IN THE HIGH COURT OF SOUTH AFRICA

(WESTERN CAPE DIVISION, CAPE TOWN)

Case no: 1074/2009

In the matter between:

NAMPAK WIEGAND GLASS (PTY) LTD	**Plaintiff**
And	
WALTER MAURICE FINLAYSON	**First Defendant**
ROBERT CHRISTIAN COPPOOLSE	**Second Defendant**
VIVIAN VICTOR GRATER	**Third Defendant**

Dates of hearing: 25 & 26 August 2014

Date of judgment: 8 September 2014

JUDGMENT

SAVAGE AJ:

Introduction

[1] On 10 January 2006 this Court placed Coppoolse Finlayson International (Proprietary) Ltd ('CFI') under provisional order of winding up, with a final order if liquidation made on 21 February 2006. At the date of its liquidation CFI owed R2 002 571.00 to the plaintiff in respect of glass bottles purchased on credit pursuant to the terms of an agreement entered into between the parties.

[2] On 21 January 2009 the plaintiff, Nampak Wiegand Glass (Pty) Ltd, instituted action against the three defendants, all former directors of CFI, in terms of which an order is sought under the provisions of s 424 of the Companies Act 61 of 1973 that the defendants are liable to the plaintiff for the amount of R2 002 571.00 plus interest at the rate of 15.5% per year a *tempore morae*. The summons with its particulars of claim was served on the first and second defendants on 27 January 2009 and on the third defendant on 5 February 2009.

[3] In its particulars of claim the plaintiff states that it became concerned about the level of its exposure to CFI due to erratic and payments and the ability of CFI to pay its debt to the plaintiff. Furthermore:

'*…13. A meeting was held at CFI's on 9 September 2005. This meeting was inter alia attended by second defendant who was the managing director of CFI at the time and Erik Smuts, Steffen [Bulbring] and Rob Coppoolse representing the plaintiff. At the same meeting and with the sole intention of inducing the plaintiff to continue extending its permission to CFI to purchase goods on credit from plaintiff the second defendant made the following express oral representations to the plaintiff he:*

13.1 re-confirmed that he was a director of CFI and that he understands the responsibilities of a company director and the consequences it would have for directors of the company if the business of the company was conducted recklessly;

13.2 assured the plaintiff that CFI's business was not conducted recklessly and/or that it was not trading recklessly;

13.3 stated that CFI owned immovable property with the fair market value of ±R16 million which is in the process of being sold and that this sale

will normalise CFI's cash flow position so that it would be able to meet its obligations and in particular the payment regime required in terms of Annexure "A";

13.4 gave the assurance that CFI was solvent and that the value of its assets far exceeded the amount of its liabilities and that there is no immediate concern about the viability of CFI's business as a going concern.

14. The said representations were made to induce the plaintiff to continue to supply to CFI on credit.

15. Plaintiff relied on the truth of the said representations and allowed CFI to continue purchasing goods on credit from plaintiff as a result whereof CFI's credit with the plaintiff was allowed to increase to R2 002 571.00.

16. The second defendant knew that the representations set out in 13.2, 13.3 and 13.4 above were not true as:

16.1 CFI's business was in fact conducted recklessly as is set out more particularly below;

16.2 CFI did not own immovable property at all and/or did not own immovable property with a market value of anything close to R16 million and/CFI had no prospect of normalising its cash flow position or to meet its obligations and payment regime in terms of Annexure "A";

16.3 CFI was not solvent in that the value of its assets was less than the value of its obligations.'

[4] In paragraph 17 the plaintiff details the payment arrangement agreed with CFI and the breach of such arrangement. It states further that:

'*…19.During the period from 31 March 2005 to 30 November 2005 CFI's assets decreased in value by more than 33%.*

20. From the aforesaid and in particular paragraphs 16, 17, 18 and 19 it was clear to the first, second and third defendants and/or should have been clear to the said defendants and/or if they had been conducting the business of CFI in a proper and diligent manner and/or in accordance with a fiduciary duty expected of directors of a company that:

20.1 CFI was trading at a loss; and/or

20.2 CFI was trading in insolvent circumstances and/or that it was commercially insolvent; and/or

20.3 A real risk existed that CFI would not be able to repay its creditors and also in particular the credit extended by plaintiff to it;

20.4 CFI's capital base was being eroded due to the losses it was incurring.'

[5] The particulars of claim provide details of other facts that came to the plaintiff's knowledge and conclude in paragraph 24 that '*the business was carried on recklessly and/or with the intention of to defraud creditors of CFI and/or for fraudulent purpose*' and in paragraph 25 that the defendants '*were at all relevant times knowingly a party to the carrying on of CFI's business in this manner'*. As a consequence, the plaintiff seeks an order declaring the defendants to be personally liable for the amount owing to it in terms of the provisions of s 424, with an order that the outstanding amount be paid to the plaintiff.

