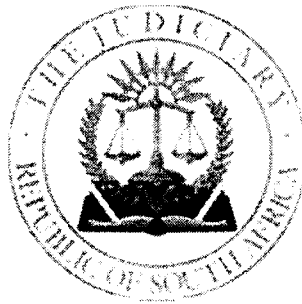


REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA,  
NORTH GAUTENG DIVISION, PRETORIA

22/9/16

CASE NO: 43918/2013

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

SIGNATURE

DATE

22.9.2016

In the matter between:

**TANKER SERVICES (PTY) LTD**

Plaintiff

and

**LEHLOHONONLO CORNELIUS LETHIBA**

Defendant

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**J U D G M E N T**

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**MSIMEKI J.**

## INTRODUCTION

- [1] On 29 August 2007 the plaintiff instituted an action against Dambas Breweries CC (1969/036009/23), (the "CC"), seeking payment for damages that it suffered when its truck was damaged in a collision between the truck and a truck which was driven by the late Mr Bongani G. Ndumo ("Ndumo") who, at the time, was allegedly acting within the course and scope of his employment with the defendant, the CC on 17 October 2004. Mr Lehlohonolo Cornelius Lethiba, the defendant in the current matter, under the above case number, at the time of the accident, was the sole member of the CC. The CC was finally deregistered on 24 February 2011 but this, allegedly, came to the plaintiff's knowledge only on 16 October 2011. The plaintiff, as a result, instituted the current action against the current defendant seeking payment of the amount of R717 806 59; interest at the rate of 15.5% per annum a *temporae morae* to date of final payment and costs of suit.
- [2] The plaintiff's action against the CC, under case number 40113/07, was instituted in this Court, Pretoria. The summons in the current matter was issued on 18 February 2013.
- [3] The CC, in the matter under case number 40113/07, pleaded to the plaintiff's particulars of claim on 19 February 2008 and the plea was served on the defendant on 20 February 2008.
- [4] The CC, as shown above, was deregistered on 24 February 2011. The plaintiff alleges that it became aware of the deregistration of the CC on 11 October 2011 which was before the action against the CC was finalised.
- [5] In the current matter, the defendant raised a special plea of prescription as its defence. The parties at the outset of the trial agreed that the issues be separated in terms of **Rule 33(4) of the Uniform Rules of Court**. The gist of the parties' application was that the Court would deal

only with the special plea, while the other issues would be postponed *sine die*. The Court granted such order.

- [6] The parties held a pre-trial conference in November 2015. One gleans from the pre-trial minute that:
1. The defendant was appointed a member of the CC on 1 February 2001.
  2. He was the only active member of the CC; and
  3. The CC was finally deregistered on 24 February 2011.

### **THE ISSUE**

- [7] The issue to be resolved is whether the current plaintiff's action under case number 43918/13 has prescribed. The defendant contends that it has while the plaintiff holds an opposite view.
- [8] Advocate W. Geyser ("Mr Geyser") and Advocate S. S Green ("Ms Green") argued the matter for the plaintiff and the defendant respectively.
- [9] Ms. Green submitted that the defendant had the duty to begin. She submitted that the action against the CC was based on vicarious liability. Mr Geyser disagreed. Ms Green's submission was that the plaintiff, in that action, had taken an inordinately long time, after the plea, before the action was disposed of. The action was not finalised until the CC was deregistered. Ms Greene's view was that the plaintiff had done nothing to further the matter. She submitted that the argument, on behalf of the plaintiff, was that its mandate, at some stage, was terminated and this, according to her, was not an acceptable reason. She questioned the institution of the second action against the current defendant on the same cause of action. Her argument was that the current defendant ought to have been joined to the original action or that the CC be cited as the CC in deregistration. I find it unnecessary to determine whether

or not her view holds water, for the purposes of resolving the current issue.

[10] Ms Green submitted that there was no final judgment in the plaintiff's case against the CC and that the defendant had pleaded and denied liability. Vicarious liability, according to her, still had to be proved. It was her further submission that no acceptable explanation as to the delay in the finalisation of the matter had been forthcoming. It seemed, according to her, that the plaintiff had abandoned its action against the CC. The delay in finalising the matter, in my view, seems to work against the plaintiff. This will become apparent later.

[11] It was not surprising when Ms Green referred to the case of **Silhoutte Investments Ltd v Virgin Hotels Group Ltd 2009 (4) SA 617**. This, Ms Green argued, because the first case against the CC had a bearing on the case against the present defendant.

[12] Mr Geyser, for the plaintiff, submitted that the two Courts i.e.: in the plaintiff's case against the CC and the current case, have two separate causes of action. The defendant's liability, in this matter, according to him, has been created by statute, namely **Section 26(5) of the Close Corporation Act 69 of 1984**. Under case number 40113/07, the plaintiff, according to him, relied on vicarious liability. The submission, in my view, is correct.

