



THE SUPREME COURT OF APPEAL OF SOUTH AFRICA
JUDGMENT

Reportable

Case no: 865/2023

In the matter between:

GODFREY GOLIATH NICHOLLS N O

FIRST APPELLANT

ILLSE HOPE SOLOMON N O

SECOND APPELLANT

ELANA OOSTHUIZEN N O

THIRD APPELLANT

and

MAGDALENA GAYBBA

RESPONDENT

UNIVERSITY OF THE FREE STATE LAW CLINIC

AMICUS CURIAE

Neutral citation: *Godfrey Goliath Nicholls N O and Others v Magdalena Gaybba and Another* (865/2023) [2025] ZASCA 138 (25 September 2025)

Coram: HUGHES, WEINER and KATHREE-SETILOANE JJA and HENNEY and MODIBA AJJA

Heard: 6 May 2025

Delivered: 25 September 2025

Summary: Prescription Act 68 of 1969 (Prescription Act) - Close Corporation Act 69 of 1984 (Close Corporation Act) - Claim under s 64 of the Close Corporation Act is not a 'debt' as contemplated in s 10 of the Prescription Act - Claim does not prescribe - Delictual claims have not prescribed.

ORDER

On appeal from: Western Cape Division of the High Court, Cape Town (Le Roux AJ, sitting as court of first instance):

- 1 The appeal is upheld with costs, including the costs consequent upon the employment of two counsel.
- 2 The order of the high court is set aside and substituted with an order in the following terms:
'The special plea of prescription is dismissed with costs, including the costs of two counsel, where so employed.'

JUDGMENT

Hughes JA (Weiner and Kathree-Setiloane JJA and Henney and Modiba AJJA concurring):

Introduction

[1] This is an appeal against the decision of the Western Cape Division of the High Court, Cape Town (the high court). The appellants, in their capacity as trustees of the Nicholls Vrugteverspreiders Trust (the Trust), challenged the high court's decision which upheld the respondent's special plea of prescription and dismissed their claims. The respondent did not participate in these proceedings. The University of the Free State Law Clinic, at this Court's behest, presented argument as amicus curiae in the proceedings (amicus). This appeal is with the leave of the high court.

The facts

[2] On 12 April 2019, the Trust served a summons on the respondent, Ms Magdalena Gaybba (Ms Gaybba). The particulars of claim alleged that in February 2010, the Trust acquired the business of GGN Vrugteverspreiders (Pty) Ltd (GGN). This acquisition included claims against third parties, one of which was a close corporation,

HTI Technologies Corporation (HTI). The claim against HTI arose because it was alleged that HTI misappropriated funds amounting to R9 882 933.40 from GGN and the Trust over a period of six years, from February 2006 to 24 February 2011. Ms Gaybba was the sole member of HTI from 25 September 2003 until it was deregistered on 24 February 2011.

[3] The Trust attributed the claim against HTI to the conduct of Ms Gaybba's late husband, Johann Gaybba (the deceased), who fraudulently made payments from the bank account of GGN and the Trust to HTI. He allegedly died by suicide on 15 January 2016. These payments, which were fictitious transactions, occurred while the deceased was the bookkeeper for GGN and the Trust. As bookkeeper, the deceased was authorised to conduct transactions through the bank accounts of GGN and the Trust.

[4] The modus operandi employed by the deceased was as follows: HTI, with the knowledge of the deceased and Ms Gaybba, received payments into its bank account to which it was not entitled; concealed payments were made from HTI's bank account to GGN; fictitious descriptions were used for the payments, creating the impression that they related to valid trade or transactions; payments received by HTI were dissipated by the deceased and Ms Gaybba and paid to third-party entities. This '*rondskyf*' [exchange] of payments occurred while HTI was trading under insolvent circumstances.

[5] The Trust alleged that from 16 January 2006 to 24 February 2011, the deceased and Ms Gaybba, through the modus operandi described above, caused GGN and the Trust to pay R21 803 899.71 to HTI without any consideration, as part of a fraudulent scheme. HTI repaid R11 920 966.31 to GGN, resulting in a shortfall of R9 882 933.40. As the Trust acquired GGN's business, it also took on the debt owed by HTI to GGN. Therefore, the Trust argued that this shortfall was fraudulently dissipated by HTI, without value, at the request of the deceased and Ms Gaybba.

