IN THE HIGH COURT OF SOUTH AFRICA
(CAPE OF GOOD HOPE PROVINCIAL DIVISION)

CASE NO: 3029/2001

In the matter between:

BURLEY APPLIANCES LIMITED	Plaintiff
And	
PATRICIA ANNE GROBBELAAR N.O.	1st Defendant
FUTEK SYSTEMS CC	2nd Defendant
DUNCAN SWINBURNE BAIN MARSHALL	3rd Defendant

JUDGMENT: 14 JULY 2003

NEL, J

During June 1995, Plaintiff ('*Burley*') instituted an action against a close corporation Futek Electronics CC ('*Futek*') for the repayment of the purchase price of certain defective alarm systems and for damages arising from the delivery of the defective systems.

The amounts claimed were R206 151-00 and £27, 995-82 respectively.

While the action was pending and during or about October 1995, *Futek* transferred its business, allegedly worth R729 890-00, to the Second Defendant, Futek Systems CC ('*Systems*') and also paid Third Defendant ('*Marshall*') an amount of R140, 855-00, purportedly in repayment of his loan account with *Futek*.

The action was still pending when *Futek* was provisionally liquidated on 15 October 1996. The order was made final on 12 November 1996. The First Defendant ('*Grobbelaar*') was appointed as its liquidator.

In the particulars of claim of the present action instituted during April 2001, *Burley* alleges that

- at all relevant times *Marshall* was the sole member of *Futek* and the managing member of *Systems*;

- the disposition of its business by *Futek* was not made for value;

- immediately after the disposition was made, the liabilities of *Futek* exceeded it's assets;

- the payment to *Marshall* took place at a time when the liabilities of *Futek* exceeded its assets;

- the payment to *Marshall* was made with the intention of preferring one of it's creditors (*Marshall*) above its other creditors, and in particular *Burley*;

- by disposing of the business of *Futek* and by paying *Marshall*, *Futek* and *Marshall* carried on the business of *Futek* recklessly, with gross negligence or with the intent to defraud the creditors of *Futek* and in particular *Burley*;

- at all relevant times *Futek*, *Systems* and *Marshall* were knowingly parties to the disposition and the payment and acted in collusion to avoid payment of *Futek*'s creditors, and in particular *Burley*;

- the disposal of the business of *Futek* constituted a gross abuse by *Marshall* of the juristic personality of *Futek* as a separate entity in that it took place in order to avoid payment of *Burley*'s claims and in order to permit *Systems* to continue to conduct the business but without the liability towards *Burley*;

- at the time of the transfer of the business to it, *Systems* knew that *Burley* had instituted the action against *Futek*;

The particulars of claim contains three causes of action.

The first cause of action is based on the provisions of Section 64(1) of the Close Corporation Act No. 69 of 1984 ("the Act") which reads as follows:

> "64. Liability for reckless or fraudulent carrying-on of business of corporation.-
>
> 1) If it at any time appears that any business of a corporation was or is being carried on recklessly, with gross negligence or with intent to defraud any person or for any fraudulent purpose, a Court may on the application of the Master, or any creditor, member or liquidator of the corporation, declare that any person who was knowingly a party to the carrying on of the business in any such manner shall be personally liable for all or any of such debts or other liabilities of the corporation as the Court may direct, and the Court may give such further orders as it considers proper for the purpose of giving effect to the declaration and enforcing that liability."

As pointed out, it is alleged that by disposing of *Futek*'s business and by making the payment to *Marshall* of the sum of R140 855-00, *Futek* and *Marshall* carried on the business of *Futek* recklessly, with gross negligence or with intent to defraud its creditors. It is also alleged that *Systems* and *Marshall* were knowingly parties to these actions and an order is sought declaring both *Systems* and *Marshall* to be jointly and severally liable for the debts of *Futek* to *Burley* and in particular for payment of the sums of R206 151-00 and £27 995-82.