[13] Mr Geyser submitted that the parties in the two matters are different. A member is the party in the current matter while the CC was a party in the first matter. This again appears to be correct.

[14] Before resolving the issue, it will be important to quote the relevant statutes. These are:

1. **Section 26(5) of the Close Corporation Act 69 of 1984;**

2. **Sections 11(d); 12 and 15(1) and 15(2) of the Prescription Act 68 of 1969; and**
3. **Sections 225; 83(2) and 83(3) and paragraph 10(1) of Schedule 5 of the Companies Act 71 of 2008.**

[15] **Section 26(5) of Act 69 of 1984** provides:

*"(5) If a Corporation is deregistered while having outstanding liabilities, the persons who are members of such Corporation at the time of deregistration shall be jointly and severally liable for such liabilities". (my emphasis).*

**Section 26** has been amended.

[16] **Section 11(d) of the Prescription Act 68 of 1969** provides:

**"11. Periods of prescription of debts**

- (a) ....
- (b) ...
- (c) ...
- (d) *save where an Act of Parliament provides otherwise, three years in respect of any other debt". (my emphasis).*

**Section 12 (1) of the Act** provides:

**"12. When prescription begins to run**

- (1) *Subject to the provisions of subsections (2) and (3), prescription shall commence to run as soon as the debt is due". (my emphasis).*

**Sections 12(2) and (3) of the Act** provide:

- "2) *If the debtor wilfully prevents the creditor from coming to know of the existence of the debt, prescription shall not commence to run until the creditor becomes aware of the existence of the debt. (my emphasis).*
- (3) *A debt shall not be deemed to be due until the creditor has knowledge of the identity of the debtor and of the facts from which the debt arises:  
Provided that a creditor shall be deemed to have such knowledge if he*

could have acquired it by exercising reasonable care". (my emphasis).

**Sections 15(1) and (2) provide:**

**"15. Judicial interruption of prescription**

(1) *The running of prescription shall, subject to the provisions of subsection (2), be interrupted by the service on the debtor of any process whereby the creditor claims payment of the debt.* (my emphasis).

(2) *Unless the debtor acknowledges liability, the interruption of prescription in terms of subsection (1) shall lapse, and the running of prescription shall not be deemed to have been interrupted, if the creditor does not successfully prosecute his claim under the process in question to final judgment or if he does so prosecute his claim but abandons the judgment or the judgment is set aside".* (my emphasis).

[17] **Section 225 of the Companies Act 71 of 2008 provides:**

**"225. Short title and commencement:-**

(i) *This Act is called the Companies Act, 2008, and, subject to sections (2) comes into operation on a date fixed by the President by proclamation in the Gazette".*

**Section 83(2) provides:**

*"The removal of a company's name from the companies register does not affect the liability of any former director or shareholder of a company or any other person in respect of any act or omission that took place before the company was removed from the register".*

**Section 83(3) provides:**

*"Any liability contemplated in subsection (2) continues and may be enforced as if the company had not been removed from the register".* (my emphasis).

A close reading of Section 83 reveals the relationship it has with the old **Section 26(5) of the Close Corporation Act 69 of 1984**.

[18] Mr Geyser submitted that it was not possible to continue with the process instituted under case number 40113/07 against the CC. Indeed, this is so because the CC was deregistered. **Section 26(5) of the Close Corporation Act 69 of 1984**, according to Mr Geyser, was caused to kick in by the deregistration of the CC resulting in the involvement of the defendant in the current matter. This, *albeit* incorrectly, impelled the plaintiff to have the second action instituted against the defendant on 18 July 2013. The question, however, is whether the second action has not prescribed or whether there is truly a valid action in the second case.

[19] Mr Geyser submitted that the delay in obtaining a trial date in the initial action against the CC was of no consequence. It is indeed so. (See: **Melamed and Another v BP Southern Africa (Pty) Ltd 2000 (2) SA 614 (WLD) 620G-622D**). However, it is of consequence seen in the light of the current case. The action in the first case ought to have been brought to finality. In this way, the debt would have been determined.

[20] Prescription, as a plea, according to Mr Geyser, was raised by the defendant in the second action. This is correct.

[21] In resolving the issue of prescription that the defendant raised, it is indeed prudent to determine when in respect of the second summons:

1. the debt became due;
2. the facts from which the debt arose; and
3. when the knowledge of the identity of the debtor was gained.

However, the second action ties up with and is dependent on the existence of the first action. The plaintiff's debt in the first action was never determined.