[6] Due to the suspicious transactions, Godfrey Goliath Nicholls (Mr Nicholls), the first appellant and a trustee of the Trust, instructed HVM Audit Incorporated to conduct an urgent investigation. The investigation took place from 12 September 2014 to 12 September 2015, and a report was submitted on 23 September 2015. Based on this report, KPMG was engaged on 1 October 2015 to carry out, among other tasks, 'an

independent investigation into the alleged misappropriation of funds by [the deceased]'. Their final report was issued on 24 March 2016 (KPMG report).

[7] During KPMG's investigations, Ms Elana Oosthuizen (Ms Oosthuizen), an employee of the Trust with authorised access to its online banking systems, informed KPMG that she had inquired from the deceased about the purpose of the '*rondskyf*' of the funds. He told her that the transactions were for tax purposes. Concerned about the movement of funds, she decided to keep a spreadsheet tracking the flow of money. The spreadsheets cover the period from 28 December 2010, when she first became concerned, to September 2014, when she was eventually retrenched. It was revealed that Ms Oosthuizen, also a trustee of the Trust, met with the other two trustees and KPMG in 2015 and early 2016. Additionally, on 13 January 2016, she sent an email to Colonel Cooper, who was investigating the criminal complaint filed in December 2015, referencing the irregularities and attaching the spreadsheet.

The high court

[8] In the high court, the Trust raised three claims against Ms Gaybba as the sole member of HTI:

(a) Since HTI was deregistered on 24 February 2011, Ms Gaybba is liable for its debts to the appellants under s 26 of the Close Corporations Act 69 of 1984 (the CC Act);¹

(b) Alternatively, having been knowingly a party to the reckless or fraudulent conduct in carrying on of HTI's business, Ms Gaybba should be declared personally liable for HTI's debts to the appellants, as stipulated in s 64 of the CC Act;²

(c) Further alternatively, as a co-wrongdoer alongside HTI and the deceased (who served as HTI's accountant), the respondent is liable to the appellants for damages in delict.

[9] In response, Ms Gaybba raised special pleas of prescription in relation to these claims on the following basis: The 'debt' fell due on 24 February 2011, alternatively on a date more than three years prior to the service of the summons on her. The appellants

¹ In this Court, the Trust did not persist with the s 26 claim, which the high court dismissed, so this claim need not detain this Court. It is worth noting that s 26 relates to the deregistration of a corporation and the personal liability of members for outstanding debts at the time of deregistration.

² See para 17 of the judgment.

had knowledge of her identity as debtor and of the facts from which the debt arose by 24 February 2011, alternatively could through the exercise of reasonable care have acquired such knowledge on a date more than three years prior to the service of the summons i.e. on or before 14 April 2016. Since the summons was only served on her on or about 15 April 2019, the appellants' claims had prescribed.

[10] In the high court, Le Roux AJ upheld Ms Gaybba's special plea of prescription in respect of all the Trust's claims and dismissed them.

[11] In determining the special plea, the high court had to decide whether the s 64 claims of the Trust constituted a debt and whether the Trust suffered damages as claimed. If answered in the affirmative, it then had to determine whether the claims had prescribed in terms of s 12(1) and (3) of the Prescription Act 68 of 1969 (the Prescription Act). The high court concluded that the Trust's claims against Ms Gaybba constituted a debt as defined by s 10(1) of the Prescription Act; that the debt became due and payable on 24 February 2011; and since the summons for the claims was served on 15 April 2019, after the three years required by s 12(1) and (3), the Trust's claims had prescribed.

Is the s 64 claim a 'debt' subject to prescription?

Submissions by the appellant

[12] A key issue in this appeal is whether the s 64 claim of the Trust qualifies as a 'debt' under s 10 of the Prescription Act, and if so, whether it has become prescribed. On this issue, the appellants argued that the s 64 claim of the Trust does not constitute a 'debt' as envisaged by s 10(1) of the Prescription Act, susceptible to prescription. They contended that, in deciding whether to grant the relief sought under s 64, a court exercises a discretion and must consider what is just and equitable based on the facts of each case. Therefore, the purpose of s 64 is to address gross or dishonest mismanagement of a corporation's affairs, not mere incompetence. Consequently, they took the view that members cannot hide behind the corporation's separate legal personality and should be held personally liable. Importantly, they asserted that s 64 can only be invoked when the corporation is unable to pay its debts.

