed above, namely whether s 13(1)(g) applies to close corporations. The question was not raised before the magistrate or in the heads of argument before us. We gave notice to the parties that they should be ready to address the issue, having regard to *Shackleton Credit Management (Pty) Ltd v Scholtz* [2011] ZAWCHC 494, an unreported judgment in which Blignault J held that s 13(1)(g) did not apply to close corporations. If that decision is correct, the defendants' prescription defence would seem to be sound.

[17] Blignault J's reasoning can be summarised thus. There are broadly three approaches to statutory interpretation. (a) The first approach is that one must give effect to the plain meaning of the words unless this causes absurdity or a result contrary to the legislature's intention. The plain meaning of s 13(1)(g) does not include a close corporation. (b) The second approach is purposive, ie interpretation in the light of the purpose which the statute seeks to achieve. Closely related to this approach is the rule that statutory language must be read in its context. Because this approach uses the actual language as the starting point, it did not assist the plaintiff's reliance on s 13(1)(g). (c) The third approach is the reading-in approach, the court playing a more creative role.

[18] Blignault J said that the third approach faced three problems in the case before him: (i) The test for implying words into a statute is quite stringent. The implication must be necessary in the sense that without it effect cannot be given to the statute as it stands and the implication must be necessary to realise the ostensible legislative intention or to make the legislation workable. Section 13 contains exceptions to the general rule regarding the running of prescription. There

are no practical or legal reasons why close corporations should be singled out for special treatment (ie why they should be among the exceptions). (ii) If it was difficult to formulate the implied term, this militated strongly against the implication. How, asked Blignault J rhetorically, would the implied provision in s 13(1)(g) be framed, bearing in mind that close corporations did not exist when the Prescription Act was passed? (iii) There had always been entities which are separate juristic entities but not companies, eg trading corporations, which would normally be sequestrated not liquidated. How could the lawmaker have known in 1969 that a similar type of entity, if and when it came into being, would be liquidated rather than sequestrated?

[19] The learned judge mentioned two cases in which s13(1)(g) was applied to close corporations, namely *Thrupp Investment Holdings (Pty) Ltd v Goldrick* 2008 (2) SA 253 (W) and *Nedcor Bank Ltd v Sutherland* 1998 (4) SA 32 (N). He observed, however, that the issue seems not to have been argued and reasons were not given for the assumption.

[20] Finally, Blignault J referred to and distinguished *Vitamax (Pty) Ltd v Executive Catering Equipment CC & Others* 1993 (2) SA 556 (W) in which Mahomed J (as he then was) concluded that a deed of suretyship relating to 'companies' included a principal debtor which was a close corporation. Blignault J listed four reasons for distinguishing *Vitamax*: (i) The Close Corporations Act did not yet exist when the Prescription Act was passed but did exist when the suretyship in *Vitamax* was executed. (ii) It is more difficult to imply a term into a statute than into a contract. (iii) The approach which Mohamed J followed placed an onus on the defendant to show that 'companies' did not include close corporations whereas in the case of s 13(1)(g) the onus would be on the plaintiff to extend the usual meaning of 'company'. (iv) Not all the entities referred to in the cases cited by Mohamed J at 558H-I were companies.

[21] The approach to statutory interpretation was stated as follows by the Constitutional Court in *Cool Ideas 1186 CC v Hubbard & Another* 2014 (4) SA 474 (CC) para 28 (footnotes omitted):

‘A fundamental tenet of statutory interpretation is that the words in a statute must be given their ordinary grammatical meaning, unless to do so would result in an absurdity. There are three important interrelated riders to this general principle, namely:

- (a) that statutory provisions should always be read purposively;
- (b) the relevant statutory provision must be properly contextualised; and
- (c) all statutes must be construed consistently with the Constitution, that is, where reasonably possible, legislative provisions ought to be interpreted to preserve their constitutional validity. This proviso to the general principle is closely related to the purposive approach referred to in (a) above.’¹

