IN THE NORTH GAUTENG HIGH COURT

PRETORIA

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

2/7/2013 .... DATE .... SIGNATURE

In the matter between: **CASE NUMBER 41924/06**

17/7/2013

THE ISIBAYA FUND **PLAINTIFF**

and

E. J. VISSER **FIRST DEFENDANT**

V. COETZEE **SECOND DEFENDANT**

T. B. LEHLOEKE **THIRD DEFENDANT**

JUDGMENT

PRELLER J:

[1] By agreement between the parties I made an order in terms of Rule 33(4) that the first and second defendants' special plea of prescription be disposed of first and separately and that the other prayers be postponed *sine die.*

[2] In the summons plaintiff is described as a fund governed by the Public Investment Corporation Act No. 23 of 2004. The predecessor of that Act was the Public Investment Commissioners Act No 45 of 1984. In terms of Sec. 12 (1)(b) of the former Act the Public Investment Corporation stepped seamlessly into the shoes of the commissioners, taking over all their rights and obligations. Sec 12(10) provides that any legal proceedings that were pending or could have been instituted by or against the commissioners may be instituted or continued by or against the Corporation *subject to any law governing prescription of debt.* (I shall revert to the words in italics shortly). The Corporation is, in terms of Sec. 2, **".....a juristic person, an institution <u>outside the public service</u>......."** (underlining added) which is registered in terms of the Companies Act. The State is the sole holder of the shares in the Corporation (Sec. 3 (1)), and in terms of Sec. 6 the members of the board of directors are appointed by the minister of finance. The main object of the Corporation is to be a financial services provider and the Corporation has in terms of Sec 11 wide powers to receive money for the purposes of investment.

[3] One of the clients of the Commissioners was the Civil Servants' Pension Fund, whose funds were entrusted to them for investment. The Commissioners operated a number of funds in whose names the investments were made, plaintiff being the relevant one in this case. In the "Last Schedule" (which is in fact the first annexure) to the shareholders' agreement which is referred to below, ISIBAYA is defined as "....**the ISIBAYA Fund Consortium of Portfolio Fund Managers represented by INFINITY**." INFINITY is in turn defined as "...**INFINITY ASSET MANAGEMENT (PROPRIETARY) LIMITED, a company duly incorporated in accordance with......**"

A "fund" is not referred to in either of the two Acts mentioned nor in the Corporation for Public Deposits Act No. 46 of 1984. There is no provision dealing with any such fund and it does not seem to me that the entity cited as the plaintiff in this case has legal personality. The plaintiff should therefore properly have been the Public Investment Corporation. However, no point was made of this in either the pleadings or during the trial and for present purposes I shall accept that the plaintiff has the necessary *locus standi.*

[4] The claim is for an order that the defendants be "held liable for the contravention of section 424 of the Companies Act" no.61 of 1973 and be held personally liable for an amount of R80 million for losses suffered by the plaintiff in the affairs of The Carewell Group. There was no suggestion of a contravention of any of the provisions of the said section but it was clear enough that what the plaintiff had in mind was a declaration of personal liability as contemplated in the section. The three defendants were the representatives of various entities that had entered into a joint venture with plaintiff and also controlled the holding company that is referred to in the next paragraph.

[5] During 1998 plaintiff decided to invest part of the funds at its disposal in a venture that was formed with defendants. On 22 February 1998 a Shareholders' Agreement was signed, from which it appears that the venture would consist of a group of companies. A copy is annexed to the particulars of claim which, together with its annexures, consists of 160 pages. The holding company was Lesiba Healthcare Holdings (Pty) Ltd, which was later renamed.

[6] In terms of the agreement plaintiff would invest an amount of R 35 million in what was agreed to be the holding company by purchasing a 25% shareholding in it and would advance a further R 35 million by way of a loan to the company. In order to protect its interests, plaintiff would have the right to veto any decision by either the shareholders or the board until such time as the loan has been repaid in full and would also be entitled to nominate two of the ten proposed members of the board.