[13] The appellants further contended that s 64 claims are similar to a claim to set aside a voidable disposition under insolvency circumstances, 'where declaratory relief immediately precedes a claim that is practically a debt under the narrow construction of the term under *Electricity Supply Commission v Stewarts and Lloyds of SA (Pty) Ltd (Escom)*', as stated in *Off-Beat Holiday Club and Another v Sanbonani Holiday Spa Shareblock Limited and Others (Off-Beat CC)*.³ They averred that there is, however, a distinction, which is not the nature of the relief sought that follows the declaration order, that is of importance, but rather the nature of the court's power to grant such an order. They challenged the high court's conclusion that the s 64 claims are a debt and, as such, align with the wide definition of a debt as postulated in *Desai N O v Desai and Others (Desai)*⁴, as opposed to the narrow definition in *Escom*.⁵

[14] In addition, the appellants argued that such claims constitute 'an equitable judicial determination' involving the exercise of a discretion, rather than a mechanical decision based solely on the fulfilment of specific statutory elements. They maintained that this is the key distinction between cases of voidable dispositions and s 64 cases.

Submissions by the amicus

[15] To the contrary, the amicus argued that the interpretation the high court attributed to the term 'debt' is unassailable as it follows *Desai*, which cites *Escom*. The amicus, however, was constrained to concede that the Constitutional Court in *Makate v Vodacom Ltd (Makate)*⁶ pronounced that the definition attributed to the term 'debt' in *Desai* was 'decided in error' to the extent that it went beyond what was said in *Escom*.⁷

[16] Notably, the amicus also conceded that the high court was wrong in considering the evidence and pleadings when interpreting what constituted a debt as contemplated in s 10 of the Prescription Act. The amicus concluded by arguing that the relief sought in this case, where 'declaratory relief immediately precedes a claim is a debt', conforms with the narrow construction of the word as enunciated in *Escom*.

³ *Off-Beat Holiday Club and Another v Sanbonani Holiday Spa Shareblock Ltd and Others* [2017] ZACC 15; 2017 (7) BCLR 916 (CC); 2017 (5) SA 9 (CC) para 32 (*Off-Beat CC*).

⁴ *Desai N O v Desai and Others* 1996 (1) SA 141 (A) at 146I-174A (*Desai*).

⁵ *Electricity Supply Commission v Stewarts and Lloyds of SA (Pty) Ltd* 1981 (3) SA 340 (A) (*Escom*).

⁶ *Makate v Vodacom (Pty) Ltd* [2016] ZACC 13; 2016 (6) BCLR 709 (CC); 2016 (4) SA 121 (CC) (*Makate*).

⁷ *Ibid* para 93.

The law

[17] Section 64 provides:

‘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.

(2) If any business of a corporation is carried on in any manner contemplated in subsection (1), every person who is knowingly a party to the carrying on of the business in any such manner, shall be guilty of an offence.’ (Emphasis added.)

[18] Over the years, courts have examined what defines a ‘debt’ under s 10 of the Prescription Act. In *Escom*⁸, this Court narrowly interpreted what constitutes a ‘debt’. It was said:

‘In terms of s 11(d) of the said Prescription Act, the period of prescription in respect of a debt is three years. It was common cause in this Court that a debt is –

“that which is owed or due; anything (as money, goods or services) which one person is under obligation to pay or render to another”.

See *Shorter Oxford English Dictionary*; and see also *Leviton and Son v De G Klerk's Trustee* 1914 CPD 685 at 691 *in fin*. “Whatever is due - *debitum* - from any obligation”.

Prescription begins to run as soon as the debt is due; see section 12(1) of the said Act.’

[19] This Court in *Desai*⁹ gave a wide definition to the term ‘debt’ as including ‘an obligation’, even though reference was made to *Escom*. Following upon *Desai* and *Escom* was the decision of the Gauteng Division of the High Court, Pretoria, in *Off-Beat Holiday Club and Another v Sanbonani Holiday Spa Shareblock Ltd and Others*.¹⁰ In

⁸ Ibid at 344F-G.

⁹ *Desai* at 146I-147A.