[22] Another recent authoritative statement of the correct approach is to be found in *Natal Joint Municipal Pension Fund v Endumeni Municipality* 2012 (4) SA 593 (SCA) para 18 (footnotes again omitted):

‘The present state of the law can be expressed as follows: Interpretation is the process of attributing meaning to the words used in a document, be it legislation, some other statutory instrument, or contract, having regard to the context provided by reading the particular provision or provisions in the light of the document as a whole and the circumstances attendant upon its coming into existence. Whatever the nature of the document, consideration must be given to the language used in the light of the ordinary rules of grammar and syntax; the context in which the provision appears; the apparent purpose to which it is directed and the material known to those responsible for its production. Where more than one meaning is possible each possibility must be weighed in the light of all these factors. The process is objective, not subjective. A sensible meaning is to be preferred to one that leads to insensible or unbusinesslike results or undermines the apparent purpose of the document. Judges must be alert to, and guard against, the temptation to substitute what they regard as reasonable, sensible or businesslike for the words actually used. To do so in regard to a statute or statutory instrument is to cross the divide between interpretation and legislation; in a contractual context it is to make a contract for the parties other than the one they in fact made. The “inevitable point of departure is the language of the provision itself”, read in context and having regard to the purpose of the provision and the background to the preparation and production of the document.’

[23] Mr Baguley’s argument was not that we should read words into s 13(1)(g) but that we should interpret the word ‘company’ as including a close corporation.

¹ See also *Democratic Alliance v Speaker of the National Assembly & Others* [2016] ZACC 8 para 19.

Another approach might be to interpret the words 'claim filed... against the insolvent estate of the debtor' as including a claim filed in the liquidation of a close corporation.

[24] As I understand the approach to statutory interpretation set out in the cases to which I have referred, one does not start with the literal meaning of the words and only move beyond that meaning if there is absurdity. One must from the outset consider the meaning of the words in their context and having regard to the purpose of the statute. One must also consider the consistency of competing interpretations with the Constitution. I do not think, with respect, that one can properly speak of an onus when it comes to the proper interpretation of a statute.

[25] The purpose of s 13(1)(g) is clear. Insolvency legislation contains specifically tailored non-litigious procedures for establishing claims against insolvent parties. It is undesirable as a matter of policy that creditors should have to engage in a parallel process of litigation to prevent their claims from prescribing (see *Leipsig v Bankorp Ltd* 1994 (2) SA 128 (A) at 134A-135A). It is likewise undesirable that those administering the insolvency should be put to the expense of investigating and defending litigation where the claims might be established without controversy through the specified procedures.

[26] When s 13(1)(g) was enacted its language covered the whole field of generally available modes for owning assets or conducting business. Sole proprietorships, partnerships and trusts would have estates which could be sequestrated. As an alternative, individuals, whether on their own or in combination, could form companies, in which case the company could upon insolvency be liquidated. These corporate bodies could take various forms as permitted by legislation prevailing from time to time, for example companies with issued shares (private or public; with or without limited liability) or not-for-gain associations limited by guarantee. (When I refer to 'generally available modes' for owning assets or conducting business, I exclude entities established to conduct specially regulated activities and which have juristic personality in terms of their governing legislation, for example pension funds and friendly societies. It is unnecessary in this judgment to consider whether s13(1)(g) could apply to such entities.)

[27] The Close Corporations Act 69 of 1984 introduced another form of corporate body, also generally available to persons seeking the benefit of incorporation. The provisions of the new Act could, without doing violence to the notion of a 'company', have been inserted into the Companies Act as a further form of 'company'. The purpose of the Close Corporations Act was to make available to members of the public a form of incorporation which was administratively less burdensome than companies as then regulated by the Companies Act. In the spectrum of available forms of organisation, the close corporation – from the perspective of administrative regulation – lay between sole proprietorships, partnerships and trusts on the one side and companies on the other.

