IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE HIGH COURT, CAPE TOWN)

CASE NO: 12611/2010

In the matter between:

SHACKLETON CREDIT MANAGEMENT (PTY) LIMITED Plaintiff

and

FREDERICK JOHANNES SCHOLTZ Defendant

JUDGMENT DELIVERED ON 10 DECEMBER 2010

BLIGNAULT J:

[1] This is an opposed application for summary judgment.

[2] Plaintiff, Shackleton Credit Management (Pty) Ltd, sued the defendant, Mr Frederick Johannes Scholtz, for payment of certain amounts alleged to be due to it in terms of agreements concluded between Absa Bank Limited and Cloud Nine Apple Farm CC ("the principal debtor").

[3] Plaintiff claimed that the debts in question had been ceded to it by Absa Bank Limited. Defendant is alleged to be liable to

plaintiff in terms of a deed of suretyship in terms of which he bound himself as surety for all debts then owing by the principal debtor to Absa Bank Limited.

[4] Plaintiff's action was instituted on 28 June 2010. Its particulars of claim follow the same format in respect of each claim. They contain in each case the following allegations:

(i) That a specific agreement was concluded between Absa Bank Limited and the principal debtor;

(ii) That the principal debtor breached its obligations in terms of the agreement;

(iii) That the principal debtor was wound up on 11 August 2005;

(iv) That Absa Bank Limited cancelled the agreement;

(v) That Absa Bank Limited proved a claim against the principal debtor in liquidation in the amount of RX;

(vi) That Absa Bank Limited received a secured award in a certain amount.

(vii) That there is a shortfall in the amount due by the principal to plaintiff.

[5] Para 78 of the Particulars of Claim reads as follows:

> *"78. The final liquidation and distribution account in the Principal Debtor has not been confirmed. A copy of the most recent Master's query sheet, dated 5th November 2009, is annexed hereto, marked "PPOC24"."*

[6] The Master's query sheet dated 5 November 2009 bears plaintiff's allegation out. It shows that the first liquidation and distribution account had not been confirmed at that time.

[7] Para 79 of the Particulars of Claim reads as follows;

> *"79. The impediment contemplated by Sections 13(1)(g) and (i) of the Prescription Act No 68 of 1969 has not yet ceased to exist."*

[8] Defendant gave notice of his intention to defend the action and plaintiff applied for summary judgment.

[9] Defendant filed an opposing affidavit. He raised a defence of prescription in the following terms:

> *"5. Plaintiff's claims as set out in it's particulars of claim all became due before, or at the latest on the date of liquidation of the principle debtor being the 11th August 2005 and prescription thus run in favour of me from such date.*
>
> *1. All seven of Plaintiffs claims would therefore have become prescribed on the 11th August 2008.*
>
> *2. The filing of the seven relevant claims against the principle debtor in liquidation however meant that the completion of prescription could only occur one year after the ceasing of this impediment.*
>
> *3. The impediment interrupting the completion prescription ceased to exist from the 22 February 2006, being the date on which Absa Bank received its final dividends from the liquidator of the principal debtor's estate.*
>
> *4. In terms of both the first and second final liquidation and distribution account it is clear that no further dividends would be paid to Absa Bank or the Plaintiff and as such I deny the Plaintiff's allegation in paragraph 79 of its particulars of claim that the impediment has not yet ceased to exist.*

5. *Because the completion of prescription would thus not have occurred within a period of one year after the cessation of the impediment, Plaintiffs claims against the Defendant based on the surety prescribed on the 11th August 2008 whilst summons was issued on the 2nd June 2010."*

[10] The application for summary judgment was heard by me on 27 July 2010. Counsel for plaintiff relied on the provisions of section 13 (1) (g) of the Prescription Act 68 of 1969 ("the Prescription Act"). They read 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 or against an applicant under the Agricultural Credit Act, 1966;

... ...

(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,

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

[11] Plaintiff's particulars of claim and defendant's opposing affidavit were both drawn on the assumption that the principal debtor, although a close corporation is to be regarded as a company within the meaning of section 13(1)(g) of the Prescription Act. I will revert to that assumption hereunder.