[6] On 24 March 2009 the defendants raised a special plea of prescription to the claim on the basis that the plaintiff knew, alternatively by the exercise of reasonable care could have acquired knowledge of the identity of the debtors and the facts from which the alleged debt arose during November 2005, alternatively on or about 10 January 2006, being the date of the provisional winding up of CFI, alternatively no later than 26 January 2006.

[7] At the outset of proceedings, and by agreement between the parties, in terms of rule 33(4) the issue of prescription was separated from the merits for determination first by this Court. There is no dispute between the parties that the defendants bear the onus to prove the facts relied upon in pleading that an obligation has been extinguished by prescription.

[8] During pre-trial procedures, the parties agreed *inter alia* that the documents in the bundles are what they purport to be without any party admitting the truth of the content of any document; and that the documents were to be admissible upon their mere production in evidence without the need for formal proof, unless any particular document is challenged by any party on reasonable notice.

Agreed facts

[9] In terms of rule 33 (1) and (2), for the purposes of the special plea of prescription only, the following facts were agreed by the parties:

1. *The plaintiff knew during 2005 that, at all relevant times, the first, second and third defendants were directors and/or members of CFI, in their capacities as such, knowingly parties to the carrying on of CFI's business.*

2. *On or about 13 February 2004 CSI, who was represented at the time by its financial manager one Andrew Jamieson, in writing, at Brackenfell, Western Cape, applied to the plaintiff to allow it to purchase goods from the plaintiff on credit. Plaintiff through its regional director Erik Smuts accepted the said application during/about February 2004.*

3. *Subsequent to February 2004 the plaintiff sold and delivered to CFI goods in accordance with the provisions of the credit agreement.*

4. *During or about September 2005 the plaintiff's financial management became concerned about the level of the plaintiff's exposure to CFI, the erratic and insufficient payments that were made by CFI in reduction of the said exposure and CFI's ability to pay its debt towards the plaintiff and ceased to allow further sales of the plaintiff's goods to CFI on credit. The members of the plaintiff's financial management who became concerned about its level of exposure to CFI included the financial director, Erik Smuts, and financial manager, Robert Antelme.*

5. *A meeting was held at CFI's principal place of business on 9 September 2005. This meeting was, inter alia, attended by the second defendant who was the managing director of CFI at the time and Erik Smuts, Steffen Bulbring and Rob Antelme representing the plaintiff. At the said meeting and with the sole intention of inducing the plaintiff to continue extending its permission to CFI to purchase goods on credit from the plaintiff, the second defendant made the following express oral representations to the plaintiff. He:*

    5.1 reconfirmed that he was a director of CFI and that he understands the responsibilities of a company director and the consequences it would

have for directors of a company if the business of the company was conducted recklessly;

5.2 assured the plaintiff that CFI's business was not conducted recklessly and/or that it was not trading recklessly;

5.3 stated that CFI owned immovable property with a fair market value of ± R16 million which is in the process of being sold and that this sale will normalise CFI's cash flow position so that it would be able to meet its obligations and in particular the payment regime required in terms of the credit agreement;

5.4 gave the assurance that CFI was solvent and that the value of its assets far exceeded the amount of its liabilities and that there is no immediate concern about the viability of CFI's business as a going concern.

6. The said representations were made to induce the plaintiff to continue to supply goods to CFI on credit. The representations were made partly in response to a specific question and partly while explaining the cash flow predicament being experienced at the time by CFI and how it intended to settle the outstanding debt owed to the plaintiff.

7. The plaintiff relied on the truth of the said representations and allowed CFI to continue purchasing goods on credit from the plaintiff as a result whereof CFI's credit with the plaintiff was allowed to increase to R 2 002 571.00.

8.

8.1 On or about 21 October 2005, the second defendant offered that CFI would make three weekly payments of R400 000.00 each and a fifth and final payment of R100 000.00 week later, totalling R 1 300 000.00 to reduce the arrears of its account with the plaintiff.

