REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

NORTH GAUTENG DIVISION, PRETORIA

17/10/2014

CASE NUMBER : 54727/2011

DELETE WHICHEVER IS NOT APPLICABLE

(1) REPORTABLE ~~YES~~ / NO
(2) OF INTEREST TO OTHER JUDGES ~~YES~~ / NO
(3) REVISED

17.X.14
DATE

SIGNATURE

In the matter between

BETTERBRIDGE (PTY) LTD Plaintiff

and

MASILO, MICHAEL MMATHOMO N.O. First Defendant

TORRE, PHILIPPUS GIOVANNI N.O. Second Defendant

COWIN, MONICA N.O. Third Defendant

JUDGMENT

D.N. Unterhalter AJ

ACTING JUDGE OF THE HIGH COURT

Date of hearing	:	14 October 2014
Date of judgment	:	~~16~~ 17 October 2014
Counsel for the plaintiff	:	Mr Nel
Instructed by	:	Neil Esterhuysen Attorneys
Counsel for the defendants	:	Mr W. Pye
Instructed by	:	Harvey Nossel Attorneys

INTRODUCTION

1. The Plaintiff has instituted an action against the Defendants, as the joint liquidators of Crystal Lakes Vaal Private Eco Estate (Pty) Limited (in liquidation) (Crystal Lakes). The Plaintiff claims that it advanced R5 million to Crystal Lakes pursuant to an agreement of loan, and that Crystal Lakes, in breach of its obligations, failed to repay the R5 million, together with interest, on 31 October 2007. Crystal Lakes was provisionally liquidated on 7 March 2008, and finally liquidated on 17 April 2008.

2. The Defendants have in a special plea alleged that as the loan was repayable on or before 31 October 2007 prescription commenced to run by no later than this date, and that the Plaintiff's claim was extinguished on 30 October 2010. The Plaintiff instituted its action and effected service on the Defendants by 26 September 2011.

3. The Plaintiff filed a Replication contending that the completion of prescription was delayed in terms of Section 13(1)(g) of the Prescription Act 68 of 1969 ("the Prescription Act"), by the filing a claim against Crystal Lakes by no later than 4 October 2010, thereby extending the date on which the claim prescribed to 4 October 2011.

4. On 19 March 2013, this Court ordered that the Defendants' special plea, the replication thereto and the rejoinder be heard separately, and it these issues that now come to trial.

5. At a pre-trial conference, the parties agreed upon a number of facts. They are as follows:

    5.1 The Plaintiff submitted claim documentation (attached to the pre-trial minute) for the purpose of proving the claim at a meeting of creditors;

5.2 The claim documentation was filed by the Plaintiff with the intention of proving such claim at the meeting of creditors held on 5 October 2010;

5.3 The claim documentation was served and filed at the office of the Master on 4 October 2010;

5.4 The Plaintiff's claim was withdrawn on 5 October 2010 without the claim having been proven.

6. Against these facts, the central issue that I am asked to determine is whether prescription was delayed by reason of the application of Section 13 (1) (g) and (i) of the Prescription Act. In particular, the parties have opposed interpretations as to what the following statutory phrase means: "the debt is the object of a claim filed against ...a company in liquidation". (my emphasis)

7. *Mr Nel,* who appears for the Plaintiff, submits that a claim is filed when it is submitted to the presiding officer who is to preside at the meeting of creditors. Alternatively it may be that the claim is filed when it is admitted to proof, but filing a claim does not mean proof of a claim to the satisfaction of the officer presiding. *Mr Pye,* who appears for the Defendants, submits that a claim is filed when the claim is in fact proved, that is to say that the claim is admitted by the officer presiding.

THE MEANING OF FILING

8. As the Supreme Court of Appeal has made clear, the interpretation of language, including statutory language, is a unitary endeavour requiring the consideration of text, context and purpose.[1]

9. Section 13(1)(g) and (i) reads, in relevant part, as follows:

"(1) If —

...

(g) the debt is the object of a claim filed against the estate of a debtor who is deceased or against the insolvent estate of the debtor or against a company in liquidation

...

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

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[1] Natal Joint Municipal Pension Fund v Endumeni Municipality 2012 (4) SA 593 SCA

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

10 In *Kilroe-Daley v Barclays National Bank Ltd* 1984 (4) SA 609 (AD) at 621 – 622, Galgut AJA explained that the words "the debt is the object of a claim filed" must refer to a claim already filed against a company in liquidation and that the impediment commences when the creditor files his claim. The judgment continues as follows:

> *"Counsel were agreed that in respect of a claim filed against a company in liquidation the impediment ceases to exist if and when the claim is rejected. They were also agreed that when such a claim has been accepted the impediment ceases to exist and that the confirmation of the account is the acceptance thereof"* (at 622 A –B).