[12] The first question that was argued before me is when, if at all, did the impediment referred to in paragraph 13(1)(g) of the Prescription Act cease to exist ie when, if at all, did the principal debt in each case cease to be the object of a claim filed against the principal debtor. The summons was served on defendant on 11 June 2010. If the debts in question had ceased to be objects of a claim filed against the principal debtor on or before 10 June 2009, they would have become prescribed.

[13] Counsel for plaintiff referred to a strong line of authorities, culminating in *Nedcor Bank Ltd v Rundle* 2008 (1) SA 415 (SCA) for the proposition that in the case of company the impediment referred to in section 13(1)(g) of the Prescription Act, ceases to exist upon the confirmation by the Master of the final liquidation and distribution account.

[14] I am bound by these authorities. It follows that if the provisions of section 13(1)(g) of the Prescription Act do apply to close corporations, defendant would have no defence to plaintiff's claims. The question, however, is whether they do. This is a legal question which depends upon the proper interpretation of section 13(1)(g) of the Prescription Act.

[15] There is authority to the effect that a court should not decide legal issues in summary judgment proceedings. See *Hollandia Reinsurance Co Ltd v Nedcor Bank Ltd* 1993 (3) SA 574 (W. It seems to me however, that it would be convenient and less expensive to the parties if this issue is decided at this stage. I propose to do so.

[16] Plaintiff's counsel referred me to two judgments, namely *Thrupp Investment Holdings (Pty) Ltd v Goldrick* 2008 (2) SA 253 (W) and *Nedcor Bank Limited v Sutherland* [1998] 3 All SA 146 (N) in which a close corporation was regarded as a *company* for purposes of section 13(1)(g) of the Prescription Act. The issue, however, does not appear to have been argued and no reasons were given to this assumption. As such these decisions have no binding or persuasive force.

[17] I revert to the interpretation of section 13(1)(g) of the Prescription Act. In broad terms there are three approaches to the interpretation of statutes. The first is the so called *golden rule* of interpretation. In terms of this rule the plain meaning of the statute is given effect to unless it would give rise to an absurdity or a result contrary to the intention of the legislature. In the present case, however, it seems to me that an interpretation in accordance with the *golden rule* would not support the contention advanced by plaintiff. The plain meaning of the word *company* does not, as a matter of language, include *close corporation.*

[18] A second approach to the interpretation of statutes can be described as purposive. This means that a statute must be interpreted in the light of the purpose which it seeks to achieve. This method uses the language and the purpose to serve as the starting point of the enquiry. Closely related to this approach, is the rule that the language of a statute must be read in its context. This approach, however, also does not assist plaintiff in this case as it uses the actual language as part of the starting point of the enquiry.

[19] A third approach can be described as the *reading in* of a word or a phrase in order to attempt to make sense of the statute. In terms of this approach the court plays a creative role by actually inserting words into or changing words in the statute to arrive at the result sought to be achieved.

[20] At first sight this approach seems to offer more hope to plaintiff. In my view, however, a *reading in* of the words *"or close corporation"* into section 13(1)(g) of the Prescription Act faces three problems in this case.

[21] The test for the implication of a word into a statute is quite stringent. In *Masetlha v President of the Republic of South Africa and Another* 2008 (1) SA 566 (CC) the Constitutional Court, at para [192], formulated it as follows:

> *"...words cannot be read into a statute by implication unless the implication is a necessary one in the sense that without it effect cannot be given to the statute as it stands. In addition, such implication must be necessary in order to 'realise the ostensible legislative intention or to make the [legislation] workable."*

[22] The proposed implied term is in my view not necessary in the sense that without it effect cannot be given to the principles and objects of the Prescription Act. Section 13 of the Prescription Act contains exceptions to the general rule that prescription is interrupted by way of the institution of legal proceedings for the enforcement of the debt. There is in principle no practical or legal reason why close corporations should be singled out for special treatment.

[23] A second problem facing the *reading in* approach is that a provision can only be implied into a statute if its language is clear. See *The Firs Investments (Pty) Ltd v Johannesburg City Council* 1967 (3) SA 549 (W) at 557E - G:

> *"Moreover, a strong factor militating against the implication of any such limitation is the difficulty of formulating it. In contract a term will not be implied where considerable uncertainty exists about its nature and scope, for it must be precise and obvious.... I think that the same must apply to implying a term in a statute, for the process is the same...."*

How, one asks rhetorically, would the suggested implied provision be framed bearing in mind that close corporations did not exist when the Prescription Act was passed?