8.2 The plaintiff accepted the said payment proposal subject to the following conditions:

(a) CFI may not pay any of its other creditors on a preferential basis to the plaintiff;

(b) CFI's total account must be brought up to date by the end of December 2005.

8.3 CFI agreed to the said conditions.

8.4 CFI failed to make the second and all subsequent payments due in terms of the offer of payment referred to in 8.1 above.

8.5 CFI then also breached the conditions referred to in 8.2 above by paying at least one of its creditors on a preferential basis to the plaintiff in that it paid an amount of approximately R 900 000.00 to Consol Glass for bottles purchased by it.

9. *During or about November 2005 CFI, in a letter, a copy of which was next to the plaintiff's particulars of claim, offered its creditors a compromise on the basis that its liabilities exceeded the value of its assets. This letter was compiled and/or distributed by CFI with the full knowledge and/or consent of the first and/or second and/or third defendants.*

10. *The aforesaid letter was handed to the plaintiff by CFI during a meeting between representatives of the plaintiff and CFI on 12 December 2005, and was handed to CFI's creditors.*

11. *The plaintiff knew on 11 January 2006 that Excelsior Boerdery (Edms) Bpk applied for the liquidation of CFI under case number 13006/05, that in order for the provisional winding up of CFI was granted and that the first, second and third defendants failed to oppose the said application and thereby had knowledge that CFI was insolvent.*

12. *The application for the winding up of CFI was issued by Excelsior Boerdery on 15 December 2005 and first enrolled for hearing on 20 December 2005.*

13. *The Master appointed provisional liquidators to CFI on 19 January 2006.*

14. *The provisional winding up of CFI was made final on 21 February 2006.*

Evidence of joint liquidator

[10] The defendants relied on the evidence of one witness, Mr Johannes Frederick Klopper, who was appointed as one of the joint liquidators of CFI. Mr Klopper met with Mr Rob Antelme of the plaintiff on 13 January 2006 at the plaintiff's premises in Johannesburg to introduce himself and seek Mr Antelme's support for his appointment as liquidator. Mr Antelme had information that he wanted to bring to the attention of the liquidators and after the meeting on 13 January 2006 sent Mr Klopper an email which included attached a document containing his queries regarding CFI. The queries were as follows:

'*1 Stock*

1.1 How did stock reduce from R21.1 million at 31 March 2005 to R10.7 million at 30 November 2005?

1.2 What happened to the proceeds realised from the disposal of stock and 31 March 2005?

1.3 As a notarial bond over the stock been granted in favour of any creditors?

2 <u>Accounts Receivable</u>

2.1 How is it that accounts receivable reduced from R5.8 million at 31 March 2005 to R3.1 million at 30 November 2005, while stock with a value of approximately R9.4 million was being sold during that period?

2.2 CFI acquired bottles worth approximately R2 million from Consol and Nampak Wiegand-Glass a few weeks before closing its business. We are told all those bottles have been found with wine and sold in Europe. We would have expected such sales to generate income of approximately R14 million, but accounts receivable is reflected as only R3.1 million. What has happened to the proceeds from such sales?

2.3 Have the accounts receivable been ceded to the banks to secure the overdraft facilities, or to secure any other debts?

3 <u>Loan to Unit 5 & 6 Kenwill Drive (Pty) Limited</u>

3.1 We have been advised that a loan to Unit 5 and 6 Kenwill Drive (Pty) Limited of R7.2 million as at 31 March 2005 has been repaid in full. When one of the loan repaid and what funds were used to repay the loan?

3.2 What was the purpose of the loan to Unit 5 and 6 Kenwill Drive?

4 <u>Land Bank Loan</u>

4.1 When was the Land Bank loan made to CFI?

4.2 What was the original amount of the loan and what are its repayment terms?

4.3 What was the purpose for the loan?

4.4 What security was granted to the Land Bank?

5 <u>The Sale of Property owned by Unit 5 and 6 Kenwill Drive (Pty) Limited</u>

5.1 Representatives of Nampak were told during a recent meeting with representative (sic) of CFI that the business would be refinanced from the proceeds of the sale of an immovable property. Was that a reference to the property owned by Unit 5 and 6 Kenwill Drive (Pty) Limited?

