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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.

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CLIFFE DEKKER HOFMEYR

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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.

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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.

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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.

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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.

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