The second cause of action is based on Section 65 of the Act, which provides as follows:

> "65. Powers of Court in case of abuse of separate juristic personality of corporation:-
>
> Whenever a Court on application by an interested person, or in any proceedings in which a corporation is involved, find that the incorporation of, or any act by or on behalf of, or any use of, that corporation, constitutes a gross abuse of the juristic personality of the corporation as a separate entity, the Court may declare that the corporation is to be deemed not to be a juristic person in respect of such rights, obligations or liabilities of the corporation, or of such member or members thereof, or of such other person or persons, as are specified in the declaration, and the Court may give such further order or orders as it may deem fit in order to give effect to such declaration."

In this regard it is alleged that the disposal of *Futek*'s business constituted a gross abuse by *Marshall* of *Futek*'s juristic personality. Accordingly an order is sought declaring that *Futek* should be deemed not to be a juristic person in respect of its liabilities and declaring that *Systems* and *Marshall* are jointly and severally liable for payment to *Burley* of the sums of R206 151-00 and £27 995-82.

The third cause of action is based on sections 34(1) and (3) of the Insolvency Act No. 24 of 1936 which provide as follows:

> "34. Voidable sale of business.-
>
> 1) If a trader transfer in terms of a contract any business belonging to him,

or the goodwill of such business, or any goods or property forming part thereof (except in the ordinary course of that business or for securing the payment of a debt), and such trader has not published a notice of such intended transfer in the Gazette, and in two issues of an Afrikaans and two issues of an English newspaper circulating in the district in which that business is carried on, within a period not less than thirty days and not more than sixty days before the date of such transfer, the said transfer shall be void as against his creditors for a period of six months after such transfer, and shall be void against the trustee of his estate, if his estate is sequestrated at any time within the said period.

2) …

3) If any person who has any claim against the said trader in connection with the said business, has before such transfer, for the purpose of enforcing his claim, instituted proceedings against the said trader-

(a) in any court of law, and the person to whom the said business was transferred knew at the time of the transfer that those proceedings had been instituted; or

(b) in a Division of the Supreme Court having jurisdiction in the district in which the said business is carried on or in the magistrate's court of that district,

the transfer shall be void as against him for the purpose of such enforcement."

As pointed out it is alleged that the business transferred by *Futek* to *Systems* constituted items contemplated in Section 34(1) of the Insolvency Act and that the action which had been instituted by *Burley* against *Futek* is a claim in connection with the business of the latter and which, to the knowledge of *Systems,* had been instituted prior to the transfer in order to enforce *Burley*'s claims. Accordingly an order is sought declaring the transfer of the business to *Systems* to be void as against *Burley* for the purpose of enforcing its claims against *Futek*.

Systems and *Marshall* filed a special plea of prescription alleging that all three causes of action had arisen more than three years prior to the issue of the summons. It is against this special plea that the exception was taken. It reads as follows:

> "1. The plaintiff's claims against the second and third defendants are based on the provisions of sections 64 and 65 of the Close Corporation Act No 69 of 1984 and section 34(3) of the Insolvency Act No 24 of 1936.
>
> 2. The said claims do not involve the enforcement of a "debt" within the meaning of that term in Chapter III of the Prescription Act No. 68 of 1969.
>
> 3. Alternatively to paragraph 2, the 'debt' enforced by the claims based on sections 64 and 65 of the Close Corporation Act do not fall 'due' for purposes of the Prescription Act unless and until a declaration under those sections has been made by the Court.
>
> 4. In the premises, the special plea of prescription is bad in law."

For the purposes of the exception, I will assume that

- a creditor of a company which is in liquidation is entitled to pursue a claim in terms of section 64 of the Act;

- a declaration by a Court that a particular person is liable for the payment of all debts or a particular debt or liability, is not a penalty;

- a Court may direct such payment to be made to a particular creditor as opposed to the company in liquidation.