[7] The first directors of the company were one Graham-Parker (representing plaintiff) and the three defendants. Third defendant was the managing director. Some three moths later the name of the company was changed to The Carewell Group of South Africa (Pty) Ltd. Graham-Parker left the employ of plaintiff in August 1998 and his place on the board was taken by one Luwazi Koyana, who also testified for plaintiff before me. First defendant resigned as a director with effect from 1 June 1999 and second and third defendants from the end of August of the same year, although the latter remained involved in the affairs of the company. On 31 August 1999 a settlement agreement was signed, the purpose of which was to regulate to some extent the termination of the relationship between plaintiff and defendants. After that date first and second defendants had no further involvement in the affairs of the company. Nothing in particular turns on this agreement and there is no need to deal with the contents thereof.

[8] By the year 2001 the entire group of companies was dormant, had lost all its share capital and had ceased trading. The group was finally wound up on 14 January 2005 on an application by plaintiff. I may add that by order of the Master of the South Gauteng division of this court dated 9 March 2005, an inquiry in terms of section 417 read with 418 of the Companies act was held into the affairs of the Carewell Group. The inquiry lasted from about April 2005 until May 2006 and the commissioner brought out her report on 14 November 2006.

[9] Summons was served on first and second defendants on 8 January 2007. After reciting *inter alia* most of the history set out above, the following allegations are made in paragraph 10 of the particulars of claim:

"10 The plaintiff has established:

10.1 that the Carewell Group, almost from the outset of the injection of the Plaintiff's funding, was mismanaged by various directors of its business who were in control of its affairs, more specifically the First, Second and Third Defendants;

10.2 that in breach of their fiduciary duties, the First, Second and Third defendants engaged the Carewell roup in certain extraordinary transactions which were dubious, were not envisaged in the business plan, had not been authorized at board meetings of directors and shareholders as envisaged by the terms of the Agreement, such transactions involving reckless conduct, alternatively fraud, as envisaged by s. 424 of the Companies Act, No.61 of 1973, on behalf of the First, Second and Third Defendants being inter alia the following:

................................"

Five instances of conduct by the defendants are listed in substantiation of the allegations made in paragraphs 10.1 and 10.2, which may be summarized as follows:

1. The purchase of 55 licences "up-front" while only 17 clinics were opened, and of a 25% interest in Solit (Pty) Ltd, a company in which first and second defendants had an undisclosed interest;

2. The lending of R 5 741 000 to a related company for the purchase of a property without the approval of the board;
3. A transaction with Incentive Holdings Limited shortly before its listing on the Johannesburg Stock Exchange without the approval of the board;
4. Certain unauthorized loans to directors and staff;
5. Allowing a debt of R 23.5 million to the Carewell Group to be incurred by one of its subsidiaries.

[10] In paragraph 11 of the particulars of claim it is alleged that there was a total lack of corporate governance by the three defendants, in that:

"11.1 board minutes did not reflect the transactions referred to;

11.2 the attendance register was negligible;

11.3 there were inadequate resolutions approving and sanctioning the transactions referred to;

11.4 there was collusion to misappropriate company funds in order to dissipate its funds provided in essence by the plaintiff;

11.5 most of the transactions were not in accordance with the original business plan, and had nothing to do with its ordinary course of business."

Save for the allegation of misappropriation in paragraph 11.4, the allegations in paragraph 11 are really covered by the five instances of misconduct listed in paragraph 10.2.

[11] The final allegation, in paragraph 12, is that plaintiff has, as envisaged by section 424 of the Companies Act, been unable to recover an amount of R80 million lost by it due to the reckless and unlawful conduct of the defendants in the affairs of The Carewell Group. Apart from the usual orders for costs and alternative relief, plaintiff asks for an order that defendants

> "*.....be held liable for the contravention of Section 424 of the Companies Act, and be held personally responsible to make payment, jointly and severally for an amount of R 80 million, owed by them to the Plaintiff for losses in the affairs of The Carewell Group.*"

It was clear enough that the intention was that defendants be declared personally liable for plaintiff's loss by virtue of the provision of Sec. 424 and the case was conducted on that basis.

[12] Defendants' special plea is to the effect that plaintiff had knowledge of the alleged conduct of defendants on or before 9 March 2000 and because summons was only served on defendants on 8 January 2007, plaintiff's claim had become prescribed in terms of section 11 of the Prescription Act, No 68 of 1969. Plaintiff did not replicate to the special plea and has made no positive averments in respect of prescription. It was common cause that defendants bear the onus to prove the facts relied on for prescription. The question for decision is therefore simply whether plaintiff had the knowledge needed to institute its claim against defendants at the stage alleged in the special plea, or at least before 8 January 2004.