The rationale for this construction was said to rest on the basis that a creditor, already taking steps to recover his debt, should not be required to institute legal proceedings merely to interrupt the running of prescription. (at 621 E – F).

11 While the decision of *Kilroe-Daley* does not define the meaning of the filing of a claim, it is apparent from the reasoning in the judgment that the commencement of the impediment by way of a filing is distinct from the event of acceptance or rejection of the claim. The acceptance or rejection of a claim

are distinct events from the filing of the claim that bring about the cessation of the impediment.

12 Following the approach in *Endumeni* at paragraph [18], the departure point is the language of the provision itself. The filing of a claim, in ordinary language, is to take the required step so as to commence the formal process by which a claim is entertained. It is the commencement of the process by which a person formally seeks to enforce the payment of a debt. As *Mr Pye* readily conceded, the filing of a claim is not the same thing as the determination of that claim. Just as the service of a summons is a procedural step removed from the final judgment of the claim.

13 This plain meaning, however, must be considered in the light of the relevant statutory context applicable to the interpretation of Section 13 (1) (g) of the Prescription Act. That context, *Mr Pye* submitted, is provided by the relevant provisions of the Insolvency Act 24 of 1936 ("The Insolvency Act"). Section 44 (3) and (4) of the Insolvency Act are of particular importance.

Section 44 (3) provides that a claim made against an insolvent estate shall be proved at a meeting of the creditors of that estate to the satisfaction of the officer presiding at that meeting, who shall admit or reject the claim.

Section 44 (4) of the Insolvency Act stipulates the procedure to be followed in order to prove a claim. Section 44 (4) provides for the following:

13.1. Every claim shall be proved by affidavit;

13.2. Such affidavit and any documents submitted in support of the claim shall be delivered at the office of the officer who is to preside at the meeting of creditors not later than 24 hours before the advertised time of the meeting at which the creditor concerned intends to prove the claim, failing which the claim shall not be admitted to proof at the meeting, unless the presiding officer is of opinion that through no fault of the creditor he has been unable to deliver such evidence of his claim within the prescribed period.

13.3. If a creditor has proved an incorrect claim, he may, with the consent in writing of the Master, given after consultation with the Trustee and on such conditions as the Master may think fit to impose correct his claim or submit a fresh correct claim.

14. It is clear that Sections 44 (3) and (4) give rise to two distinct powers enjoyed by the presiding officer at the meeting of creditors. The first is the power set out in Section 44 (3), being a power to admit or reject the claim. The exercise of this power is *quasi*-judicial and requires a decision as to whether the claim discloses, *prima facie,* the existence of an enforceable claim.

15. The power of the officer presiding in terms of Section 44 (4) is different. Section 44 (4) sets out what must be provided to make a claim and when and where the claim must be delivered. These requirements must be met by a creditor who intends to prove a claim. If the creditor fails to meet the requirements, then the consequence of this is set out in Section 44 (4). A failure to meet the requirements has the consequence that the claim shall not be admitted to proof at the meeting of creditors. But that consequence is subject to a power enjoyed by the presiding officer to nevertheless admit the claim to proof at the meeting, if such officer is of the opinion that the creditor, through no fault of his own, has been unable to deliver the evidence of his claim within the prescribed period.

16. This power to condone non-compliance with the requirements of Section 44 (4),and thereby alter the consequence of non-admission to proof, is a competence given to the officer presiding to determine which claims may be considered by him for the purposes of determining whether to admit or reject such claims. The exercise of the power in Section 44 (4) simply permits the creditor intending to prove a claim to proceed to do so at the meeting of creditors. The power to override the legal consequence of non-admission is not to be equated with the decision to admit or reject a claim. The power in Section 44 (4) is a power to condone non-compliance. It is a power exercised prior to and on grounds separate from the power in Section 44 (3) to admit or reject a claim. The basis upon which the power is exercised in Section 44 (3) is determined by whether the presiding officer is satisfied, to the requisite degree of proof provided concerning a claim. By contrast, the power in

Section 44 (4) requires a determination as to whether the requisite opinion can be formed concerning the fault of the creditor and his ability to provide evidence of the claim within the prescribed period.

17. I have set out the distinction between the powers in Section 44 (3) and (4) because the concept of admission to proof at a meeting of creditors, as used in Section 44 (4), is distinct from the decision by the presiding officer to admit or reject a claim as provided for in Section 44 (3).

18. This distinction also provides the context for determining what is meant by the filing of a claim against a company in liquidation. As I have indicated, counsel for the Plaintiff says that filing means lodgement of the claim, in the sense of delivery of the affidavit and supporting documents to the office of the presiding officer. Alternatively, it is said that filing is constituted by the claim being admitted to proof. Counsel for the Defendants submits that filing means a decision by the officer presiding to admit the claim in terms of Section 44 (3).

