

Dispute Resolution

19 May 2026

South Africa

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Dispute Resolution

Reckless members can be held personally liable under the Close Corporations Act

In *Godfrey Goliath Nicholls N.O. and Others v Magdalena Gaybba and Another* (865/2023) [2025] ZASCA 138 (25 September 2025), the Supreme Court of Appeal (SCA) was required to, among other things, determine whether claims arising from section 64 of the Close Corporation Act 69 of 1984 (Close Corporation Act) are debts susceptible to prescription in terms of section 10 of the Prescription Act 68 of 1969 (Prescription Act). This was an appeal against a decision made by the Western Cape Division of the High Court, Cape Town (High Court).

Background

On 12 April 2019, the appellants, in their capacity as trustees of the Nicholls Vrugteverspreiders Trust (Trust) served summons on the respondent, Ms Magdalena Gaybba. The particulars of claim were based on a claim GGN Vrugteverspreiders (Pty) Ltd (GGN), a business acquired by the Trust, had against the close corporation of HTI Technologies Corporation (HTI). Gaybba was the sole member of the close corporation.

It was alleged that HTI had misappropriated funds to the value of R9,882,933 from GGN and the Trust over a six-year period utilising a series of concealed payments made to several bank accounts over several years.

The case before the High Court

The Trust raised three claims against Gaybba in the High Court: that (i) as HTI had been deregistered, Gaybba was liable for its debts to the Trust as per section 26 of the Close Corporation Act; (ii) alternatively, having been knowingly part of the reckless or fraudulent conduct in carrying on HTI's business, Gaybba should be declared personally liable for HTI's debts to the Trust as provided for in section 64 of the Close Corporation Act; and (iii) further alternatively, as a co-wrongdoer, Gaybba would be liable to the Trust for the damages in delict. It is the second claim that is the focus of this Alert.

Gaybba raised the special plea of prescription in response to the claims. She alleged that, as the debts fell due on 24 February 2011, a date more than three years prior to the service of the summons upon her, the debts had prescribed.

She argued that the Trust was aware of her identity as debtor from the date the debts arose on 24 February 2011, and if it had exercised reasonable care, it could have acquired such knowledge on a date three years prior to the service of summons, this being before 14 April 2016. Since summons was only served upon her on or about 15 April 2019, the Trust's claims had prescribed.



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The High Court was tasked with the duty of determining whether section 64 of the Close Corporation Act constituted a debt. If so, the court would have to determine whether the claims had prescribed in terms of section 12(1) and (3) of the Prescription Act.

The High Court found that the Trust's claim constituted a debt, and that the debt became due and payable on 24 February 2011. As the summons were served after three years, in line with section 12(1) and (3) of the Prescription Act, the Trust's claim had prescribed and thus extinguished. The High Court accordingly upheld the special plea of prescription and dismissed all of the Trust's claims.

Section 64 claim: A debt subject to prescription?

On appeal, the SCA had to consider whether the section 64 claim of the Trust qualified as a "debt" under section 10 of the Prescription Act, and, if so, whether it had prescribed.

The Trust argued that the section 64 claim did not constitute a debt, and that the court had the power and the necessary discretion to grant the relief sought under section 64 of the Close Corporation Act based on what was just and equitable on the facts of the case.

The Trust further contended that the purpose of section 64 of the Close Corporation Act was to address gross or dishonest mismanagement of a corporation's affairs and not mere incompetence. In this vein, the Trust argued that members could not hide behind the corporate's separate legal personality to avoid liability.

Section 64 of the Close Corporation Act provides that:

"(1) If it at any time appears that any business of a corporation was or is being carried on recklessly, with gross negligence or with intent to defraud any person or for any fraudulent purpose, a court may on the application of the Master, or any creditor, member or liquidator of the corporation, declare that any person who was knowingly a party to the carrying on of the business in any such manner, shall be

personally liable for all or any of such debts or other liabilities of the corporation as the court may direct, and the court may give such further orders as it considers proper for the purpose of giving effect to the declaration and enforcing that liability.

(2) If any business of a corporation is carried on in any manner contemplated in subsection (1), every person who is knowingly a party to the carrying on of the business in any such manner, shall be guilty of an offence."

The SCA confirmed the intention of section 64 was clear in that it sought to empower the courts with the ability to make declarations to hold members of close corporations personally liable if they knowingly carried on the business of a corporation recklessly, with gross negligence, or for the purpose of committing fraud. The court could therefore exercise its discretion to lift the corporate veil and hold members personally liable.