[13] Mr. Wagener SC who appeared for first and second defendants, informed me that he proposed proving the required knowledge on two bases: firstly that plaintiff had been represented on the board of directors and therefore had knowledge of every relevant fact as the events took place and secondly by virtue of the application for an order for the seizure of assets in terms of section 26(1) of the Prevention of Organised Crime Act 121 of 1998 which was granted by this court in case number

6352/2000 on 9 March 2000. In addition plaintiff, because of its suspicion of mismanagement, had the affairs of the company investigated by two different firms of auditors and was in possession of both reports, as well as the answer thereto by first and second defendants, towards the end of July 1999. The first of these reports was drafted by an ordinary firm of auditors and the second by a firm of forensic auditors. Both these reports served before a meeting of the board of directors of the company on which plaintiff was represented as set out above.

[14] Mr Wagener called the first defendant to testify. It soon became clear that an inordinate amount of time would be spent in dealing with every incident of which plaintiff is alleged to have had knowledge through its representative on the board. I accordingly made a ruling at the request of Mr Wagener that the evidence regarding the application in case number 6352/2000 be dealt with first and separately. Mr Farber opposed the application, but in the end consented to this procedure on the understanding that he might need the case to stand down in order to enable him to prepare for leading his evidence. If needs be, the evidence relating to the actual incidents could be reverted to at a later stage.

[15] The entire set of affidavits and annexures in case 6352/2000, consisting of more than 2 000 pages, was placed before me in five or six lever arch files. The applicant was the Director of Public Prosecutions, but it was brought at the instance and with the assistance of plaintiff. The application was based on the allegations made by plaintiff in criminal charges against first and second defendants. The founding affidavit was deposed to by the head of the asset forfeiture unit, Mr. W.A. Hofmeyr, who clearly had no personal knowledge of the facts. He relied on supporting affidavits by inter alia one Amod, plaintiff's legal advisor, whose information in turn came from mainly the aforesaid Koyana (plaintiff's representative on the board), and also from third defendant. Although one of the defendants in the present claim, I can only assume that the latter's inclusion as a defendant was for the sake of formality only, as he clearly sided with plaintiff in the entire dispute. Mr Farber submitted that it does not follow that the plaintiff had the necessary knowledge at the time when the Asset Forfeiture Unit instituted its application against the defendants, because it was the National Prosecuting Authority that launched the application and not the plaintiff. According to his argument the plaintiff was not privy to all the information available to the NPA.

There is no merit in this submission. The NPA had no information of its own and relied exclusively on the information supplied to it by the plaintiff. Mr. Farber was not able to refer me to any information used in the application that did not originate from persons who were in the camp of the plaintiff.

[16] In his evidence first defendant identified the passages in the affidavits in which each one of the aspects mentioned in paragraph 10 of the particulars of claim is dealt with. Paragraphs 10 and 11 of the particulars of claim were clearly based on the allegations made in the affidavits and the reports by the auditors.

[17] The interim attachment order in terms of the Prevention of Organised Crime Act was granted on 9 March 2000 in an *ex parte* urgent application. The provisional order was opposed on the return day and was eventually discharged by Van der Westhuizen J (as he then was) in a fully reasoned judgment on 22 December 2000. He discharged the rule in the exercise of his discretion in terms of the Act. From his judgment, as also from even a cursory glance at the affidavits deposed to on behalf of the applicant, it is abundantly clear that the deponents had an intimate knowledge of the facts and circumstances on which they based their confident statements under oath in the founding papers that serious irregularities and even theft and fraud had been committed.

Defendants filed voluminous answering affidavits. It was a matter of months before the applicants finally filed their replying affidavits. In the founding papers the applicants relied on about 18 transactions involving an amount of approximately R 50 million. On the return day their counsel abandoned all but the five instances that are listed in paragraph 10 of the particulars of claim and reduced the amount allegedly misappropriated to just about R 12 million. That was certainly not, as suggested by Mr Farber for the plaintiff, due to any lack of knowledge on the part of the applicant at the time, but simply because it had investigated the matter more fully and knew that its earlier claims could not be substantiated. The reason for the discharge of the rule was likewise not a lack of knowledge of the facts on the part of the applicant, but the exercise of its discretion by the court, based on inter alia the failure by the applicant to disclose several material facts in the *ex parte* application.