- [22] It is noteworthy that the date on which a debt arises and the date on which it is due are not necessarily the same (See: **The Master v IL Back and Co Ltd 1983 (1) SA 986 (AD) at 1004F-G** and **List v Jungers 1979 (3) SA 106 (AD) at 121C-D**). The difference between the two dates relates to the coming into existence and the recoverability of the debt. The debt in the first action has evidently not been determined. The CC has been deregistered. There can therefore, be no debt against the defendant in the second action.
- [23] In the current case, according to Mr Geyser, the defendant's liability was created by **Section 26(5) of the Close Corporations Act** which only kicks in once a close corporation is deregistered. Mr Geyser further submitted that the prescriptive period, in respect of the debt, could not commence to run as against the current defendant before the close corporation was deregistered. The defendant's liability, the submission proceeded, only arose on 24 February 2011 when the CC was deregistered. It is on this date that the plaintiff's right of action against the defendant was established. All it means is that the "facts from which the debt arose, as envisaged in **Section 12(3) of the Prescription Act**, came into existence on 24 February 2011 when the identity of the debtor" became known. The plaintiff, therefore, could not exercise the remedy that **Section 26(5)** created, against the defendant in his capacity as a member of the CC before the CC was deregistered. Sight should not be lost of the fact that the defendant's liability in the second action depends on whether there is liability against the CC.
- [24] **Section 26(5)**'s purpose, according to Mr Geyser, is to bring on board a member who prefers the route of deregistration instead of the other routes such as liquidation where the rights of the creditors are properly taken care of. (See: **Mouton v Boland Bank Ltd 2001 (3) SA 877 at 881 paragraph [7] to [9]**). However, the defendant's liability in the



second action must be seen in the light of the existence or non-existence of liability on the part of the CC.

[25] The liability created in terms of **Section 26(5)**, once created, continues even in circumstances where the Close Corporation might subsequently be re-registered. (See: **Mouton v Boland Bank Ltd** (*supra*)). This is indeed so, however, no liability was determined until the CC was deregistered.

[26] Ms Green, asked by the Court if a member of a CC and the CC could be cited simultaneously, answered that that would not be proper and permissible. Indeed, she was correct as the member could only be brought on board once the CC was deregistered. This obviously negates Ms Greene's submission that the plaintiff ought to have joined the current defendant to the action that the plaintiff brought against the CC.

[27] Of significance is the answer to the question whether there was a debt which the defendant had to take over when the CC was deregistered.

[28] **Section 26(5) of the Close Corporation Act**, as it then was, speaks of "liabilities". To be "jointly and severally liable" for the liabilities of the CC presupposes that the liability must be in existence when the close corporation is deregistered. This, in my view, means that such liability must have been determined when the close corporation is deregistered. This begs the question whether such liability was determined before the close corporation was deregistered on 24 February 2011. It appears not as I shall demonstrate shortly.

[29] Liability in my own understanding will cover debts. Even if I am wrong, Mr Geyser, in paragraph 2.3 of their heads of argument says:

"2.3     *Relevant to the issue of prescription raised as a defence in this case the issues to be decided revolve around the questions which may be formulated as follows:*

2.3.1 *When the debt became due;*

2.3.2 *the facts from which the debt arises;*

2.3.3 *knowledge of the identity of the debtor."*

This seems to support my view, and takes us to what the meaning of the "debt is due" is. In **The Master v IL Back and Co Ltd 1983 (1) SA 986 at 1004F-H** the Court said:

*"The date on which a debt arose and the date on which it is due are not necessarily the same, see List v Jungers 1979 (3) SA 106 (A) at 121. The import of the submissions in (aa) and (bb) is that the debt may well have arisen but that it had not become due as required by s 12 (1) of the Prescription Act. The words "debt is due" in the section must be given their ordinary meaning. It seems clear 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, see Western Bank Ltd v S J J van Vuuren Transport (Pty) Ltd and Others 1980 (2) SA 348 (T) at 351 and HMBMP Properties (Pty) Ltd v King 1981 (1) SA 906 (N) at 909 and the cases there cited".*

All this means is that for a debt to be "due" there must be a liquidated money obligation presently claimable by the creditor for an action that could presently be brought against the debtor. This, put differently, means that the debt must be payable "immediately".

[30] To resolve the impasse we need to answer the question whether the debt when the CC was deregistered was immediately payable. The question, as Ms Green correctly submitted, cannot be answered in the affirmative. This is because the debt in the first case brought against the CC still had to be determined when the CC was deregistered. There was no debt yet that could be taken over in terms of **Section 26(5)** by the defendant in the current matter. The debt was not immediately payable as it was not in the form of a liquidated claim. The CC, in any event, denied liability.