¹⁰ *Off-Beat Holiday Club and Another v Sanbonani Holiday Spa Shareblock Limited and Others* [2014] ZAGPPHC 418.

dealing with a s 252 challenge of the Companies Act 61 of 1973, Bertelsmann J applied the dictum in *Duet and Magnum Financial Services CC (In Liquidation) v Koster (Koster)*.¹¹ In *Koster*, the liquidators sought, in terms of s 32 of the Insolvency Act 24 (the Insolvency Act) of 1936, to set aside a disposition made before the liquidation of the corporation. This Court stated that the liquidator's right to claim to set aside an impeachable transaction constitutes a 'debt' for purposes of the Prescription Act.¹² Hence, Bertelsmann J concluded that the s 252 claim was akin to the liquidator's right, and as such, having had knowledge of the cause of action for the s 252 claims for many years, the claim had prescribed.

[20] On appeal, this Court in *Off-Beat Holiday Club and Another v Sanbonani Holiday Spa Shareblock Limited and Others (Off-Beat SCA)*,¹³ stated that the definition of a 'debt' as expressed in *Escom* was narrow and chose to adopt the broader definition outlined in *Desai*, which includes 'an obligation'. The Court concluded that a broad and general understanding of a 'debt,' encompassing an obligation to do or refrain from doing something, is most appropriate for the Prescription Act. Maya ADP (as she then was), writing for the majority, stated the following:

'As our courts have frequently observed, the Prescription Act does not define the term "debt". However, it is established that for purposes of this Act, the term has a wide and general meaning; that it includes an obligation to do something or refrain from doing something; and entails a right on one side and a corresponding obligation on the other.'¹⁴(Footnotes omitted.)

[21] However, the Constitutional Court in *Makate*¹⁵ stated that the contractual obligation between Vodacom and Makate to negotiate in good faith did not qualify as a 'debt'. Additionally, to the extent that *Desai* regarded an obligation as constituting a debt, the decision was deemed incorrect and was thus overruled. It concluded that there was consequently no debt due and, accordingly, no question of prescription.

¹¹ *Duet and Magnum Financial Services CC (In Liquidation) v Koster* [2010] ZASCA 34; 2010 (4) SA 499 (SCA); [2010] 4 All SA 154 (SCA) (*Koster*).

¹² *Ibid* para 28.

¹³ *Off-Beat Holiday Club and Another v Sanbonani Holiday Spa Shareblock Ltd and Others* [2016] ZASCA 62; [2016] 2 All SA 704 (SCA); 2016 (6) SA 181 (SCA) (*Off-Beat SCA*).

¹⁴ *Ibid* para 32.

¹⁵ *Makate* paras 186 and 187.

[22] The Constitutional Court, subsequently, considered the decision of *Off-Beat SCA* and concluded that this Court had taken an incorrect approach in that matter. The Constitutional Court elaborated on its conclusion in paragraphs 30 and 31:

‘In my view, the SCA adopted an incorrect approach. It seems to me that until a determination on the validity of the parties’ positions against each other is made under section 252, neither party can discharge its respective obligations as neither is aware of the existence or extent of these obligations...

The manner in which section 252 is drafted makes it possible that a particular claim brought under this section is not a “debt” as defined in *Makate*... The relief sought has a direct effect on the future conduct and running of the company. The mere fact that the claim is for a declarator does not mean that the Clubs are attempting to avoid the construction of “debt” per *Escom* and therefore the application of the Prescription Act. In *Escom*, the term “debt” was defined as “that which is owed or due; anything (as money, goods or services) which one person is under obligation to pay or render to another”.¹⁶

Discussion

[23] The first issue for consideration in the appeal is whether the s 64 claim constitutes a debt under the Prescription Act. In addressing this issue, it is important to remember that with a s 64 claim, a court primarily exercises its discretion to lift ‘the shield of personal liability that would otherwise protect members from personal liability via the separate juristic personality of a corporation’.

[24] It is therefore appropriate to begin with a quote from *Off-Beat CC*,¹⁷ which, in my view, helps clarify whether the s 64 claim constitutes a debt as envisaged in s 10 of the Prescription Act:

‘In this case, we are not dealing with relief of the nature discussed in *Koster*, where declaratory relief immediately precedes a claim that practically is a “debt” under the narrow construction of the term in *Escom*. In this sense, the declarator would be a mere litigatory framing technique that fetters even the narrow application of the Act. *Instead, this case concerns an entitlement to the making of an equitable judicial determination, which in any event considers the delay. The outcome of an equitable determination is not certain in advance.* A court has to decide what is just and equitable based on the unique facts of the case. The declaratory order would clearly spell out the rights and duties of a party going forward and whether the applicants’ claim should

¹⁶ *Off-Beat CC* op cit fn 3 paras 30 and 31.