[18] In his cross-examination of first defendant which started on Monday afternoon 29 November, Mr Farber commenced by referring first defendant to a handwritten document headed "With Prejudice Offer" which he had signed on 15 June 2006 during the course of the inquiry in terms of section 417 of the Companies Act into the affairs of the company. It was an offer by first defendant to pay an amount of R 1 400 000 as well as a contribution to costs of R 250 000 to the Public Investment Corporation in settlement of every claim "*on both a civil and criminal basis*" against first and second defendants. Mr Wagener objected to the production of this document on the grounds that plaintiff had not made discovery in respect thereof. In answer Mr Farber informed me that plaintiff had only become aware of the document during consultation on the previous Sunday afternoon. The case stood down until the next day on the understanding that Mr Wagener would be allowed to consult with his client and consider his position. On the next morning he informed me that in order to avoid a further delay he would consent to the document being used provisionally, subject to his right to dispute its admissibility and relevance in closing argument and provided that the witness be allowed to place the background against which the document had been signed on record.

After eliciting from the witness the statement that he had written out the document as it was dictated to him by Mr Farber, the latter declined the opportunity to cross-examine him further about the circumstances under which it had been signed, save for recording that he disputed any suggestion by the witness of improper conduct by him in the process.

[19] In order to avoid the need to take the witness in cross-examination through his answering affidavit, Mr. Wagener at my invitation conceded that it could be accepted that the witness had given an exonerating explanation for every allegation that is made against defendants in the founding papers. It also emerged in his cross-examination that first and second defendants had been arrested and detained on criminal charges but were never asked to plead. All charges against them were later withdrawn.

[20] In re-examination by Mr Wagener he stated that he had signed the acknowledgment under duress and that it was Mr Farber himself, who had been doing the questioning, who dictated its terms to him. He added that he never admitted owing anything to plaintiff and that when he signed it, it was nothing more than an attempt to put an end to the pressure that was brought to bear on him in the inquiry. I shall deal with the admissibility and relevance of this document later in this judgment.

That concluded the evidence for defendants on the special plea.

[21] Mr. Farber called Mr. Luwazi Mandisi Koyana as a witness on behalf of plaintiff. He is a chartered accountant and succeeded Graham-Parker as plaintiff's representative on the board of the Carewell Group. He became the acting managing director after the departure of third defendant during about the middle of 1999. He was an employee of Infinity Asset Management (Pty) Ltd, a company that was managing the investment in Carewell on behalf of plaintiff. According to him he was moved to Carewell in order to salvage their investment. As stated above, he had deposed to an affidavit in case number 6352/2000 and he and third defendant were the two main witnesses on the facts on behalf of the applicant. He conceded in his evidence in chief that he could not say that there was any new information in his evidence at the inquiry in terms of section 417 that had not already been included in his affidavit in support of the application. He also testified that at the inquiry he had expressed the view that a claim in terms of sec. 424 against defendants could succeed.

[22] He testified in cross-examination that the Public Investment Commissioners ("PIC") were an arm of government and that plaintiff was a division in the business of the Commissioners and not a separate entity. That could mean nothing more than that in reality the plaintiff before me was the Public Investment Corporation. The question whether that means that plaintiff is the State as contemplated in the Prescription Act and the argument advanced in this regard by Mr. Farber will be dealt with later in this judgment.

[23] Because of his function to salvage the investment, he informed his principals at the PIC of events as they unfolded. He participated in the decision to prosecute the first two defendants and the PIC as well as the attorney who acted for them, one Mr. Pathudi Maponya, were also consulted. He never saw the two reports of the auditors in their final form and as far as he was aware they were never finalised, due to plaintiff's failure to pay the fees of the auditors. In any event he made sure that all the information at his disposal was passed on to the asset forfeiture unit. Mr. Maponya had also testified at the inquiry that he did the "donkey work" for the inquiry. He was the plaintiff's attorney and all the knowledge that he obtained in the process was obtained on behalf of the plaintiff and simply is the plaintiff's knowledge.