[24] A third problem is that there have always been entities which are separate legal *personae* but not companies. They include trading corporations. Such entities would normally be sequestrated and not liquidated. See *Lawsa Vol 1 Associations* paras 618 and 661. How would the legislature have known in 1969 that a similar type of entity, if and when it comes into being, would be liquidated and not be sequestrated.

[25] Some support for an argument that section 13(1)(g) is amenable to an interpretation that the words "or corporate entity similar to" or similar words be implied into section, may be found in the judgment of Mahomed J in *Vitamax (Pty) Ltd v Executive Catering Equipment CC and Others* 1993 (2) SA 556 (W). He dealt with a situation where a person had bound himself as surety *in respect of companies.* The principal debtor was a close corporation and the contention was raised that the word *companies* did not apply to a close corporation. Mahomed J rejected this argument.

[26] It may be suggested that the *Vitamix* judgment appears to supports plaintiff's contentions. There are, however, significant differences between that case and the present one. Mahomed J

said there was no reason why the parties would have intended to define *company* in such a manner. He said *inter alia* the following:

> *"Crucial to the essential characteristics of a company is its existence as an entity distinct from its members, its capacity to own property apart from its members and perpetual succession. (Dadoo Ltd and Others v Krugersdorp Municipal Council 1920 AD 530; Klerksdorp & District Muslim Merchants Association v Mahomed & Another 1948 (4) SA 731 (T) at 738; Morrison v Standard Building Society 1932 AD 229 at 238; Stellenbosch Farmers' Winery Ltd v Distillers Corporation (SA) Ltd and Another 1962 (1) SA 458 (A) . These are also all characteristics of a close corporation in terms of the Close Corporations Act 69 of 1984 (see s 2)."*

[27] The reasoning in *Vitamax* can be distinguished in four material respects. The first is that the Close Corporation Act did not exist in 1969 when the Prescription Act was passed. An entity such as a close corporation had not yet come into being. It did exist, however, when the parties concluded the agreement in the *Vitamax* case. It is trite law that an agreement must be construed within its proper context. See *KPMG Chartered Accountants (SA) v Securefin Ltd and Another* 2009 (4) SA 399 (SCA) para [39]. The existence of the entity known a close corporation was manifestly part of the context which played a role in the court's reasoning in *Vitamax*.

[28] The second point of distinction is that it is more difficult to imply a term into a contract than into a statutory provision. I have already referred to the stringent test in the case of a statute. In the case of a contract the existence of an implied term depends on the intention of the parties which can be proved on no stricter test than a balance of probabilities. The court also has a wider discretion to look at surrounding circumstances.

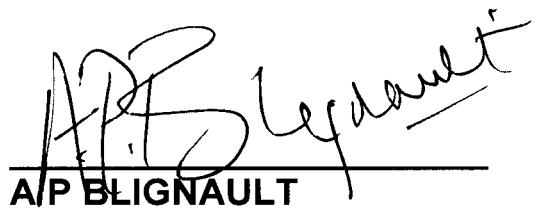
[29] The third distinguishing feature is that the general approach of Mahomed J does not apply to statutory interpretation. He saddled the defendant with an onus to support a special interpretation of the word *company*. In the case of section 13(1)(g) of the Prescription Act, however, the onus would rest on the party seeking to extend the meaning of *company*.

[30] The fourth point of distinction is that not all of the entities referred to in the passage quoted above are companies. In *Klerksdorp & District Muslim Merchants Association v Mahomed & Another* 1948 (4) SA 731 (T) it was an association formed for religious purposes which was regarded by the court as a *universitas* or legal *persona*. In *Morrison v Standard Building*

Society 1932 AD 229 it was a building society which was regarded as a universitas.

[31] I find therefore that the interpretation contended for by plaintiff is not supported by any of the accepted methods of interpretation. The *Vitamax* judgment can be distinguished in various significant respects and does not assist plaintiff to overcome its problems with the interpretation of section 13(1)(g) of the Prescription Act.

[32] In the result, the application for summary judgment is refused with costs.



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