[28] With the coming into force of the Companies Act 71 of 2008, close corporations may no longer be formed (see s 2 of the Close Corporations Act as amended). Instead the new Companies Act has introduced a somewhat greater gradation in the formal regulation of companies. For example, private companies falling below prescribed thresholds need not have their financial statements audited (cf 30(2)) and do not have to comply with the enhanced accountability and transparency provisions of Chapter 3.

[29] If close corporations had existed when the Prescription Act was enacted, there would have been no conceivable reason to treat them differently from sole proprietorships, partnerships, trusts and companies. The policy considerations and purposes underlying s 13(1)(g) would have applied as much to close corporations as to these other forms of organisation. In *Shackleton* Bignault J said that there was no practical or legal reason to single out close corporations for special treatment. If by this he meant (as I think he did) that there was no practical or legal reason for close corporations to be subject to s 13(1)(g), then I must respectfully disagree. On the contrary, there is to my mind no practical or legal reason why close corporations should be treated differently from unincorporated insolvent estates and liquidated companies.

[30] Section 366 of the old Companies Act (which remains applicable to the liquidation of insolvent companies) renders applicable to companies the provisions of the Insolvency Act in relation to the proof of claims. The old Companies Act

contains its own provisions for liquidation and distribution accounts and their confirmation (ss 403-408). These are analogous to corresponding provisions in the Insolvency Act (ss 91-111). In terms of s 342 of the Companies Act the assets of a liquidated company must be applied in the payment of costs, charges and expenses incurred in the winding-up and in the claims of creditors as nearly as possible as they would be applied in the payment of costs of sequestration and the claims of creditors under the law relating to insolvency. Section 66(1) of the Close Corporations Act states, subject to certain exclusions not here relevant, that the provisions of the Companies Act relating to the winding-up of companies apply *mutatis mutandis* to close corporations which are thus, in the respects I have mentioned, put in exactly the same position as companies.

[31] There is also a constitutional dimension to the interpretation of s 13(1)(g), because consistency with the Constitution is an important controlling consideration in the interpretation of statutes. Differentiation on grounds other than those specified in s 9(3) of the Constitution violates s 9(1) (the right of equality before the law and the equal protection and benefit of the law) if the differentiation does not bear a rational connection to a legitimate government purpose (*Harksen v Lane NO & Others* 1998 (1) SA 300 (CC) para 54; *Sarrahwitz v Maritz NO & Another* 2015 (4) SA 491 (CC) paras 48-54). If s 13(1)(g) does not apply to close corporations in liquidation but does apply to insolvent estates which can be sequestrated under the Insolvency Act and to liquidated entities incorporated under the Companies Acts as they have existed from time to time, the differentiation would indeed in my view be utterly irrational and unrelated to any legitimate government purpose. I do not think that Blignault J suggested that there were grounds (apart from the strictures of language) justifying differential treatment.

[32] What is the significance of the fact that close corporations did not exist in 1969 when the Prescription Act was enacted? In a leading English decision, *R (Quintavalle) v Secretary Of State for Health* [2003] 2 All ER (HL), Lord Bingham said that there was no inconsistency between the rule that statutory language retains the meaning it had when Parliament used it and the rule that a statute 'is always speaking' (para 9). In terms of the latter rule, a statute may in appropriate circumstances be held to apply to something which could not have been known to

the lawmaker when the legislation was enacted. Lord Bingham and Lord Steyn both cited the following passage from the speech of Lord Wilberforce in *Royal College of Nursing of the UK v Department Of Health and Social Security* [1981] 1 All ER 545 (HL) at 564-565:

'In interpreting an Act of Parliament it is proper, and indeed necessary, to have regard to the state of affairs existing, and known by Parliament to be existing, at the time. It is a fair presumption that Parliament's policy or intention is directed to that state of affairs. Leaving aside cases of omission by inadvertence, this being not such a case when a new state of affairs, or a fresh set of facts bearing on policy, comes into existence, the courts have to consider whether they fall within the parliamentary intention. They may be held to do so if they fall within the same genus of facts as those to which the expressed policy has been formulated. They may also be held to do so if there can be detected a clear purpose in the legislation which can only be fulfilled if the extension is made. How liberally these principles may be applied must depend on the nature of the enactment, and the strictness or otherwise of the words in which it has been expressed. The courts should be less willing to extend expressed meanings if it is clear that the Act in question was designed to be restrictive or circumscribed in its operation rather than liberal or permissive. They will be much less willing to do so where the new subject matter is different in kind or dimension from that for which the legislation was passed. In any event there is one course which the courts cannot take under the law of this country: they cannot fill gaps; they cannot by asking the question, "What would Parliament have done in this current case, not being one in contemplation, if the facts had been before it?", attempt themselves to supply the answer, if the answer is not to be found in the terms of the Act itself.'

[33] In *Malcolm v Premier, Western Cape Government* 2014 (3) SA 177 (SCA) Wallis JA, after referring to the *Quintavalle* case and other authorities to similar effect (para 10 and footnote 14), said that there was obvious sense in the always-speaking approach when a court is confronted with a novel situation that could not have been in the contemplation of the legislature when the law was enacted. Courts can then, in the light of the broad purpose of the legislation, current social conditions and technological development, determine whether the new situation can properly, as a matter of interpretation, be encompassed by the language. While the principle has limits, Wallis JA saw no reason why in appropriate cases our courts should not invoke it, particularly in the light of our present constitutional order in terms of which statutes are to be construed in the light of constitutional values (para 11).

[34] In *Chubb Insurance Company of Australia Ltd v Moore* [2013] NSWCA 212 the court said that another way of putting the always-speaking proposition was

‘that a statute should generally be construed so as to apply to all things coming within the denotation of its terms, having regard to their connotation at the time of enactment. The connotation of a word or phrase is its essential attributes, which are to be determined as at the time of enactment. The denotation of a word or phrase is the class of things that, from time to time, may be seen to possess those essential attributes sufficiently to justify the application of the word or phrase to them.’ (Para 82, emphasis in the original.)

[35] I am entirely satisfied that the legislature could not rationally have intended to exclude corporate entities such as close corporations from the scope of s 13(1)(g) and that such entities are within the parliamentary intent of s 13(1)(g). I reach this conclusion not by speculating as to what the lawmaker would have done had it been aware that statutory provision would in the future be made for corporate entities in the form of close corporations but by having regard to the lawmaker’s intent and purpose as they appear from s 13(1)(g) and to the absence of any material distinction (insofar as such intent and purpose are concerned) between the sequestration of individuals and liquidation of the companies on the one hand and the liquidation of close corporations on the other. In the language of Lord Wilberforce in the *Royal College of Nursing* case, close corporations fall within ‘the same genus of facts’ as those to which the lawmaker’s expressed policy has been formulated. The filing of claims against liquidated close corporations is not ‘different in kind or dimension’ from the filing of claims against sequestered individuals and liquidated companies.

[36] For these reasons, and in order to avoid irrational and thus unconstitutional differentiation, I am satisfied that s 13(1)(g) should be construed as being applicable to close corporations if its language reasonably permits. One possibility is to construe ‘company’ liberally so as to include a close corporation. This is what Mr Baguley argued. In *Vitamax* Mohamed J said that the crucial characteristics of a ‘company’ are its existence as an entity distinct from its members, its capacity to own property apart from its members and perpetual succession; and that a close corporation shared all these characteristics (at 558J-559B). I may add that share capital is a common but not essential characteristic of a company (in certain

circumstances a company may be limited by guarantee). In the context of s 13(1)(g), another characteristic of a 'company' might be that it is a form of incorporation available to members of the public for general purposes rather than a specially regulated form of juristic person (such as a pension fund).