5.2 Who are the shareholders and directors of Unit 5 and 6 Kenwill Drive (Pty) Limited?

5.3 The company borrowed at least R7.2 million from CFI. What was the reason for the loan?

5.4 The loan of R7.2 million has apparently been repaid in full to CFI 31 March 2005. When was the loan repaid and how did the company obtain funds to repay the loan?

5.5 Why is it no longer possible to refinance CFI through the proceeds from the sale of the property?

5.6 When was the decision taken that the company would no longer use the proceeds from the sale of the property to refinance CFI?

6 <u>Way Forward</u>

6.1 An application for the liquidation of CFI has being postponed to 17 January 2006. What does CFI intend to do in the interim period?

6.2 *Is there any good reason why CFI should not be put in liquidation immediately in order to protect the assets of the company for the benefit of creditors?*

[11] Mr Klopper considered the queries to be of a general nature, with their origins in the offer of compromise made by CFI in December 2005 to creditors, received by the plaintiff on 12 December 2005, and indicated that he would investigate. He had no recollection as to what information the plaintiff had in its possession other than what was supplied to him during January 2006.

[12] On 18 or 19 January 2006 Mr Klopper attended at the premises of CFI. The immediate concern related to the realisation of assets. Although Mr Nicky Thomatos, the Financial Manager of CFI, was appointed by the liquidators as a representative to secure and provide the necessary information, documents were not forthcoming and in October 2006 a subpoena *duces tecum* was served on the defendants although the directors were ultimately excused from the enquiry. A statement of affairs in terms of s 363 was not received and on 29 November 2006 Mr Klopper's office sent a letter to the defendant's attorneys indicating his frustration with the lack of cooperation of the directors, with the liquidators having been severely hampered in their work.

[13] On 12 September 2006 the liquidators instructed Accountants@Law ('A@L') to assist in undertaking a forensic investigation of CFI on '*matters which may reflect reckless and fraudulent trading*'. Mr Klopper could not recall what information he had prior to the A@L reports dated 19 October 2006 and 21 March 2007 which focused on CFI's relationship with units 5 and 6 Kenwill and loan accounts of the Walter Finlayson Family Trust. The directors refused to submit

accounting records, annual financial statements, trial balances and supporting documentation in respect of units 5 and 6 on the basis that this was irrelevant for purposes of A@L's investigation. Although the liquidators were informed that no lease agreements existed with units 5 and 6, in March 2007 a copies were located by the defendants as a result of which it was concluded that R11 million plus expenses were not due by that company to CFI.

[14] Mr Klopper confirmed that there was no mention of a Land Bank loan in the company financial statements and the balance sheet did not indicate any immovable property owned by CFI. As a result, he accepted that the reference in the offer of compromise to a Land Bank loan was a misrepresentation.

[15] The report of the joint liquidators was finalised by the beginning of August 2006 and that it was not clear to him on the information he had whether the directors of the company could be held personally liable as this was a matter for the Court to determine. This joint report stated that '(s)*ave to state that the directors have failed to submit a Statement of Affairs, it is not at this stage certain what other contraventions of the Act have been committed by the directors. This is still under investigation*.' A settlement agreement was finally entered into with the defendants on 1 March 2007 in full and final settlement of all claims.

[16] With reference to the letter sent by him to Standard Bank dated 18 August 2006 in which the bank was informed of allegations of reckless trading and improper conduct by the directors of CFI, Mr Klopper indicated that the letter would have been based on information available to the liquidators and it is apparent from the contents of the letter that some information had been obtained after the report which may have accounted for the letter.

[17] Although on 28 August 2006 Mr Klopper wrote to the first and second defendants' attorneys stating *inter alia* that '(c)*onsultants appointed by the directors advised them in writing that they were trading recklessly'*, in evidence he had no recollection of this statement and was unable to indicate where it came from.

Documentary evidence

[18] The documentary evidence in the form of emails between the parties provides a useful insight into their interactions and the pertinent events prior to CFI's liquidation. In an email forwarded to the second defendant on 19 September 2005, Mr Steffen Bulbring of the plaintiff recorded the agreement reached at the meeting on 9 September 2005 as follows:

> '1. *Coppoolse will pay R1.2 million of the outstanding amount owing to Nampak Glass as soon as possible – but in no way any later than 30th September which is our year end cut-off date. Upon receipt of these monies the account will be opened for trading once again.*
>
> *2. The balance of the account will be settled as soon as possible and further discussions will take place on this as soon as Coppoolse's liquidity problems have eased. Regular communication will occur between the parties to ensure that everything is done to get the account back into line with its agreed trading terms.*
>
> *3. Nampak Glass will receive 80% of all Coppoolse's wine bottle purchase allocation for the period going forward beginning October 2005 - October 2006.*
>
> *4. Coppoolse warranties that there are no immediate concern about the viability of the business as a going trading concern.*
>
> *A more detailed legal letter will follow setting of the above in more detail which Coppoolse will review, amend if necessary and then sign.*'