That concluded the evidence of the plaintiff.

[24] Mr. Wagener submitted that section 11 (d) of the Prescription Act is applicable and that the relevant period for the prescription of plaintiff's claim is three years. In this regard section 12 (3) is also relevant, which reads:

> **" (3) A debt shall not be deemed to be due until the creditor has knowledge of the identity of the debtor and of the facts from which the debt arises: Provided that a creditor shall be deemed to have such knowledge if he could have acquired it by exercising reasonable care."**

He submitted that plaintiff must have had all the knowledge that it required in order to institute its claim by the time that the application was made in the beginning of 2000. Plaintiff was the complainant in the criminal case that gave rise to the application for the attachment order, and the application was based on the statements made on behalf of plaintiff in the criminal case. I shall deal further with the question of plaintiff's knowledge later in this judgment.

[25] Mr. Farber made several submission regarding prescription but I do not find it necessary to deal with every one of them and shall limit myself to the main points of his argument.

His first submission was that the applicable period of prescription was 15 years, in terms of section 11(b) of the Prescription Act. For this submission he relied on the provisions in the Public Investment Commissioners Act, in terms of which the Commissioners were charged with the investment of certain funds held on behalf of the Government. (Apart from the Government, the headnote to the Act also makes provision for the investment of funds held on behalf of **"certain bodies, councils, funds and accounts".**) Furthermore the commissioners were the Minister or his alternative and certain persons appointed by him, with the result that the commissioners and their successor, the Public Investment Corporation, were all government controlled who invested government funds and the loan should therefore be regarded as one by the government.

The short answer to that submission is that the Commissioners were clearly not the State as contemplated in the Prescription Act. The meaning attributed to "the State" in that Act has to be restricted. (See: **Holeni v. Land and Agricultural Development Bank, 2009 (4) SA 437 SCA** at paragraph [18].) Plaintiff is certainly not **"....government, going about government business and recovering moneys due to treasury."** (Ibid. paragraph [19]). Furthermore, as pointed out in paragraph [2] above, the real plaintiff in this case is the Corporation which, in terms of section 2 of its creating Act, is "**.... a juristic person, an institution outside the public service...**". This status of the PIC must, if anything, apply with even more force to Isibaya, which is merely one of its divisions. It is also of interest that the amount of R 70 million was paid to Carewell by plaintiff and not by National Treasury. Both the loan and the capital investment were therefore not made by the State.

[26] Mr Farber submitted in the alternative that the investment was made in 1998 and in any event, according to defendants, the plaintiff had knowledge of the identity of the defendant and of the facts from which the debt arose at the time of the application, which was in the year 2000. That was well before the Public Investment Corporation Act, No. 23/2004 came into force and the investment was made by the Public Investment Commissioners in terms of Act 46/1984.

In the first place, what is at stake here is not the loan to or the investment in the Carewell group, but the manner in which the defendants conducted the business of that company. The date on which the loan was made is therefore of no consequence.

Secondly, and although it is not necessary for me to make a finding in this respect, it seems clear to me that even the commissioners were not the State for the purposes of the Prescription Act. That is apparent from the headnote of the Act in terms of which the commissioners were entrusted with funds for investment from not only the Government, but also of "**.....certain bodies, councils, funds and accounts.**" Furthermore, apart from the minister, there would be at least two other commissioners appointed by him, leaving the possibility that the majority of the commissioners could be private citizens.

Thirdly, by the time that the present action was instituted, the previous act had been replaced by the Public Investment Corporation Act n. 23 of 2004. As already pointed out, that body is clearly not the State for the purposes of the Prescription Act. Nor does it avail the plaintiff that the claim may have arisen during the shift of the Commissioners: When the new Act came into operation, the commissioners simply ceased to exist and all the assets and liabilities of the Commissioners were transferred to the Corporation. Any claim that the Commissioners may have had against the defendants, now became the claim of the Corporation, which is not the Sate. The claim, even if it were based on the original loan and investment, was no longer a "**debt owed to the State**" nor one "**arising out of an advance or loan of money**" as contemplated in sec. 11(b) of the Prescription Act. As pointed out above, the claim was not one for a loan of money, but one for an order that the defendants be held liable by virtue of the provisions of sec. 424 of the Companies Act.