See generally *Mafikeng Mail (Pty) Ltd v Centner (No.1) and L & P Plant Hire Bk v Bosch 2001 CLR* 602 (SCA) but compare the unpublished thesis of Professor Louis de Koker Die *Roekelose en Bedrieglike Dryf van Besigheid in die Suid-Afrikaanse Maatskappyreg* (Universiteit van die Oranje Vrystaat, 1996) chapter 4 and authorities referred to therein. See also *Re Nimbus Trading Co Ltd* (1983) 1 NZCL 98, 762.

Mr. Rogers, who appeared on behalf of the excipient, submitted that the action instituted by Burley in terms of sections 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 section 64 or 'declares' in terms of section 65, no 'debt' exists.

In this regard he referred to *Barnard and Lynn NNO v Schoeman and Another* 2000(3) SA 168 (N) p. 170-171.

Mr *Gess*, who appeared on behalf of *Systems* and *Marshall* in turn submitted that

- the obligation or 'debt' arises, not merely when a declarator is issued by the Court, but from the time of the conduct being committed or the event taking place which creates liability under the Close Corporation Act;

- the submission that prescription cannot commence to run until a Court issues the declarator is contrary to the established principle that a

> creditor cannot by supine inaction arbitrary and at will postpone the commencement of prescription.

He referred to *Kotze v Ongeskiktheidsfonds, Universiteit Stellenbosch* 1996(3) SA 252 (C) and *F P and C H Matthew Limited* [1982] 1 All ER 338 (CA).

In *Barnard and Lynn NNO v Schoeman and Another, supra,* relied upon by Mr *Rogers,* Nicholson J held as follows (at p 170-171):

> *"Mr Winchester argued that in terms of s 29(1) (of the Insolvency Act) the Court has a discretion to set aside an impugned disposition by the company which had the effect of preferring one of its creditors above any other. He further argued that in terms of s 32(3), when the Court sets aside any disposition of property, it shall declare the liquidator entitled to recover any property alienated under the said disposition. He submitted that the liquidated amount was not a 'debt' in the true sense of the word as it only became due once the Court exercised the said discretion.*
>
> *Mr Winchester quoted as authority for this proposition Meskin Insolvency Law para 5.31.16.1 where the learned author said the following: 'there is no obligation to restore or pay until the Court orders accordingly and consequently … the trustee's rights of action in this context can never prescribe'.*
>
> *De la Rey Mars' Law of Insolvency in South Africa 8th ed at 206 is to the opposite effect where he (sic) says that the period of prescription of a debt is three years. No authority is quoted by the learned author in this regard and no reasons are supplied for the said conclusion.*
>
> ………………..
>
> *"Mr Winchester made mention of the difficulty a liquidator might have in a large and complex liquidation where it could be some time before he became aware of the existence of any voidable transaction. Mr Skinner submitted that the answer to this was that he had a remedy. As has been pointed out above it is clear, in terms of s 11(3) of*

the Prescription Act, that, if the creditor is not aware of the identity of the debtor and the facts from which the debt arises, he can bring an action within three years of gaining such knowledge.

A liquidator is appointed and performs a function for the Court on behalf of the general body of creditors. When he seeks to impeach a transaction he is challenging, on behalf of the other creditors, an improper preference that the insolvent sought to achieve. He is setting in motion a statutory procedure for recovering an asset. Can this be said to be a debt? A normal debt can be freely ceded but a liquidator, who acts in terms of the said section, acts *nominee officii* and cannot cede the right to recover voidable transactions to any other party. See *South African Board of Executors and Trust Co Ltd (in Liquidation) v Gluckman* 1967 (1) SA 534 (A) at 541C-542A. This seems to me to be an indication 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.