[37] I consider that 'company' in s 13(1)(g) is indeed capable of being interpreted liberally so as to include a close corporation. Whether the word was correctly ascribed this extended meaning in *Vitamax* is of course not germane; that depended on the interpretation of the suretyship in question. However, and in respectful disagreement with Blignault J, I do not regard as significant that in *Vitamax* close corporations existed when the suretyship was executed whereas they did not exist when s 13(1)(g) was enacted. On the contrary, it might tell against an extended meaning that the draftsman omitted reference to a known type of entity: *inclusio unius exclusio alterius*. In the case of s 13(1)(g) there can be no question of an intentional omission or inadvertence, since close corporations did not then exist.

[38] There is, however, another way to reach a rational result in accordance with the lawmaker's obvious purpose. A claim filed in the liquidation of a close corporation could be regarded as a claim filed 'against the insolvent estate of the debtor'. Section 13(1)(g) does not use the word 'sequestration' or refer in terms to claims filed in terms of the Insolvency Act. What is sequestrated under the Insolvency Act is an estate, the assets and liabilities of the debtor vesting in the debtor's trustee. In the case of companies and close corporations, the entity itself is liquidated. Its estate, while falling under the control of the liquidator, remains vested in the entity (see *Leigh v Nungu Trading 353 (Pty) Ltd & Another* 2008 (2) SA 1 (SCA)). The reason for this is probably that, unlike the sequestration of individuals, a corporate entity's existence is terminated upon the conclusion of the liquidation process. However, in the context of s 13(1)(g) this is a distinction without a difference. In both instances there is a concursus. The hand of the law is placed on the estate. The manner of proving claims is the same. The same rules govern how the assets in the estate are to be applied to meet costs and claims. The fact that the corporate entity's assets and liabilities are not vested in the liquidator does not mean that the entity does not have an estate. Since in liquidation claims have to be met

from that estate, I see no difficulty in regarding a claim filed in the liquidation of a close corporation as being a claim against the corporation's insolvent estate.

[39] It may be said that, if this view were sound, it would have been unnecessary for the lawmaker in 1969 to have made express reference to a company in liquidation. While one normally avoids an interpretation which results in tautology (*Commissioner for Inland Revenue v Golden Dumps (Pty) Ltd* 1993 (4) SA 110 (A) at 116F-117A), statutory tautology is not unknown, particularly where the lawmaker is intent on 'covering the field' (*Sekretaris van Binnelandse Inkomste v Lourens Erasmus (Edms) Bpk* 1966 (4) SA 434 (A) at 441F-442D; *Casey NO v Minister of Defence* 1973 (1) SA 630 (A) at 639B-D; *Bastian Financial Services (Pty) Ltd v General Hendrik Schoeman Primary School* 2008 (1) SA 1 (SCA) paras 26-27). If the lawmaker in 1969 had failed expressly to mention the only form of generally available incorporation then available (companies), some significance might have been attached to the omission. It thus made sense, and did no harm, to refer to liquidated companies, even if, without such reference, the preceding words would have been sufficient.

[40] In the above discussion I have referred to 1969 as the date of s 13(1)(g)'s enactment. I do not overlook that s 13(1)(g) was amended by s 11(b) of the General Law Amendment Act 139 of 1992, at a time when close corporations existed. The amendments effected by Act 139 of 1992 were the deletion of various provisions in the Prescription Act referring to the former territory of South West Africa. In the case of s 13(1)(g), all that was done was to delete a reference to a South West African ordinance. There is nothing to suggest that other matters, such as the introduction of close corporations, were within the lawmaker's contemplation. There had been no judicial decisions on the subject.

[41] For all the reasons given above, I respectfully consider that *Shackleton* was incorrectly decided. It follows that the appeal in the present case must be dismissed.

[42] In regard to costs, we raised with Mr Baguley whether, having regard to the fact that his client's points in limine were dismissed pursuant to a separate hearing, the parties should not bear their own costs in the court a quo. Although he left this in

our hands, I do not think on reflection that we can intervene as there is no distinct appeal against the magistrate's costs order.

[43] The following order is made: The appeal is dismissed with costs.

ROGERS J

NUKU AJ

APPEARANCES

For Appellants

In person

For Respondent

Mr D Baguley

Instructed by

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