Plaintiff is clearly not the State and there is no reason why the applicable period should not be three years.

[27] He further submitted that in terms of the loan agreement the first instalment was only repayable in March 2003 and the second one a year later. Although the agreement contains an acceleration clause, it was subject to an election by plaintiff, who elected not to rely on the clause after the first default by Carewell. Consequently, on his argument, the debt became due at the earliest only after the second default during March 2004, which was less than three years before service of the summons in January 2007.

That cannot be correct for two reasons. Firstly plaintiff is not claiming repayment of the loan, but an order in terms of section 424 of the Companies Act. Secondly prescription in respect of a debt that is due on demand commences to run as soon as demand can be made. A plaintiff cannot thwart the very objective of the Prescription Act by electing for years not to rely on an acceleration clause and then claim to have elected not to rely on it until he has reached the safety of the three year period before prescription is completed. See in this regard

Western Bank v. S J J van Vuuren Transport, 1980(2) SA 348 (T)

as approved of in:

The Master v. I L Back & Co Ltd, 1983(1) 896 (AD) at 1004F-H and 1005H-1006A.

[28] Mr Farber also referred me to par. [28] of the judgment in **Duet and Magnum Holdings v. Koster, 2010(4) SA 499 SCA** in which Nugent JA refers to the "last event" that was required to have occurred for the particulars of claim not to have been excipiable. He submitted that in the present case that "last event" was the insolvency enquiry, "where sufficient and reasonable knowledge was acquired".

That submission misses the point of the dictum by Nugent JA. The "last event" referred to by the learned Judge of appeal is not the final piece of the puzzle that completes the picture for the plaintiff, but the occurrence of the last event which the plaintiff must allege in his particulars of claim in order to complete his cause of action. The question is not whether the plaintiff on that occasion obtained sufficient information to persuade him of the soundness of his case, but when he became aware of all the facts that he needed to allege in order to draft particulars of claim that will not be excipiable.

See inter alia: **Minister of Justice v. Gore, 2007(1) SA 111 SCA par. [17].**

[29] I should perhaps briefly deal with the document signed by the first defendant at the inquiry in terms of Sec. 417.

I find it inconceivable that neither Mr. Farber, who did the questioning at the inquiry and obtained the acknowledgment of debt from the first defendant, nor is instructing attorney could have been unaware of what would, from their point of view, have been a very important document until as late as the Sunday afternoon, after the trial had already started and just before the cross-examination of the first defendant was to commence. This failure was not explained to me, nor was the person identified who brought its existence to their attention. I think that discovery should have been made of it before the time and if not, then at least at the commencement of the hearing on the Monday morning.

Secondly the nature of the dispute should be kept in mind. The claim is not for money owing, but for an order in terms of Sec. 424 of the Companies Act. The fact that the defendant may have given an undertaking to pay a sum of money to the plaintiff is irrelevant and has no bearing on the question whether the affairs of the company were conducted in the manner contemplated in Sec 424. If the plaintiff wished to rely on the acknowledgment as a cause of action, it should have been pleaded.

I accordingly find the document to be inadmissible, both because of the failure to make discovery of it and because it is irrelevant.

[30] The first of the main issues for decision in this case concerned the nature of plaintiff's claim. Plaintiff sues for a declaratory order in terms of section 424 of the Companies Act and the question arises whether such an order is a "debt" as contemplated in section 11 of the Prescription Act. A similar question arose for decision in **Barnard & Lynn NNO v. Schoeman, 2000(3) SA 168 (N)** in respect of a claim for setting aside a disposition in terms of section 340(1) of the Companies Act. The court found that the "debt" is not a debt in the normal sense but a specialised right of action bestowed on a liquidator arising out of his statutory functions and that the claim had accordingly not become prescribed..

[31] The Cape court came to a different conclusion on an exception raised against a special plea of prescription on a claim in terms of sections 64 and 65 of the Close Corporations Act, 1984 in **Burly Appliances Ltd v. Grobbelaar NO & Ors., 2004(1) SA 602 (C).** The court found that the term "debt" is not defined in the Prescription Act, but has to be given a wide and general meaning and dismissed the exception.