Section 32(3) allows the Court to set aside a disposition of property and declare the liquidator entitled to recover the property or its value at the date of disposition or the date it was set aside by the Court, whichever is the higher. Clearly the Legislature contemplated that with the passage of time the property might have escalated in value and decreed that the general body of creditors should receive the benefit of this higher value. If a liquidator reckons the property has increased in value he will be entitled to lead such evidence and ask for a finding in that regard. He would, of course, not know what that would be when he first demands the repayment of the impugned transaction. The debt, in that case the value of the property, would not be known until the Court pronounced its findings. It seems to me that this is an additional reason why the debt did not become due until the value was pronounced by the Court. Only at that stage can it be properly said to have been quantified to constitute a debt.

Section 29(1) provided that the person, in whose favour the disposition is made, has the right to prove that the disposition was made in the ordinary course of business and that it was not intended to prefer one creditor above another. It seems clear that the proof referred to in the subsection refers to proof before the Court and not before the liquidator. The liquidator will only know about this defence when he received the plea or opposing affidavit. The debt as such is not owing if it was made in the circumstances protected by the section. For this reason also I am of the view that a debt only comes into being once the Court pronounces upon the disposition, after considering the existence or otherwise of the statutory defences provided.

As is made abundantly clear in Morris NO v Airomatic (Pty) Ltd t/a Barlows Airconditioning Co 1990 (4) SA 376 (A) at 396A-B the liquidator has no power to set aside transactions which are contemplated by the Act. It is the Court and the Court alone that has the power to set aside transactions in terms of s 29. The amount of any impugned loan only becomes a debt and recoverable once the Court has made an order

> *to that effect."*

The only authorities which seemed to have been brought to the attention of Nicholson J were the 8 ed of Mars' Law of Insolvency in South Africa and Meskin's Law.

With respect to the learned Judge, it seems as if De la Reyhad been misread. In the passage referred to she deals with the common law Paulianaand in note 6 at page 206 draws attention to 42.8.13; 2.5.4.; der Keessel Thes Select200 and Villiers v Estate Hunt1939 AD 531. These authorities support her view that at common law the actio Pauliana prescribed after one year, in terms of the 1943 Prescription Act after 30 years and in terms of the 1969 Prescription Act after 3 years. See also v Ebrahim and Others1956 (4) SA 723 (N).

It is *Meskin's* statement that

> "there is no obligation to restore or pay until the Court orders accordingly and consequently …. the trustee's rights of action in this context can never prescribe."

which has to be examined.

As pointed out, *Nicholson* J, in accepting *Meskin*'s view, concluded that the right accorded to a trustee to recover assets or their value is something so *sui generis* that it can never prescribe.

He reached this conclusion on the following grounds:

- The liquidator sets a statutory procedure into motion to recover an asset;

- The right to recover the asset cannot be ceded and it is thus not a debt in the normal sense, because normal debts can be ceded;

- As the liquidator is entitled to recover the property or its value at the time of disposition or its value at the date it is set aside by the Court, whichever is the higher, the value of the debt would not be known until the pronouncement by the Court;

- As the recipient of the asset has the right to prove that the disposition was made in the ordinary cause of business and that it was not intended to prefer one creditor above another the trustee or liquidator will only know about this defence when the plea or an opposing affidavit is received, and as the debt will not be owing if the disposition had been made in the circumstances protected by the section, it cannot become owing before the defences are dismissed;

- In the circumstances the amount of any impugned loan only becomes a debt and thus recoverable once the Court has made an order to that effect.

The first ground (setting into motion a statutory procedure) is certainly not unique. There are many statutory procedures which are not excluded from the provisions of the 1969 Prescription Act. Even a claim against the Road Accident Fund is a claim which has been created by a statute.