[19] On 21 September 2005 the amount of R1.2 million was paid to the plaintiff by CFI, which payment enabled CFI to obtain bottles from the plaintiff in October 2005. Mr Thomatos, on 18 October 2005, undertook to pay the outstanding balance of R1.3 million in November 2005, to which the plaintiff's Mr Michael

Smither responded that by the end of November R2 002 571 would be outstanding and sought confirmation that the amount of R665 995.00 would be paid when it fell due. In response, the second defendant in an email on 20 October 2005 stated that:

> '*At the meeting with Mr Smuts, Bulbring et al we agreed on the following:*
>
> *CFI to pay R1 201 773.76 by the end of September 2005 (we in fact paid on 21 September) in order to draw bottles in October.*
>
> *CFI to purchase 80% of bottles from Nampak CFI a settle balance of account in consultations with Nampak CFI to order many bottles before 1 October to assist Nampak, based on paying for these bottles by December (together with payment for bottles ordered in October).*
>
> *CFI to provide a statement concerning their solvency.*
>
> *In order to show our goodwill we ordered bottles in September actually only needed for October. Further Nampak run out of DG 724 bottle, which we now had to replace with a* [illegible] *which is 0,20 more expensive.*
>
> *I suggest therefore that we settle R1 336 576 by end November and R665 995.00 plus our drawings in October by end December. Our cash flow can handle this and brings our account right up-to-date'.*

[20] On 21 October 2005 the second defendant proposed the payment of R400 000 in week 43, R400 000 in week 45, R400 000 in week 47 and R100 000 in week 48. Mr Smuts confirmed acceptance of this payment proposal on 24 October 2005 on condition that:

> '1. *None of your other creditors should be paid on the preferential basis to Nampak Glass, i.e. the percentage of their total outstanding debt paid should not exceed that payments made to Nampak Glass as a percentage of the total debt owed to Nampak Glass.*
>
> *2. The total account must be up to date by the end of December 2005, and stay up-to-date into January 2006 and beyond.'*

[21] CFI made only one payment of R400 000 and failed to make any further payments. In addition, it did not provide a statement concerning its solvency. On 28 November 2005 the second defendant indicated in an email to Mr Smuts, Mr Smither and Mr Bulbring of the plaintiff that:

> '*I refer to our meeting during September 2005.*

At the meeting it was agreed, among others, that we would try to bring on count back to normal terms and that we would purchase about 80% of our product from Nampak. Nicky an (sic) I worked on a solid payment plan based on current orders. Consol payments were put on the backburner. However, soon after the above meeting you first ran out of 724 DG bottles, which we being replaced with much more expensive 724 DL bottles and subsequently you run out of 724 bottles altogether. We have no other option than to buy 724 DG bottles from Consol on a cash basis with funds allocated to you. This amounted to over R 900 000, obviously not an amount we had made provision for. As result of our account is now again of (sic) track and I suggest that we meet sometime next week in order to resolve the impasse.

I trust you understand our predicament.'

[22] On 13 December 2005 in an email to Mr Neill O'Brien, Mr Smuts and Mr Bulbring, Mr Smither forwarded a five-page letter received from CFI at a meeting on 12 December 2005. He stated that:

'*The purpose of the meeting was for CFI to explain when they were going to settle their debt with Nampak. It wasn't long before the above letter was pushed in front of me outlining that CFI was closing its doors. Erik requested that I think the letter to you so that you can discuss the way forward with him. Their current outstanding debt is as follows:*

30 days:	*505 734*
60 days:	*491 744*
90 days:	*640 045*
180 days:	*993 174*
Total:	*2 630 698 ...*'

[23] The document provided by CFI to the plaintiff was a proposed compromise with creditors. In this document, in setting out the history of the business it was stated that in 1998 Coppoolse Finlayson CC, before its conversion into a (Pty) Ltd in 2005, purchased the premises at 5 and 6 Kenwill Drive in a CC called Unit 5 & 6 Kenwill Drive CC (later converted to 5 & 6 Kenwill Drive (Pty) Ltd) ('Unit 5 & 6'). In 2002 Unit 5 & 6 acquired the farm Bon Esperance outside Stellenbosch. The document continued:

'*…November 2005, Rob Coppoolse start (sic) discussions with Overhex Private Cellars (Pty) Ltd about the possibility of utilising the facilities of CFI in a joint venture. These meetings and discussions of splitting the value of the two companies come to an end when CFI receives notice from their largest client "Groupe LFE" in the Netherlands that their contract for 2007 will not be renewed. The shareholders agree that the business needs to close.*

After doing a physical stock count at the end of November and looking at realisable values for the stock and fixed assets of CFI, it becomes apparent that CFI is insolvent. Options for closing down the business are considered and have led to the situation where the shareholders and directors of CFI believe that a Section 311 scheme of arrangement is in the best interests of all creditors and likely to realise the highest value for creditors…'

[24] Recorded in the document was a breakdown of the financial situation of CFI in which was reflected a Land Bank loan in the amount of R5 637 000. In addition, the assets of CFI were recorded as at 31 March 2005 in the amount of R49 748 000 whereas the estimated value of such assets at 30 November 2005 was R25 834 000. Also recorded was that Unit 5 & 6 '*have put the properties owned by the company up for sale*' and that the shareholders and directors were prepared to put R3 million of the residual equity in Unit 5 & 6 into CFI by way of a loan account in order to help pay off concurrent creditors. The scheme proposed that CFI stop trading and retrench its staff.

Evaluation

[25] There is no dispute between the parties that the subject of the plaintiff's claim is susceptible of prescription, nor that the plaintiff had knowledge of the identity of the 'debtors'. In issue is when the plaintiff became aware of the facts from which the 'debt' for purposes of s 12(3) arose.

[26] Section 424(1) of the Companies Act 61 of 1973 provides that:

'(1) *When it appears, whether it may be in winding-up, judicial management or otherwise, that any business of the company was or is being carried on*

recklessly or with intent to defraud creditors of the company or creditors of any other person or for any fraudulent purpose, the Court may, on the application of the Master, the liquidator, the judicial manager, any creditor or member or contributory of the company, declare that any person who was knowingly a party to the carrying on of the business in the manner aforesaid, shall be personally responsible, without any limitation of liability, for all or any of the debts or other liabilities of the company as the Court may direct.'

[27] Section 12 (3) of the Prescription Act 68 of 1969 provides that:

'(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.'

[28] Section 424 gives rise to liability for a date in respect of which prescription commences to run once the converse 'right' has accrued.[1] S 424 supplements but does not to replace remedies which may be available at common law to any person, imposing liability where at common law such liability may not exist at all:

'...In particular, it relieves the claimant of proof of any causal connection between the fraudulent or reckless conduct of the business of the company and the debts or liabilities for which the wrongdoer may be declared liable'.[2]

[29] In determining for purposes of s 424 whether a person was knowingly a party to the carrying on of the business recklessly or with intent to defraud creditors, or for any fraudulent purpose, the test –

'*…is objective insofar as the defendant's actions are measured against the standard of conduct of the notional reasonable person and it is subjective insofar as one has to postulate that notional being as belonging to the same group or class as the defendant…'*.[3]

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[1] *Duet and Magnum Financial Services CC v Koster* 2010 (4) SA 499 (SCA) at 507A-G
[2] *Kalinko v Nisbet and others* 2002 (5) SA 766 (W) at 774
[3] *Philotex (Pty) Ltd and others v Snyman and others* 1998 (2) SA 138 (SCA) 144B-C

[30] The Court is required to have regard '*inter alia to the scope of operations of the company, the role, functions and powers of the directors, the amount of the debts, the extent of the company's financial difficulties and the prospects, if any, of recovery*.' However the mere fact of an excess of liabilities over assets does not in itself amount to reckless trading as directors in carrying on business do not make an implied representation that the assets of the company exceed its liabilities but rather that the company will be able to pay its debts when they fall due.[4]

[31] It is only when debts are incurred in circumstances in which '*in the opinion of reasonable businessmen, standing in the shoes of the directors, there would be no reasonable prospect of the creditors receiving payment*' that a proper inference may be drawn that the business is being carried on recklessly.[5] S 424 only penalises directors, apart from circumstances of fraud, when third parties are subjected to risk which is grossly unreasonable such as where the reasonable businessman would realise that in all the circumstances the payment would not be made when due. Each case must however turn on its own facts and involve a value judgment on those facts. [6]