[32] This court followed the decision of the Cape court in **Barnard NO v. Bezuidenhout, 2004(3) SA 274 (T)** in respect of a claim in terms of sections 63, 64 and 65 of the Close Corporations Act. In **Duet and Magnum Financial Services CC (In Liq) v. Koster, 2010(1) SA 312 (T)** it was argued that a finding that e.g. the affairs of a company had been conducted recklessly or fraudulently is an essential step that has to be pleaded before an action can be instituted for the payment of an amount. According to the argument, the running of prescription will only commence once such a finding has been made. The argument was rejected and the court followed the judgments in **Burley** and in **Barnard v. Bezuidenhout** on a claim for an order setting aside and unlawful disposition by a close corporation that fell within the ambit of either section 26(1)(b), 30(1) or 29(1) of the Insolvency Act. The court also found that there is no reason, for purposes of the commencement of the running of prescription, to distinguish between a claim in terms of sections 64 and 65 of the Close Corporations Act on the one hand, and one in terms of section 424 of the Companies Act on the other.

[33] The **Duet and Magnum** case went on appeal to the Supreme Court of Appeal and the judgment was confirmed. (Reported at **2010(4) SA 499**). In paragraphs [12] and [13] of the latter judgment the court found that similar remedies are given to the liquidator in terms of sections 64 and 65 of the Close Corporations Act and section 424 of the Companies Act, and concluded in paragraph [13]:

> **"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.**"

The right to have such a declaration made is the right that plaintiff is attempting to enforce and which the Supreme Court of Appeal found to have been extinguished by prescription. I can see no reason why the Prescription Act should not apply with equal force to the present claim as it does to claims in terms of sections 26 to 31 of the Insolvency Act.

[34] Mr. Farber sought to distinguish the Duet and Magnum case from the present, because the former was based on the provisions of the Close Corporations Act and the latter on section 424 of the Companies Act. The distinction, according to him, lies in the words "*or otherwise*" in section 424(1) which do not occur in the corresponding section of the Close Corporations Act. Apart from the fact that the Supreme Court of Appeal did not find a distinction between the two situations, the words quoted and the fact that in terms of the section the remedy is also available to a creditor or a contributory, both widen the applicability of section 424 rather than to restrict it. As already mentioned, the court *a quo* in **Duet and Magnum** expressly found there is no distinction in this respect between the remedies offered by the two Acts and the SCA did not differ from that view.

[35] The second main issue in the trial before me was the question when plaintiff had acquired the required knowledge, as contemplated in section 12(3) of the Prescription Act, "of the facts from which the debt arises."

This case differs from the normal situation in which a creditor attempts to hold the directors of an insolvent company personally liable for the debts of the company, in the important respect that plaintiff had a representative on the board of the Carewell Group throughout. Mr Farber attempted to put some distance between plaintiff and its representative, with the evidence of Koyana that he was not directly employed by plaintiff but by INFINITY, which is referred to in paragraph 3 above. I was told very little about the exact arrangement between plaintiff and Infinity, but Koyana's evidence was that Infinity was managing the investment on behalf of Isibaya. Although he attempted to minimize the part that he played in the management of Carewell's affairs with his statement that he was a non-executive director (the meaning of that term is not clear in the context of this case), he stepped into the shoes of third defendant when the latter resigned as managing director at the end of August 1999. In any event, plaintiff had the right to be represented on the board and if the knowledge of its appointed agent could not be ascribed to plaintiff, then at least plaintiff could have acquired all the necessary knowledge with the exercise of reasonable care, as contemplated in section 12(3) of the Prescription Act.

[36] Mr. Farber also relied on the reference in paragraph [28] of the **Magnum** judgment to the need to identify the "last event" that was required to have occurred for the particulars of claim not to be excipiable and submitted that in the present case that event was the insolvency enquiry, "where sufficient and reasonable knowledge was acquired". That argument is with respect based on a misunderstanding of the SCA judgment. What is referred to is knowledge of the occurrence of the last event that needs to be pleaded in the particulars of claim and not the acquisition of further evidence to fortify his confidence in the strength of his case.

My conclusion is that the plaintiff's claim has been extinguished by prescription. The order that I make is that the special plea of prescription is upheld with costs.

F G PRELLER
JUDGE OF THE HIGH COURT