- [31] Once our answer to the question is in the negative the matter then ends here because there is no liability or debt of the CC which has been determined and which must fall on the shoulders of the current defendant. Liability had to be determined before it could be passed on to the current defendant. There is, therefore, no liability which the current defendant must inherit. The second action, which is dependent on the action against the CC which, in my view, has prescribed, has also prescribed.
- [32] The plaintiff had the opportunity to have liability determined before the CC was deregistered but for no explicable and acceptable reason failed to do so. I say so because a very long time lapsed after the CC pleaded in the first case.
- [33] The summons was served on 29 August 2007 while the defendant's plea was served on the plaintiff on 20 February 2008. The time between the plea and the deregistration, indeed, is inordinately long. Liability can now not be determined against the CC which no longer exists. In any event, the CC could probably successfully refute such liability.
- [34] Mr Geyser submitted that the parties are different and this, in my view, bolsters my view that this is not the correct forum to determine the CC's liability in its absence. The train has come and gone leaving the plaintiff behind.
- [35] Given the fact that the plaintiff did not successfully prosecute its claim under case number 40113/07 to final judgment, it can now safely be accepted that the interruption of prescription in terms of **subsection 15(1) of the Prescription Act** has lapsed. The plaintiff did nothing until the CC was deregistered. This enables one to safely accept that the plaintiff's intention was not to prosecute its claim under the process in question to final judgment. The debt was not determined when the CC was deregistered. Had the plaintiff seriously intended to pursue the

process, the debt would have been determined before the CC was deregistered. This was not done and the CC is deregistered. A decision was taken to have the CC deregistered long after the plaintiff failed to prosecute its claim and this has its implications. The position would have been different had the CC been deregistered after the debt was determined. Liability of the CC would probably have been established. This never happened.

[36] The defendant, had the debt been determined before the CC was deregistered, would have been jointly and severally liable for such debt. Having regard to what is meant by “the debt is due”, it then becomes abundantly clear that no debt which was immediately payable had been determined when the CC was deregistered.

[37] Indeed, it is correct as Mr Geyser submitted that **the Companies Act 71 of 2008** became law on 1 May 2011 which was after the CC was deregistered. The deregistration occurred when **Section 26(5)** was still applicable.

[38] **Paragraph 10(1) of Schedule 5 to the Companies Act 71 of 2008** deals with transitional arrangements. It provides:

*“Any proceedings in any Court in terms of the previous act immediately before the effective date are continued in terms of that Act, as if it had not been repealed”.*

[39] **Section 83 (2) of the Companies Act 71 of 2008** provides:

*“The removal of a company’s name from the companies register does not affect the liability of any former director or shareholder of a company or any other person in respect of any act or omission that took place before the company was removed from the register”.*

**Section 83(3)** provides:

*“Any liability contemplated in subsection (2) continues and may be enforced as if the company had not been removed from their register”. (my emphasis).*

[40] I indicated above, that there was no debt which was immediately enforceable when the CC was deregistered. According to the ‘Concise Oxford Dictionary, Tenth Edition Revised and edited by Judy Pearsa’, “enforce” means “*compel compliance with (a law, rule, or obligation) cause to happen by necessity or force*”. Enforce appears in **Section 83(3) of the Companies Act 71 of 2008**. It, in my view, bears the same meaning.

[41] I said earlier on that liability properly considered must mean a debt. You enforce a debt which has been determined or established and not a liability which is still to be determined.

[42] It will be remembered that the plaintiff over a period of time did nothing to prosecute its claim to final judgment under case number 40113/07. The judgment which could have determined liability and the debt was not obtained by the plaintiff until the CC was deregistered. There was no debt determined at the time of deregistration. There is still no debt at this point in time. The plaintiff’s claim against the Dambas Breweries CC has accordingly prescribed. This, as a consequence, means that the plaintiff’s claim against the current defendant has also prescribed (See: **Silhouette Investments Ltd v Virgin Hotels Group Ltd 2009 (4) SA 617 (SCA)**).

[43] Mr Geyser submitted that prescription as against the current defendant could not commence to run from any date earlier than the date the Close Corporation of which he was a member was deregistered on 24 February 2011 and that the current summons was issued and served upon the defendant within the period of 3 years as envisaged in **Section 11(d) of Act 68 of 1969** i.e.: calculated from the date of deregistration of Dambas Breweries CC. This, in light of what I have discussed above

cannot be correct. The plaintiff's claim in the second action depends on the existence of a valid claim in the first action. The first claim prescribed resulting in the prescription of the second claim. The defendant's special plea, in my view, should succeed.

**ORDER**

**[44] I, as a result, make the following order:**

**The plaintiff's claim is dismissed with costs.**



**M. W. MSIMEKI**  
**JUDGE OF THE HIGH COURT OF SOUTH AFRICA**  
**GAUTENG DIVISION OF THE HIGH COURT,**  
**PRETORIA**