[32] The creditor for purposes of s 12(3) requires knowledge only of the material facts from which the debt arises, not of the relevant legal conclusion or of an expert opinion.[7] The knowledge required is the minimum necessary to enable a creditor to institute action.[8]

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[4] *Ex parte De Villiers and Another NNO: in re Carbon Developments* 1993 91) SA 493 (A) at 504C-E
[5] *Ozinsky NO v Lloyd and others* 1992 (3) SA 396 (C) at 414F-H, 145H-J
[6] *Philotex (supra) at 146-7*
[7] *Truter v Deysel* 2006 (4) SA 168 (SCA)
[8] *Van Zijl v Hoogenhout* 2005 (2) SA 93 (SCA) at 102J-103A

[33] In *Minister of Finance v Gore*[9] the Court 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'.*'[10]

[34] In *Nedcor Bank Bpk v Regering van die Republiek*[11] it was stated:

'Reeds ten tyde van die opstel van die brief van 22 April 1994 was die eiser op hoogte van die basiese feite waarop hy 'n eis teen die verweerder kon inklee (Van Staden v Fourie, supra, te 216B-F) - weliswaar 'n eis wat op die oog af karig was, maar nietemin 'n geldige eis. Menige eiser wat uiteindelik suksesvol was, het sy saak in die verlede bloots aangepak mits dit origens op eie pote kon staan. Later mag hy besmoontlik beter ingelig word, by wyse van blootlegging van dokumente, of sy eie ondersoek, of onderhoude met potensiële getuies of selfs aan die hand van die getuienis wat deur sy teenparty aangebied word. Altemit sou hy daarna uitvind dat daar inderdaad 'n goeie verweer bestaan waarvan hy net nie geweet het nie of dat hy om die een of ander tot dusver onbekende rede glad nie 'n eis het nie. Dit sou egter geheel en al verkeerd wees om in die artikel in te lees dat hy van al sodanige omstandighede bewus moes wees alvorens verjaring teen hom kon begin loop. Litigasie is uiteraard vol risiko's, maar opsigself is dit geen rede waarom die reg hom oor 'n eiser moet ontferm indien hy origens oor die basiese feite beskik om die proses binne die aangewese verjaringstermyn aan die gang te sit nie. Om daardie rede kan ek nie akkoord gaan met die strekking van die woorde van die verhoorhof wat ek vroeër beklemtoon het, naamlik dat die feite wat op 22 April 1994 aan die eiser bekend was "nie noodwendig die ... nalatigheid ... bewys nie ..." Wat beoordeel moet word, is nie of die eiser oor voldoende feite beskik het om sy saak teen die einde daarvan te bewys nie, maar of hy oor die minimum feite beskik het om daarmee te begin.'

[35] In *Drennan Maud & Partners v Pennington Town Board*[12] the word 'debt' in s 12(3) it was stated '*does not refer to the "cause of action" but more generally to the "claim"...In deciding whether a "debt" has become prescribed, one has to identify the "debt", or put differently, what the "claim" was in the broadest sense of the word*'.

[9] 2007 (1) SA 111 (SCA) at 120A
[10] With references at footnote 3. See too *Geldenbuys NO v Diedericks* 2002 (3) SA 674 (O) at 682I
[11] 2001 (1) SA 987 (SCA) at 996F-997A
[12] 1998 (3) SA 2000 (SCA) at 212G

[36] The plaintiff elected to lead no evidence of its representatives as a result of which the evidence of Mr Klopper with the documentary evidence before the Court stands to be analysed from the perspective of a reasonable creditor with the knowledge possessed by the representatives of the plaintiff at the time.

[37] At the meeting on 9 September 2005 the plaintiff was concerned as to the solvency of CFI, its viability as a business and was aware of the consequences of reckless trading. As much is evident from the fact that the second defendant was asked whether he was a director of CFI, if he understood the consequences for directors of trading recklessly,[13] his reference to CFI's '*liquidity problems*'[14] and his undertaking to provide a statement as to the solvency of the company. What followed was that increased credit was provided to CFI in spite of no solvency statement being received, apparently due to the second defendant's representation that there was no immediate concern about the viability of the business[15] on the basis that CFI would purchase 80% of bottles required by it from the plaintiff and R1.2 million would be paid before the end of September 2005.

