

# DISPUTE RESOLUTION ALERT

IN THIS  
ISSUE

## **BUSINESS RESCUE, RESTRUCTURING AND INSOLVENCY:**

### **PRESCRIPTION – THE MOTHER OF ALL EVIL**

Prescription is one word which every creditor (and attorney) dreads. Prescription extinguishes a debt and there is very little a creditor can do once that proverbial ship has sailed.

# BUSINESS RESCUE, RESTRUCTURING AND INSOLVENCY: PRESCRIPTION – THE MOTHER OF ALL EVIL

*The Prescription Act, No 68 of 1969 (Prescription Act), on a good day, has its challenges, but the situation is even more uncertain when an insolvent estate is concerned.*

*If the debt is the object of a claim filed against a company in liquidation, the relevant period of prescription would be completed before or on, or within one year after, the date on which the “relevant impediment” referred to in this section and sub-sections has ceased to exist.*



**Prescription is one word which every creditor (and attorney) dreads. Prescription extinguishes a debt and there is very little a creditor can do once that proverbial ship has sailed.**

The Prescription Act, No 68 of 1969 (Prescription Act), on a good day, has its challenges, but the situation is even more uncertain when an insolvent estate is concerned.

Rogers J, with Nuku J concurring, in the recent judgment of *Van Deventer and Another v Nedbank Ltd* 2016 (3) SA 622 (WCC) shed some very needed light on this issue.

The plaintiffs, A and E van Deventer (Sureties), signed a suretyship in favour of Nedbank on behalf of a close corporation, J & B Biltong CC (JBB). During March 2008, JBB was placed in liquidation. Nedbank issued summons against the Sureties in July 2012. The summons was duly served at the domicilium citandi et executandi of the Sureties on 13 July 2012. Nedbank obtained default judgment on 13 December 2012.

Upon becoming aware of the default judgment granted against them, the Sureties brought an application to rescind the default judgment (Rescission Application). One of the grounds upon which the Rescission Application was brought, was that the claims against the Sureties had prescribed. The Magistrate hearing the Rescission Application dismissed it.

The Sureties appealed against the dismissal of the Rescission Application.

On appeal, Rogers J considered the prescription defence raised by the Sureties in the Rescission Application. They alleged that the debts arose at the time of JBB’s liquidation in March 2008 and that summons was only issued in July 2012, more than three years later.

In its opposing papers, Nedbank alleged that it, on 14 November 2008 lodged its claims against JBB in terms of the relevant provisions of the Insolvency Act, No 24 of 1936 read with s366 of the Companies Act, No 61 of 1973 and s66(1) of the Close Corporations Act, No 69 of 1984, which claims were proved on 26 October 2009. Nedbank argued that when summons was issued the first and final liquidation and distribution account had not yet been approved by the Master and on these facts the completion of prescription against JBB, and thus against the sureties, had been delayed in terms of s13(1)(g) of the Prescription Act and was not yet complete when summons was issued.

In terms of s13(1) of the Prescription Act, if the debt is the object of a claim filed against a company in liquidation, the relevant period of prescription would be completed before or on, or within one year after, the date on which the “relevant impediment” referred to in this section and sub-sections has ceased to exist.

# BUSINESS RESCUE, RESTRUCTURING AND INSOLVENCY: PRESCRIPTION – THE MOTHER OF ALL EVIL

CONTINUED

*Rogers J confirmed that the impediment contemplated in s13(1)(g) ceases to exist, for purposes of s13(1)(i), when the filed claim is rejected or, if it is accepted, when the final liquidation and distribution account is confirmed by the Master.*

Rogers J confirmed that the impediment contemplated in s13(1)(g) ceases to exist, for purposes of s13(1)(i), when the filed claim is rejected or, if it is accepted, when the final liquidation and distribution account is confirmed by the Master.

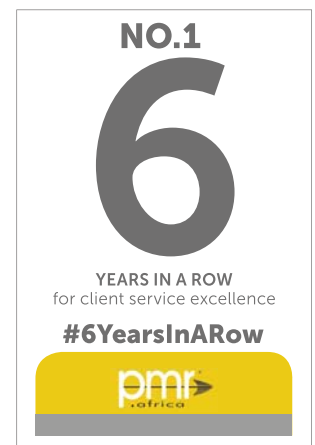
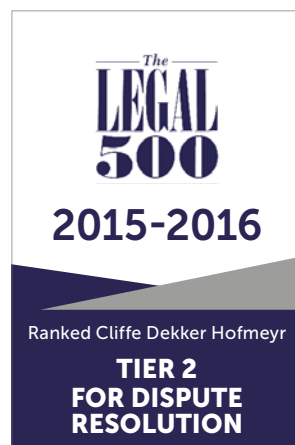
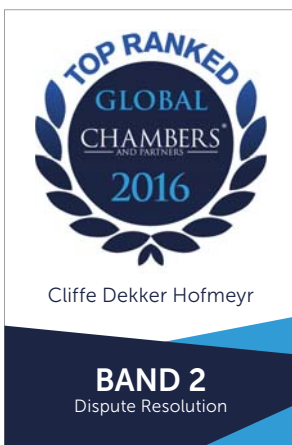
On the facts the court found that a final account had not been approved as at 5 July 2012, from which it would follow that prescription could not conceivably have been completed earlier than one year later, ie 5 July 2013. Since summons was duly served on 13 July 2012, prescription would have been interrupted prior to its completion.