19. Lodgement, admission to proof, and the decision to admit a claim are separate stages in the making of a claim against a company in liquidation. Lodgement does not necessarily entail that the person making the claim has complied with the requirements of Section 44 (4). A claim is admitted to proof when these

requirements are met, failing which, absent an exercise of discretion by the presiding officer, the claim is not admitted to proof. Filing in this sense would require both lodgement and satisfaction of the requirements stipulated in Section 44 (4). A claim is admitted in terms of Section 44 (3) only once a claim is proved to the satisfaction of the officer presiding who then shall admit the claim.

20. Which of these three meanings should be attributed to the word filing is the matter to which I now turn.

21. In *Thrupp Investment Holdings (Pty) Limited v Goldrick* 2008 (2) SA 253 (W), a full bench of this division, considered the meaning of the word "filed" in Section 13 (1) (g) of the Prescription Act. *Van Oosten J*, writing for the court, after citing Section 44 (4) of the Insolvency Act, put the matter this way:

> *"That being the prescribed procedure, the filing of the claim referred to in Section 13 (1) (g) of the Prescription Act can only mean the date upon which the presiding officer of either the first or second meeting of creditors (vide Section 44 (1) of the Insolvency Act) admits the claim for purposes of proof thereof. In casu it is common cause that the claim documents of the Appellants were rejected by the presiding officer of that meeting. The impediment provided for in Section 13 (1) (g) of the Prescription Act accordingly did not come into operation".* at paragraph *[22]*

22. Counsel for the parties interpret this passage differently. *Mr Pye* contends that the phrase "admits the claim for purposes of proof thereof" must be understood to

mean that the presiding officer admits the claim, in the sense provided for in Section 44 (3). *Mr Nel* says that the phrase means no more than that the claim was admitted to proof in the sense, described above, in terms of Section 44 (4).

23. The matter is not free of all ambiguity. But in my view the correct reading of paragraph [22] of the judgment indicates that the concept of filing is to be ascertained by reference to the procedure for proof provided in Section 44 of the Insolvency Act. This much is squarely reflected in paragraph [22] of the judgment. Accordingly the sense in which the presiding officer admits the claim for purposes of proof is a reference to compliance with the procedural requirements of Section 44 (4) and not the substantive power conferred upon the presiding officer to admit a claim in terms of Section 44 (3). In the *Thrupp* case, on the facts, the appellants claim documents were rejected by the presiding officer (see paragraph [21]). That rejection however was not a rejection of the claim but a rejection on the basis that the documents failed to meet the requirements, so as to admit the claim for the purposes of proof.

24. Accordingly, I find that the correct interpretation of the *Thrupp* decision is that the full bench held that a claim has been filed against the company in liquidation when the presiding officer at either the first or second meeting of creditors admits the claim for purposes of proof in the sense of allowing the claim to go forward to the meeting of creditors so as determine whether the claim should be admitted or

rejected.

25. I observe that the notion that a presiding officer admits the claim for purposes of proof comes about as a consequence of the provisions of Section 44 (4) rather than as a decision directly referenced in the statutory language. Section 44 (4) regulates the consequences of failing to meet the procedural requirements for admission to proof at the meeting of creditors. But it is a necessary implication of the language that in order to determine whether a claim meets the requirements of Section 44 (4), it is the presiding officer that must determine conformity with the requirements, and must exercise powers consequent upon a failure to meet those requirements.

26. There are important entailments that follow from my interpretation of the decision in *Thrupp*. Since the decision was rendered by a full bench of this division, sitting alone, I am bound by the *ratio* of the decision. The Constitutional Court has recently stressed the importance of adherence to precedent as an attribute of the rule of law [2]. And unless *Thrupp* has been overruled, I am bound to follow it.

27. I have been referred to a number of appellate decisions that have considered Section 13 (1) (g) of the Prescription Act, in particular *Leipsig v Bankkorp Limited*

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[2] Turnbull – Jackson v Hibiscus Municipality & Others [2014] JOL32282 (CC)

1994 (2) SA 128 (A), *Jans v Nedcor Bank Limited* 2003 (6) SA 646 (SCA) and *Nedcor Bank Limited v Rundle* 2008 (1) SA 415 (SCA), *Absa Bank Bpk v De Villiers* 2001 (1) SA 481 (SCA). In addition, there is the decision of *Kilroe-Daley*, already referenced. The burden of this authority is rather more directed to when the impediment under Section 13 (1) (g) ceases, rather than when it comes into being. These cases have affirmed that it is only on confirmation of the final account that the impediment ceases to exist. This emphatic pronouncement was most recently to be found so in the *Rundle* case at paragraph [11]. While these cases make it plain that the commencement of the impediment takes place upon the filing of the claim, there has been no authoritative determination of the meaning of filing by our Appeal Courts.