[38] A payment of R1.2 million was received by the plaintiff on 21 September 2005, which the plaintiff argued indicated that the defendants had acted in accordance with the agreement and that there was no basis on which to conclude that there existed liquidity problems. While this payment may have eased the plaintiff's immediate concerns regarding payment of the outstanding amount and CFI's financial predicament, by 20 October 2005 there could have been no doubt that there existed serious liquidity issues. CFI sought a further indulgence to pay R1.3 million of the R2 million due by the end of November 2005 with R665 995 and drawings for October to

[13] Response to Further Particulars at para 5
[14] Second defendant's email dated 20 October 2005 concerning meeting of 9 September 2005
[15] Plaintiff's Response to Request for Further Particulars at para 4

be paid at the end of December 2005, which the plaintiff accepted on the basis that no other creditor would be paid on a preferential basis. Shortly thereafter the last payment of R400 000 was received from CFI and when no payments were made thereafter it would have been clear that the company was in a serious financial predicament and unable to pay its debts when due.

[39] When CFI did not pay on the basis agreed, the second defendant proffered an excuse to the plaintiff that CFI had been unable to pay the plaintiff as it had used cash allocated for payment to the plaintiff to purchase bottles from Consol as the plaintiff did not have the specified bottles available. In spite of this payment being in breach of the agreement that no creditors would be paid on a preferential basis, the plaintiff did nothing to follow up on this breach. Instead, it appeared to adopt the somewhat lenient response in the circumstances of accepting it. And when on 28 November 2005 the second defendant sent an email to the plaintiff in which it was reported that payment to Consol was '*to be put on the backburner*' and CFI '*would try*' to bring their account back to normal terms, the plaintiff again failed to respond to what illustrated that liquidity issues prevailed.

[40] Two weeks later, on 12 December 2005, the plaintiff was informed in the offer of compromise sent to creditors, with the consent of the defendants, that CFI's liabilities exceeded the value of its assets and that it was closing its doors. From this letter the plaintiff was made aware that on the face of it the representations made to it at the meeting of 9 September 2005 by the second defendant[16] were false: CFI did not own immovable property and could not sell any such property to meet its obligations. Rather, immovable properties were owned by Unit 5 & 6, and once sold it

[16] Para 13.3 of Particulars of Claim

appeared that the directors were prepared to loan R3 million to CFI. Furthermore, that the representation made by the second defendant that there were not immediate concerns about the viability of the business were false given its financial predicament. The plaintiff would have been made aware of two further issues from the letter. From 31 March 2005 to 30 November 2005 CFI's assets had decreased in value by almost 50%; and a Land Bank loan in the amount of R5 637 000 was reported without reference to any immovable property securing such loan.

[41] The contents of the compromise letter would reasonably have raised alarm bells for the plaintiff and pointed to serious shortcomings in the manner in which the business had been carried on by the defendants. The queries provided to Mr Klopper by Mr Antelme on 13 January 2006 indicate that the plaintiff carefully interrogated the compromise letter in the context of the liquidation application. What is clear is that the content of the compromise letter, the content of the queries raised and the fact of liquidation would have provided a reasonable creditor with sufficient facts to formulate a claim in terms of s 424 against the defendants. The facts permit a conclusion that the plaintiff's knowledge by 26 January 2006 was the minimum necessary to enable it to institute action within a three year period.

[42] The plaintiff's contention that the liquidator, who was assisted by forensic auditors nine months into the liquidation process could not establish whether there was reckless trading or not and that this warrants a conclusion that the plaintiff would not have been able to do so within the limited time available to it cannot be sustained. The plaintiff was by 26 January 2006 '*op hoogte van die basiese feite waarop hy 'n eis teen die verweerder kon inklee'.* It had three years within which to

institute action from such date and was not required, as was suggested for the plaintiff, to do so within a matter of weeks.

[43] It follows for these reasons that the defendants have discharged the burden of proving that the plaintiff's claim has prescribed. The special plea is upheld and there is no reason as to why costs should not follow the result.

Order

[44] In the result, an order is made in the following terms:

1. The special plea of prescription is upheld and the action is dismissed with costs.

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K M SAVAGE

Acting Judge of the High Court

Appearances:

Plaintiff:	A de Villiers and L Wade
	Instructed by Macgregor Stanford Kruger
Defendants:	R G Goodman SC
	Instructed by Edward Nathan Sonnenbergs