The second ground (that the right to recover cannot be ceded) is also not unique. Many rights cannot be ceded. See *Lawsa Vol 2 R*. par 254 as follows:

> "**254 Cession prohibited by statute** Particular statutory provisions may prohibit the cession of particular rights, for instance a pensioner's right to his pension or an

> insolvent's right to his earnings. Similarly, the Public Service Act prohibits the cession of the whole or any part of any salary or allowance owed to an 'officer' or 'employee' without the written approval of an accounting officer. The Credit Agreements Act contains a qualified prohibition: a cession of more than 25% of the cedent's income is invalid if made to secure payments due in terms of a credit agreement. The right to compensation in terms of the Workmen's Compensation Act cannot be ceded or assigned. The Alienation of Land Act provides that a cession of the right to payment of an amount payable periodically under a contract of service or towards the maintenance of any person, to secure any payment in terms of a contract, as defined, will be null and void. Under the old Prescription Act a prescribed debt could not be ceded. A statutory claim which one spouse has against the other or his or her estate upon the dissolution of their marriage for a proportionate share in the accrual of their respective estates, is not transferable. And the Commissioner for Inland Revenue, so it has been held, cannot cede a claim for the payment of income tax."

Of more relevance an *actio injuriarum* can also not be ceded before *litis contestatio*. See *Sande* Cession of Actions, (Anders) p.62 par 11 and *Susan Scott* 'The Law of Cession' 2ed p.188 and authorities there cited. It can surely not be suggested that the running of prescription is delayed until *litis contestatio*.

The third ground (the amount not fixed) is also not unique. The amount of general damages is never known until pronounced upon by a Court.

See *Benson and Another v Walters and Others* 1984(1) 73 (AD) at p82 A-D:

> "Section 12(1) of the Prescription Act 68 of 1969 provides that 'prescription shall commence to run as soon as the debt is due'. It is clear that the date on which a debt becomes due does not always coincide with the date on which it arises. In *List v Jungers* 1979 (3) SA 106 (A) at 121, DIEMONT JA remarked that the difference relates to the coming into existence of the debt on the one hand and the recoverability thereof on the other hand. And in *The Master v I L Back and Co Ltd and Others* 1983(1) SA 986 (A) at 1004 the following was said:

> 'The words 'debt is due' in the section (ie s 12(1)) must be given their ordinary meaning. It seems clear that this means that there must be a liquidated money obligation presently claimable by the creditor for which an action could presently be brought against the debtor. Stated another way, the debt must be one in respect of which the debtor is under an obligation to pay immediately.'
>
> In parenthesis it may be pointed out that, if it was intended to formulate a principle of general application, the words 'liquidated' and 'money' were clearly used *per incuriam*, since is no doubt that prescription runs in regard to unliquidated claims for damages and also claims not sounding in money. It should be borne in mind, however, that in *Back*'s case the relevant obligation was indeed one to pay a liquidated amount of money, and that the only question was whether that amount was 'presently claimable."

See also *Harker v Fussell and Another* 2002 (1) SA 170 (TPD).

The fourth ground (special defences which might be raised) is not convincing. It has never been suggested that the possibility that special defences to delictual claims might exist, such as statutory authority or necessity, would delay the date upon which prescription would start to run.

Any any event, even if *Nicholson* J was correct in regard to section 29 of the Insolvency Act, section 64 of the Close Corporation Act fortunately does not create so many problems.

Section 64 of the Close Corporation Act, (as did the corresponding section in the Companies Act) created statutory rights and corresponding liabilities when the business of a CC is carried out recklessly or with gross negligence or with the intent to defraud any person or for any fraudulent purpose.

The history and development of these rights and corresponding liabilities which were created in the companies acts of England, Ireland, Austalia, New Zealand and South Africa, are traced in the well researched thesis of *Professor de Koker*.

Following upon the report of the Greene Committee in 1926, the following section was introduced in the English Companies Act, 1928

> "If in the course of a winding-up it appears that any business of the company has been carried on with intent to defraud creditors of the company or creditors of any other person or for any fraudulent purpose, the court, on the application of the official receiver, or the liquidator or any creditor or contributory of the company, may, if it thinks proper to do so, declare that any of the directors, whether past or present, of the company who were knowingly parties to the carrying on of the business in manner aforesaid shall be personally responsible, without any limitation of liability, for all or any debts or other liabilities of the company as the court may direct…"

Some amendments were introduced in 1948. In 1986 this section, with amendments thereto, was introduced into a new Insolvency Act.