28. In *Leipsig v Bankkorp Limited*, at 135, *Eksteen JA*, while approving the reasoning of the court below that a "filing" is an accomplished fact, then sought to clarify when the impediment would cease. It is in this context that the learned Judge referred to the steps by which a liquidator accepts the claim and the Master comes to confirm an account. Indeed, *Eksteen JA* found no fault with the formulation of the *dictum* of *Fleming DJP* in the court below (reported as *Bankkorp Limited v Leipsig* 1993 (1) SA 247 (W)) concerning a "filing being an accomplished fact". That notion is captured in the following *dictum* in *Bankkorp Limited v Leipsig* at 250E: *"Appellant's counsel did not distinguish between "filing" and "proving". One can see why. Unless it is set aside by competent authority, filing is an accomplished fact; on a retrospective view it is as mutable as other history that the claim did become the object of a filed claim".* This *dictum* cited by the Appellate Division in

Liepsig v BankKorp was not departed from. And this appears to me to be a clear indication that the Appeal Court did indeed distinguish between the filing of a claim and the approving of that claim.

29. I was referred to decisions in the high courts of other divisions. In *W P Koöperatief Bpk v Louw* 1995 (4) SA 978 (C), *Traverso J* approved the line of reasoning adopted in *Bankkorp Limited v Leipsig.*

30. Mr Pye placed particular reliance upon the decision of *Regering van die Republiek an Suid Afrika v South Africa Eagle Versekerings Maatskape Bpk* 1985 (2) SA 42 (O) at 53. This decision simply confirmed that it would be anomalous to allow the giving of informal notice to interrupt prescription. But admission for the purposes of proof under the provisions of Section 44 (4) is not the same thing as an informal notice. And consequently this authority is of limited assistance.

31. Quite apart from the question of authority, there are two broad principles that underlie the meaning to be attributed to the word "filing". The first is the principle, referred to above, that a creditor already taking appropriate steps to recover his debt should not be required to institute legal proceedings merely to interrupt the running of prescription. And the only question that then arises is what is it to take an appropriate step to recover a debt against an insolvent company. The other principle, reflected somewhat in the *South Africa Eagle* decision, is that opportunistic action by a creditor to engage the process detailed in Section 44 (4)

should not be rewarded with delay in the completion of prescription.

32. It appears to me however that the legislature has, in using the word "filing" decided between these principles. Under the interpretation of the court in *Thrupp*, the appropriate step is admission to proof. This discourages informal opportunistic behaviour and requires at least that the claim be made in accordance with the procedural requirements of Section 44 (4).

33. I accordingly reach the following conclusion. First, the word "filing" has been interpreted in *Thrupp* to mean that the claim is admitted for the purposes of proof, but not that the claim is approved in the sense set out in Section 44 (3). Second, the *Thrupp* decision is binding authority upon me. Third, the decisions of the Appeal Courts do not overrule *Thrupp*, and, if anything, support it. Fourth, I must accordingly apply the decision in *Thrupp* to the facts in this case.

THE APPLICATION OF THE LAW TO THE FACTS

34. It became common ground between the parties that if I should find that the correct interpretation of *Thrupp* was that filing meant that the presiding officer admits the claim for the purposes of proof, then the claim made by the Plaintiff was admitted for this purpose in contemplation of the meeting of creditors held on 5 October 2010.

35. For the purposes of determining the facts relevant to the issue before me, counsel invited me to consider the affidavits filed in the application for separation. In paragraphs 11, 31 and 34.1, the Deponent on behalf of the Plaintiff stated that on 5 October 2010 the Master did not reject the Plaintiff's claim documents, but admitted the Plaintiff's claim for the purposes of proof. These averments are not specifically denied. In particular in paragraph 14.1 of the replying affirmation the following is said *"receiving a claim or admitting it for proof does not mean that the claim is proved".* Thus the central thrust of the Defendants case is that the claim was not proved at the meeting of creditors and consequently was not filed. But if, as I conceive the law to be, filing does not require proof of the claim but rather the admission of the claim to proof, then the claim must be taken to have been filed. And I do so find upon an application of *Thrupp* to the facts of this case.

CONCLUSION

36. It follows that the special plea of prescription must fail.

I make the following order:

(A) the Defendants special plea is dismissed

(B) the Defendants are ordered to pay the costs of the separated action

D N Unterhalter ACTING JUDGE OF THE HIGH COURT

17
~~16~~ October 2014