The court reiterated the fact that the timeous interruption of prescription of the principal debt, or a delay in the completion of prescription of the principal debt, also interrupts or delays prescription in respect of a surety's obligation.

Although the point was not raised by the sureties the court addressed a further issue: whether, having regard to the wording of s13(1)(g), which does not refer to close corporations, this section applies to close corporations? After examining the principles applicable to interpreting statutes, Rogers J was satisfied that the legislature could not rationally have intended to exclude corporate entities such as close corporations from the scope of s13(1)(g) and that such entities are within the parliamentary intent of s13(1)(g).

This judgment provides very necessary clarification of the issue of prescription in the context of insolvent estates.

*Lucinde Rhoodie*



**CLICK HERE** to find out more about our Business Rescue, Restructuring and Insolvency team.

## OUR TEAM

For more information about our Dispute Resolution practice and services, please contact:



**Tim Fletcher**  
National Practice Head  
Director  
T +27 (0)11 562 1061  
E tim.fletcher@cdhlegal.com



**Grant Ford**  
Regional Practice Head  
Director  
T +27 (0)21 405 6111  
E grant.ford@cdhlegal.com

**Roy Barendse**  
Director  
T +27 (0)21 405 6177  
E roy.barendse@cdhlegal.com

**Eugene Bester**  
Director  
T +27 (0)11 562 1173  
E eugene.bester@cdhlegal.com

**Lionel Egypt**  
Director  
T +27 (0)21 481 6400  
E lionel.egypt@cdhlegal.com

**Jackwell Feris**  
Director  
T +27 (0)11 562 1825  
E jackwell.feris@cdhlegal.com

**Thabile Fuhrmann**  
Director  
T +27 (0)11 562 1331  
E thabile.fuhrmann@cdhlegal.com

**Anja Hofmeyr**  
Director  
T +27 (0)11 562 1129  
E anja.hofmeyr@cdhlegal.com

**Willem Janse van Rensburg**  
Director  
T +27 (0)11 562 1110  
E willem.jansevanrensburg@cdhlegal.com

**Julian Jones**  
Director  
T +27 (0)11 562 1189  
E julian.jones@cdhlegal.com

**Tobie Jordaan**  
Director  
T +27 (0)11 562 1356  
E tobie.jordaan@cdhlegal.com

**Corné Lewis**  
Director  
T +27 (0)11 562 1042  
E corne.lewis@cdhlegal.com

**Richard Marcus**  
Director  
T +27 (0)21 481 6396  
E richard.marcus@cdhlegal.com

**Burton Meyer**  
Director  
T +27 (0)11 562 1056  
E burton.meyer@cdhlegal.com

**Rishaban Moodley**  
Director  
T +27 (0)11 562 1666  
E rishaban.moodley@cdhlegal.com

**Byron O'Connor**  
Director  
T +27 (0)21 405 1140  
E byron.oconnor@cdhlegal.com

**Lucinde Rhoodie**  
Director  
T +27 (0)21 405 6080  
E lucinde.rhodie@cdhlegal.com

**Jonathan Ripley-Evans**  
Director  
T +27 (0)11 562 1051  
E jonathan.ripleyevans@cdhlegal.com

**Willie van Wyk**  
Director  
T +27 (0)11 562 1057  
E willie.vanwyk@cdhlegal.com

**Joe Whittle**  
Director  
T +27 (0)11 562 1138  
E joe.whittle@cdhlegal.com

**Jonathan Witts-Hewinson**  
Director  
T +27 (0)11 562 1146  
E witts@cdhlegal.com

**Pieter Conradie**  
Executive Consultant  
T +27 (0)11 562 1071  
E pieter.conradie@cdhlegal.com

**Nick Muller**  
Executive Consultant  
T +27 (0)21 481 6385  
E nick.muller@cdhlegal.com

**Marius Potgieter**  
Executive Consultant  
T +27 (0)11 562 1142  
E marius.potgieter@cdhlegal.com

**Nicole Amoretti**  
Professional Support Lawyer  
T +27 (0)11 562 1420  
E nicole.amoretti@cdhlegal.com

### BBBEE STATUS: LEVEL THREE CONTRIBUTOR

Cliffe Dekker Hofmeyr is very pleased to have achieved a Level 3 BBBEE verification under the new BBBEE Codes of Good Practice. Our BBBEE verification is one of several components of our transformation strategy and we continue to seek ways of improving it in a meaningful manner.

This information is published for general information purposes and is not intended to constitute legal advice. Specialist legal advice should always be sought in relation to any particular situation. Cliffe Dekker Hofmeyr will accept no responsibility for any actions taken or not taken on the basis of this publication.

### JOHANNESBURG

1 Protea Place, Sandton, Johannesburg, 2196. Private Bag X40, Benmore, 2010, South Africa. Dx 154 Randburg and Dx 42 Johannesburg.  
T +27 (0)11 562 1000 F +27 (0)11 562 1111 E jhb@cdhlegal.com

### CAPE TOWN

11 Buitengracht Street, Cape Town, 8001. PO Box 695, Cape Town, 8000, South Africa. Dx 5 Cape Town.  
T +27 (0)21 481 6300 F +27 (0)21 481 6388 E ctn@cdhlegal.com

©2016 1257/AUG