¹⁷ *Off-Beat CC* op cit fn 3 para 32.

be absolutely barred or not. Therefore, the fact that the Clubs' claim is for a declarator does not affect the applicants' entitlement to the relief sought.' (Emphasis added.)

[25] The intention of s 64 is to provide legitimate creditors with both compensatory and punitive measures, importantly reminding 'those who run corporations, and those knowingly party to their business methods, that the shadow of personal liability can fall across their dealings. . . [t]he jurisprudence of this Court evidences claimants' spirited reliance on the provision. Though courts will never 'lightly disregard' a corporation's separate identity, nor lightly find recklessness, such conclusions, when merited, can only help in keeping corporate governance true'.¹⁸ Put differently, the section permits a court to make a declaration that a member of a close corporation may be held personally liable if knowingly he/she carries on the business of the corporation recklessly, with gross negligence, or for fraud.

[26] Importantly, in my view, s 64 is instructive because the cause of action would only arise after the court has declared liability. Before the declaration is made, no liability exists. Therefore, the right to the debt depends on the court's judicial discretion and only arises after a court issues the declaration. Until the court makes a declaration based on the facts of a specific case, there will be no debt, as nothing would be owing or due to constitute a debt.¹⁹

[27] I am aware that this case does not address the merits of the s 64 claim, but rather its legitimacy. It is not comparable to cases like the right to initiate a claim to set aside a voidable disposition in insolvency matters, such as in *Koster*, where the right precedes the claim and is categorised as a 'debt' under the narrow interpretation outlined in *Escom*.

[28] Of relevance in *Koster*,²⁰ this Court emphasised what was stated in *Burley Appliances Ltd v Grobbelaar N O* regarding a declaration in terms of s 64, and said:

¹⁸ *Ebrahim and Another v Airports Cold Storage (Pty) Ltd* [2008] ZASCA 113; 2008 (6) SA 585 (SCA); [2009] 1 All SA 330 (SCA) paras 21 and 22 (Footnotes omitted).

¹⁹ *Off-Beat CC* op cit fn 3 para 32.

²⁰ *Koster* para 24 and 25 citing *Burley Appliances Ltd v Grobbelaar NO* [2003] ZAWCHC 31; [2003] 3 All SA 505 (C); 2004 (1) SA 602 (C).

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

Having found that the Close Corporations Act created a new "right" the learned judge in *Burley* went on to find that the complement of that right was a "debt" against which prescription commenced to run once the right had accrued. The approach that was taken in that case has the support of the authors of all the standard texts in this country on the law of insolvency and company law and I have pointed out that other jurisdictions that have similar remedies take the same approach.'

[29] In *Koster*, the declaratory relief immediately preceded the claim and was hence characterised as a 'debt' in narrow terms. As the appellants argue, claims in terms of s 64 require an 'equitable judicial determination'. Significantly, this was not made in advance, as in the present case. Such a determination spells out the rights and duties of the parties in the future. It removes the protection of members of the corporation, thus piercing the shield of personal liability. This distinguishes a s 64 claim from that of a claim to set aside a voidable disposition in insolvency cases. In the latter, the right to institute the claim exists before the determination, as this claim is bound by the statutory requirements established. Whilst in the former, the right to claim arose after the determination and requires the court to exercise a discretion for the entitlement of a determination. Reference is made to the paragraph quoted above in para 25 of *Off-Beat CC*.

[30] Both s 64 and s 252 claims are similar because both seek declaratory relief, aiming for a just and equitable judicial determination where the court's broad discretion is used to achieve a fair and just outcome. Importantly, the results of such judicial determinations are not guaranteed. Additionally, these declarations permit lifting the corporate veil in s 64 claims, while in s 252 claims, the corporate veil can be pierced to impose personal liability. Therefore, the claims under s 64 and s 252 are intended to

address and rectify unjust and inequitable conduct that prejudices the close corporation or the company, as clearly outlined in the *Off-Beat* judgment of the Constitutional Court. 'A section 252(2) claim affords a claimant the right to seek an equitable, judicial determination of the merits of a complaint about the governance of a company. It is open to a court, in determining a just and equitable remedy, to take into account the history of the company's management and governance. This may include the fact that certain issues that underlie the complaint may have prescribed. This fits with the wide discretion the provision confers on a court. And it is not incongruous with the finding that a section 252(2) claim is not invariably a "debt".'²¹

[31] The high court was correct in its conclusion that '[s]ection 64(1) of the CC Act, thus clearly gives a right to a creditor to issue summons for a declaration that such a 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 [any] other liabilities of the corporation as the court may direct'. However, the high court erred when it concluded that this claim was subject to prescription. For the reasons I have outlined above, s 64(1) claims are not subject to prescription.