New Zealand, as did Australia, also followed the recommendations of the Greene Committee with the resultant introduction of the 'fraudulent trading' concept. In 1955 section 320 of the New Zealand Companies Act of 1955 read as follows:

> "(1) If in the course of the winding up of a company it appears that any business of the company has been carried on with intent to defraud creditors of the company or creditors of any other person or for any fraudulent purpose, the Court, on the application of the Official Assignee or the liquidator or any other creditor or contributory of the company, may, if it thinks proper so to do, declare that any persons who were knowingly parties to the carrying on of the business in manner aforesaid shall be personally responsible, without any limitation of liability, for all or any of the debts or other liabilities of the company as the Court may direct …"

In South Africa, the concept of fraudulent trading was introduced into the Companies Act in 1939. After some amendments in 1952 and 1973 the present section 424(1) reads as follows:

> "When it appears, whether it be in a winding-up, judicial management or otherwise, that any business of the company was or is being carried on recklessly or with intent to defraud creditors of the company or creditors of any other person or for any fraudulent purpose, the Court may, on the application of the Master, the liquidator, the judicial manager, any creditors or member or contributory of the company, declare that any

> person who was knowingly a party to the carrying on of the business in the manner aforesaid, shall be personally responsible, without any limitation of liability, for all or any of the debts or other liabilities of the company as the Court may direct."

This section was considered by Schabort J in *Food & Nutritional Products (Pty) Ltd v Neumans* 1986 (3) 464 and he seems to have come to the conclusion that the previously existing common law action based on fraud had been codified by the section.

The judgment reads as follows (at 476 G – 477 A)

> "It has been submitted on the strength of *Orkin Bros Ltd v Bell and Others* 1921 TPD 92 that the creditors of a company could 'at common law' found personal liability against the director of a company for their 'recklessness without the necessity of proving a fraudulent intent in the ordinary sense' (Hyman 'Directors' Liability for Company's Debtors' in 1980 SA *Company Law Journal at* E4). With due respect, this view does not in my opinion reflect the import of the *Orkin Bros* judgment correctly. According to my understanding of the decision, the directors were held liable personally on the basis of fraud and BRISTOW J, in his concurring judgment, went no further than to point out that fraud could also be committed with *dolus eventualis*. It has moreover been decided recently with pertinent reference to the *Orkin* case *supra* that 'save where authorized by statute' our Courts would 'at the present juncture' not disregard 'the separate identity of companies except upon proof of fraud'. Cf *Lategan and Another NNO v Boyes and Another* 1980 (4) SA 191 (T) at 201F-202A.
>
> Upon proof of fraud it is quite clear, on the authority of the *Orkin* and *Lategan* case *supra*, that a Court would at the instance of a creditor of a company impose personal liability on those responsible and who would otherwise have been able to shelter behind the corporate façade of the company.
>
> The effect of the aforegoing is that s 424 must be construed as comprising a single remedy in respect of a common law right (relating to fraud) and a statutory right (relating to recklessness) against the persons contemplated therein. The common law right was codified to the extend that it was enacted in the provision and the statutory right was

created therein."

With respect to the learned judge, I do not agree with his view that "*the common law right was codified to the extend it was enacted in the provision*".