Have the appellants' delictual claims prescribed

[32] I now address whether the alternative delictual claims have prescribed. It is important to remember that the Prescription Act '...operates ... to extinguish the right—referred to in the Act as a "debt" — with the natural consequence that nothing remains to enforce (or to set-off against countervailing debts)'.²² Considering the facts of this case, the appellants argue that the claims have not prescribed, while the respondent and the amicus contend otherwise.

[33] In the high court, the respondent's special plea of prescription was separated from the other issues in the application and referred to oral evidence. Mr Thinus Barnard (Mr Barnard), a forensic accountant and fraud risk management consultant, testified on behalf of Ms Gaybba. Ms Oosthuizen testified on behalf of the Trust. The high court concluded that the trustees were aware of the primary facts, including the fraudulent conduct of the deceased, and the involvement and identity of Ms Gaybba, the sole

²¹ *Off-Beat* CC op fn 3 para 38.

²² *Koster* para 21.

member of the corporation, at least by the time they received the KPMG report on 24 March 2016.

[34] The primary facts revealed during the presentation of oral evidence are outlined below. Notably, these facts relate to both the s 64 claim and the delictual claim. Concerning the s 64 claim, these facts show that the corporation HTI, through the actions of Ms Gaybba, by knowingly engaging in reckless or fraudulent conduct in managing HTI's business, caused HTI's liability to GGN and the Trust. HTI was unable to repay its debt to GGN and the Trust when payment was demanded. Ms Gaybba, as the sole member of the corporation, either actively participated in or was aware of the fraud on GGN and the Trust and failed to act against it. Regarding delictual liability, due to her involvement in the deceased's modus operandi through HTI, Ms Gaybba was involved in the fraud committed against GGN and the Trust.

[35] Besides the testimony of the two witnesses, the evidence before the high court also included spreadsheets properly compiled by Ms Oosthuizen and the KPMG report, which involved documents and financial records from 1 January 2006 to 30 September 2015. According to the affidavits of Mr Nicholls before the high court, the KPMG report confirmed that the deceased committed fraud against GGN and the Trust while employed there. One of the methods used involved HTI, the corporation of Ms Gaybba, sometimes with her knowledge. The reason for this statement was that, when reporting the deceased's estate to the Master, Ms Gaybba failed to include the defrauded amounts in the inventory. The KPMG report stated that Mr Nicholls first suspected the deceased on 5 September 2015, when his business account was overdrawn. He then ended the deceased's services on 11 September 2015. Notably, neither the deceased nor Ms Gaybba were interviewed during the investigation or the preparation of the KPMG report.

[36] The KPMG report concluded that their investigation found that the deceased and Ms Gaybba had multiple business interests that disproportionately benefited from irregular payments made from bank accounts by the deceased. All relevant entities involved in the investigation are detailed in the relationship chart annexed to the report. Additionally, regarding Ms Gaybba's involvement, KPMG stated that 'the majority of the irregular payments identified from Mr Nicholls' bank account were paid to entities partly

and wholly controlled by [Ms Gaybba], which received a combined total of R33 283 648 from 7 March 2006 to 11 September 2015’.

[37] Ms Oosthuizen testified that she and the deceased were the only two individuals with access to the business's online banking accounts. She initially noticed and questioned the suspicious transactions made by the deceased in 2010, but he consistently provided reasonable explanations for them. This prompted her to record these suspicious transactions in a spreadsheet, as mentioned above. The spreadsheet was also shared with KPMG, as per their engagement letter, and they commenced their audit on 1 October 2015.

[38] Mr Barnard's testimony confirmed that the KPMG report was the key piece of evidence before the high court. He stated that Ms Gaybba's involvement in any misappropriation of funds ended in February 2011. He confirmed that the fraud was suspected in September 2015 and verified by the KPMG report dated 24 March 2016. He also confirmed that, based on the documentary evidence, there was indeed money being '*rondgeskyf*' between GNN, the Trust, and HTI, and the trustee would have known this by 2014.

[39] The trustees argued that the KPMG report identifies Ms Gaybba, but it does not conclusively prove her involvement in the fraud. It was only when they received the HTI bank statements (sometime in October 2018) through the insolvency inquiry (instituted on 21 April 2016) that Ms Gaybba admitted receiving monthly income from HTI, despite HTI not employing her. Moreover, throughout the relevant period, Ms Gaybba denied her involvement in the fraud, as stated in her affidavit resisting the sequestration of the deceased's estate on 26 October 2016. Based on these facts, as stated by the trustees, they found it necessary to obtain the bank statements to establish the amount received by Ms Gaybba from HTI. Therefore, the cut-off period of 12 April 2016 cannot be correct, and the summons served on 15 April 2019 was within the three-year period, as prescribed by s 10 of the Prescription Act, considering when the trustees knew all the primary facts or reasonably should have discovered them.

[40] The high court concluded that, based on Ms Oosthuizen's evidence, the trustees were aware of the fraud committed by the deceased during 2015 and early 2016.

Furthermore, Ms Gaybba's possible involvement as the sole member of HTI would have been known before KPMG's report, which led to the request for KPMG to investigate. The high court concluded that after receiving the KPMG report, the trustees did not merely suspect the fraud committed by the deceased; by then, they were aware 'of the fraud and the identity and involvement of [Ms Gaybba]' or could have reasonably acquired such knowledge through reasonable care. This is especially true considering that the deceased's services were terminated 'on or about 14 September 2015', which suggests they knew about the fraudulent activities and Ms Gaybba's involvement. Furthermore, the trustees could have discovered Ms Gaybba's liability earlier than they did.

[41] In determining when the statute of limitations begins to run for a debt, it is essential to consider s 12(3) of the Prescription Act, which states:

'A debt shall not be deemed to be due until the creditor has knowledge of the identity of the debtor and 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.'

Put simply, a debt is not considered due until the creditor knows the identity of the debtor and the relevant facts behind the debt. A creditor is assumed to have such knowledge if he could have exercised reasonable care to obtain it. This Court, in *Minister for Health, Western Cape v Coboza (Coboza)*²³, explained how to apply prescription under s 12(3). *Coboza* stated that, first, one must identify the facts that give rise to the debt, which are the primary facts; and second, one must determine when the primary facts were known or should have been reasonably known to the creditor.

[42] Regarding when the prescription period should begin and whether it can be delayed, *Minister of Finance v Gore N O* said the following at paragraph 17:

'This court has in series of decisions emphasised that time begins to run against a creditor when it has the minimum facts that are necessary to institute action. The running of prescription is not postponed until a creditor becomes aware of the full extent of its legal rights, nor until the creditor has evidence that would enable it to prove a case "comfortably".'

Pertinently, at paragraph 19, the following was stated, which resonates with this case:

'It is well established in our law that:

²³ *Minister for Health, Western Cape v Coboza* [2020] ZASCA 165; 2020 JDR 2720 (SCA) para 8; *Le Roux and Another v Johannes G Coetzee and Seuns and Another* [2023] ZACC 46; 2024 (4) SA 1 (CC); 2024 (4) BCLR 522 (CC) para 39.

- (a) Knowledge is not confined to the mental state of awareness of facts that is produced by personally witnessing or participating in events or by being the direct recipient of first-hand evidence about them.
- (b) It extends to a conviction or belief that is engendered by or inferred from attendant circumstances.
- (c) On the other hand, mere suspicion not amounting to conviction or belief justifiably inferred from attendant circumstances does not amount to knowledge.

It follows that belief that is without apparent warrant is not knowledge; nor is assertion and unjustified suspicion, however passionately harboured; still less is vehemently controverted allegation or subjective conviction.²⁴

[43] Finally, the Constitutional Court in *Mtokonya v Minister of Police* had the following to say in relation to when a claim arises and when prescription commences:

‘Furthermore, to say that the meaning of the phrase “*the knowledge of . . . the facts from which the debt arises*” includes knowledge that the conduct of the debtor giving rise to the debt is wrongful and actionable in law would render our law of prescription so ineffective that it may as well be abolished. I say this because prescription would, for all intents and purposes, not run against people who have no legal training at all. That includes not only people who are not formally educated but also those who are professionals in non-legal professions. However, it would also not run against trained lawyers if the field concerned happens to be a branch of law with which they are not familiar. The percentage of people in the South African population against whom prescription would not run when they have claims to pursue in the courts would be unacceptably high. In this regard, it needs to be emphasised that the meaning that we are urged to say is included in section 12(3) is not that a creditor must have a suspicion (even a reasonable suspicion at that) that the conduct of the debtor giving rise to the debt is wrongful and actionable but we are urged to say that a creditor must have knowledge that such conduct is wrongful and actionable in law. If we were asked to say a creditor needs to have a reasonable suspicion that the conduct is or may be wrongful and actionable in law, that would have required something less than knowledge that it is so and would not exclude too significant a percentage of society.’²⁵