See *De Kokersupra*at p.222-223 as follows:

> "'n Eiser wat 'n aansoek ingevolge artikel 424 bring, moet aantoon dat die betrokke persone wetens deelgeneem het aan die roekelose of bedrieglike dryf van besigheid van die maatskappy, maar het nie nodig om skade of benadeling te bewys ten einde 'n hofbevel rakende die persoonlike aanspreeklikheid van die betrokke persone te verkry nie. Waar skade wel gely is, hoef geen kousale verband tussen die skade en die betrokke skulde of verpligtinge aangetoon te word nie. Die gemeenregtelike remedie ten aansien van opsetlike wanvoorstelling is deliktueel van aard. 'n Eiser wat hierdie remedie wil benut moet gevolglik al die deliktuele elemente, waaronder skade en kousaliteit, aantoon. Die afwesigheid van hierdie twee elemente in die statutêre bepaling bring teweeg dat die karakter van die statutêre remedie so ingrypend verskil van die deliktuele remedie dat daar kwalik van kodifisering sprake kan wees.

Artikel 424 kodiseer en vervang dus nie die gemeenregtelike remedies nie, maar bied 'n unieke verhalingsmeganisme vir 'n skuldeiser van 'n maatskappy. Waar die skuldeiser oor deliktuele remedies teenoor die maatskappy beskik, stel artikel 424 'n addisionele meganisme tot sy beskikking. Waar 'n skuldeiser egter nie oor 'n deliktuele remedie beskik nie, aangesien hy nie skade gelei het of nie 'n kousale verband tussen 'n gewraakte handeling en sy gelede skade kan aantoon nie, kan hy artikel 424 benut om 'n bedrag gelykstaande aan sy skuldvordering te verhaal, indien hy in staat is om te bewys dat die betrokke persone wetens deelgeneem het aan die roekelose of bedrieglike dryf van besigheid ingevolge die bepaling."

See also *Howard v Herrigel and Another NNO*1991(2) SA 660 (AD) at 672 C-G.

In my view, section 64 of the Close Corporation 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.

In terms of sections 10, 11 and 12 of the South African Prescription Act of 1969, a debt is extinguished by prescription after the lapse of the relevant period (ie. three years) and prescription commences to run as soon as the debt is due.

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.

In *Desai NO v Desai and Another* 1996(1) SA 141 (AD) at 146 it was stated that

> " 'Debt' is not defined in the Act but it has a wide and general meaning, and includes an obligation to do something or refrain from doing something".

And as pointed out by *Howie* J (as he then was) in *Cape Town Municipality and Another v Allianz Insurance Co Ltd* 1990 (1) SA 311 (CPD).

> "a right and a debt are, after all merely opposite poles of one and the same obligation"

The judgment reads as follows at 321 C-F; 324 D-G and 331 C-E

> "It seems to me that the familiar comprehensive motor insurance policy affords an appropriate illustration on the present point. It indemnifies an insured against (a) loss or damage to the motor car and (b) all sums which the owner shall become legally liable to pay. Clearly (a) is property insurance and (b) is liability insurance. In *Boshoff v South British Insurance Co Ltd* 1951 (3) SA 481 (T) at 487 C-D, the Court said, of the stage when such indemnities are due:

'All that can ever be 'due' to the insured under the policy, all that he can ever have a 'right to' is an indemnity; an indemnity against loss or damage or an indemnity against sums which he becomes legally liable to pay. He can only be indemnified, compensated, when the extent of his loss is known. He only becomes legally liable to pay a sum when a sum is fixed by a Court or by agreement.'

> The statement in the last sentence in that passage was confirmed in *Pereira's* case at the above-cited reference and applies to liability insurance. The penultimate sentence reflects, in my view, the position in the case of property insurance, ie the insurer's debt is

> due when the extent of the insured's loss or damage is known. That must mean, in my view, the physical loss, not the final ascertainment of its pecuniary extent."

"In response, second plaintiff's counsel argued that one is not dealing here with a damages claim but a claim for a specific performance of a contractual obligation and that the attempted analogy is inappropriate.