[44] What emerged from the evidence is that the relevant facts concerning the trustees’ claims against Ms Gaybba only came to light after they initiated insolvency

²⁴ *Minister of Finance v Gore N O* [2006] ZASCA 98; [2007] 1 All SA 309 (SCA); 2007 (1) SA 111 (SCA) para 17 and 19.

²⁵ *Mtokonya v Minister of Police* [2017] ZACC 33; 2017 (11) BCLR 1443 (CC); 2018 (5) SA 22 (CC) para 63.

proceedings and requested the bank statements for HTI from Ms Gaybba. From her affidavit resisting sequestration, it was revealed that she was the sole member of HTI, received monthly payments from HTI, and was a signatory to many documents, including those appointing her as a director of other business ventures of the deceased, as he had been sequestered. It therefore stands to reason that she would have been privy to everything related to the corporation, and her assertion that she was merely a dummy member in the corporation cannot be so.

[45] Ms Gaybba failed to provide evidence that the trustees should have known or been aware before 12 April 2016 that HTI was unable to pay its debts, without obtaining the bank statements. She also did not demonstrate that, as the sole member of HTI, she was merely appointed as a dummy member and was not involved in the management affairs of the corporation. In the circumstances outlined above, when the trustees issued the summons, the delictual claims had not prescribed.

[46] The KPMG report, although it covered only one year from 1 September 2014 to 1 September 2015, aligned with one of the spreadsheet schedules compiled by Ms Oosthuizen and a side-by-side analysis conducted by Mr Barnard, Ms Gaybba's expert witness. This report, along with the bank statements obtained through the insolvency proceedings, establishes the trustees' delictual case. These relevant facts only became known to the trustees during the insolvency proceedings, not when the KPMG report was prepared. The KPMG report, though it mentions Ms Gaybba and highlights the deceased's fraud, did not specify Ms Gaybba's role; there was merely a suspicion that she was involved in the fraud. Further, the report did not specifically identify HTI as the entity used to commit the fraud. This information was only accessible by viewing the bank statements provided by Ms Gaybba during the insolvency proceedings.

[47] I agree with the trustee's assertion that the period from 24 March 2016, when the KPMG report was issued, to the deadline of 12 April 2016 was neither adequate nor reasonable to obtain the bank statements and complete the necessary reconciliation to prove HTI's indebtedness as outlined in the particulars of claim.

[48] Ms Gaybba also admitted at the insolvency inquiry that she had received money monthly from HTI, hence the request for the bank statements only emerged thereafter. This knowledge could not have been reasonably attained without the concession. Further, the bank statements were obtained during the insolvency proceedings because at all material times Ms Gaybba was uncooperative with the Trust.

[49] The common cause facts upon which the delictual claims are based are from the bank statements received in the insolvency proceedings, which took place 'sometime after October 2018', through the insolvency inquiry. This inquiry was instituted on 20 April 2016 by Mr Nicholls in his personal capacity. In addition, at the inquiry, Ms Gaybba admitted to receiving monthly income from HTI, even though HTI did not employ her. In conclusion, these facts and the identity of Ms Gaybba as the sole member of the corporation HTI only arose at the time of the insolvency inquiry. Therefore, the delictual claims had not prescribed at the time the summons was served on 15 April 2019.

Order

[50] As a result, the following order is made:

- 1 The appeal is upheld with costs, including the costs consequent upon the employment of two counsel.
- 2 The order of the high court is set aside and substituted with an order in the following terms:
'The special plea of prescription is dismissed with costs, including the costs of two counsel, where so employed.'

W HUGHES
JUDGE OF APPEAL

Appearances

For the first to third appellants:	A H Morrissey
Instructed by:	Oosthuizen & Co, Cape Town Claude Reid Attorneys, Bloemfontein
For the respondent:	No appearance
Instructed by:	No appearance
For the amicus curiae:	R J Nkhahle
Instructed by:	University of the Free State Law Clinic, Bloemfontein.