> In my view, the analogy is correctly drawn. An action against an insurer for wrongful repudiation of an indemnity insurance policy 'sounds in unliquidated damages rather than in debt': Ivamy *General Principles of Insurance Law* 5th ed at 9. The case of action accrues when the loss is suffered: Halsbury's *Law of England* 4th ed vol 28 para 622 read with para 669. When the loss has occurred the insured becomes entitled to enforce the policy and the insurer becomes liable to pay the amount of the loss: *Ivamy (op cit at 395)*. In context, those authorities, in my view, can only mean that the cause of action accrues when the physical loss is suffered and not when the pecuniary extent of the loss is finally ascertained. Consistent with this conclusion are the *dicta* in *Chandris v Argo Insurance Co Ltd and Others* [1963] 2 Ll LR 72 at 73-4.

Accordingly, the debt was due when the pipeline was damaged and displaced. Therefore, first plaintiff's ground for contending that defendant's debt was not due by 7 October 1984 must fail."

> "One must bear in mind that a 'right' and a 'debt' are, after all, merely opposite poles of one and the same obligation (*Erasmus v Grunow en 'n Ander* 1978 (4) SA 233 (O) at 245E). Essentially, therefore, claiming payment of the debt is no different in principle from enforcing the right to payment of the debt. The 1943 Act required that for the interruption of prescription the process served had to be one whereby proceedings were instituted for the enforcement of a right. Construing that requirement in *Santam Insurance Co Ltd v Vilakasi* 1967 (1) Sa 246 (A) at 253H, the majority of the Court held that the process envisaged was one whereby action was instituted 'as a step in the enforcement of a claim or right' whereby the creditor 'formally involves his debtor in court proceedings for the enforcement of his claim.' "

In my view as soon as it

> "appears that any business of the corporation was or is being carried on recklessly, with gross negligence or with intent to defraud any person or for any fraudulent purpose …"

and the corporation has debts or other liabilities, a creditor can enforce the remedy which was created by section 64. The remedy is the right to apply to a Court for a declaration that a particular person or particular persons should personally be held liable for all or any of such debts or liabilities as the Court may direct.

In England proceedings under the corresponding section must be commenced within six years of the company going into insolvent liquidation, which has been held to be the date when the *'cause of action accrues'* for the purposes of the Limitation Act. See *Boyle & Sykes*, *Gore-Browne on Companies* vol 2 p. 35.026.

In *Re Maney & Sons De Luxe Service Station Ltd, Covan V Maney* 1969 NZLR 116 the New Zealand Court of Appeal similarly held that prescription begins to run against the liquidator of a company from either the commencement of the winding up or from the appointment of the liquidator. (The date upon which '*the cause of action accrued*' in terms of section 4 of the Limitation Act, 1950).

If follows, that in my view, the exception taken against the plea to the cause of action based on section 64, must fail.

The exception taken against the plea to the cause of action based on section 65 must, in my view, and for similar reasons, also fail.

The third cause of action based on sections 34(1) and (3) of the Insolvency Act is not a true cause of action and relates to the action instituted during June, 1995. No order was sought in relation thereto.

Accordingly, I would dismiss the exceptions, with costs.

I agree

POTGIETER AJ

The exceptions are dismissed, with costs.

H C NEL

IN THE HIGH COURT OF SOUTH AFRICA
(CAPE OF GOOD HOPE PROVINCIAL DIVISION)

CASE NO: 3029/2001

REPORTABLE

In the matter between:

BURLEY APPLIANCES LIMITED	**Plaintiff**
And	
PATRICIA ANNE GROBBELAAR N.O.	**1st Defendant**
FUTEK SYSTEMS CC	**2nd Defendant**
DUNCAN SWIMBURNE BAIN MARSHALL	**3rd Defendant**

JUDGMENT BY	:	H C NEL, J
For the Plaintiffs	:	Adv. O. L. Rogers
Instructed by	:	Fairbridge Arderne & Lawton Inc
For the 1st Defendant	:	Not represented
For the 2nd & 3rd Defendant	:	Adv. D.W. Gess
Instructed by	:	Scheibert & Associates
Date of Hearing	:	10 May 2002
Judgment delivered on	:	14 July 2003