With respect to whether a section 64 claim was a debt, the SCA considered case law that sought to define "debt" as it was not defined in the Prescription Act. Our courts have, over the years, examined what constitutes a debt under the Prescription Act, with some cases narrowly interpreting the word to mean "something that is owed or due; anything which one person is under an obligation to provide to another", while others have given it a wide definition to include "an obligation" to do something or refrain from doing something.



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However, the court found that section 64 of the Close Corporation Act was instructive in that the cause of action would only arise after the court had declared the liability, and no liability would exist before the declaration was made. As such, the right to the debt would depend on the court's judicial discretion and would only arise after the court issued the declaration. Therefore, until the court makes a declaration based on the facts of a specific case, there will be no debt, as nothing would be owing or constitute a debt.

As such, the SCA found that the High Court was correct in its finding that section 64 of the Close Corporation Act gave a creditor the right to issue summons for a declaration that a person who knowingly is a party to the carrying on of a business recklessly, with gross negligence or with intent to defraud or for any fraudulent purpose, to be personally liable for all or any such debts or other liabilities of the corporation as the court may direct. However, the SCA found that the High Court erred in its finding that the claim was subject to prescription, for the reasons outlined above.

As for whether the Trust's alternative delictual claims had prescribed, the SCA confirmed that the relevant facts concerning the Trust's claims against Gaybba only came to light after the Trust initiated insolvency proceedings and requested bank statements for HTI from Gaybba. Thus, when the Trust issued the summons, the delictual claims had not prescribed.

As a result, the SCA ordered that the appeal be upheld with costs, and that the order of the High Court be set aside and substituted to read that *"the special plea of prescription is dismissed with costs"*.

Takeaway

The key takeaway from this case is that the SCA confirmed that section 64 claims are not *"debts"* as contemplated in section 10 of the Prescription Act. Section 64 claims are intended to address and rectify unjust and inequitable conduct that prejudices the corporation, and such claims require an equitable judicial determination. It is therefore open to a court, in determining a just and equitable remedy, to take into account the history of the corporation's management and governance, and this may include the fact that certain issues that underlie the complaint may have prescribed. Thus, creditors seeking relief under this section may be able to hold those members of a company or close corporation personally liable even if it appears, on the face of it at least, that such debts may have prescribed.

This is indeed good news for creditors.

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A prudent question is one half of wisdom: The consequences of business email compromise on purchasers | Part 3

It has become common place in modern society to conclude agreements and conduct financial transactions electronically. However, cybercrime finds its breeding ground and thrives in this convenience. In part 1 of this [alert](#), titled *A prudent question is one half of wisdom: The consequences of business email compromise for banks and attorneys* we discussed the case of *Hartog v Daly and Others* [2023] JOL 57408 (GJ), in which an attorney fell victim to fraudsters who intercepted email communication between him and the sellers of immovable property and provided false banking details to the attorney. This resulted in payment of the proceeds of the sale into a fraudulent account. In [part 2](#), we focused on the case of *Edward Nathan Sonnenberg Inc v Hawarden* [2024] JOL 65083 (SCA), in which the Supreme Court of Appeal (SCA) considered the liability of a law firm in respect of a claim by an individual for pure economic loss caused by an alleged negligent omission, i.e. the failure to confirm banking details telephonically. In that case, the SCA upheld the first principle of the law of delict, that everyone has to bear the loss that they suffer.

In the recent case of *Intengo Imoto (Pty) Ltd t/a Northcliff Nissan v Zoutpansberg Motor Wholesalers CC t/a Hyundai Louis Trichardt* [2025] JOL 69171 (SCA), the SCA had to consider the question of whether a purchaser, who pays the purchase price into a bank account other than the account of the seller, due to a fraudulent substitution of account details through business email compromise, has in fact discharged their obligation in terms of the agreement.

In this case, Intengo Imoto (Pty) Ltd (Intengo) and Zoutpansberg Motor Wholesalers CC (Zoutpansberg) concluded a partly written and partly oral agreement for the sale of two Nissan NP200 vehicles by Intengo to Zoutpansberg for an amount of R290,000. The written aspects of the contract were reflected in two invoices, one for each of the vehicles, and contained the particulars of the vehicles, the price, delivery address and the banking details of the seller, Intengo. The parties also agreed that the invoices would be dispatched by Intengo to Zoutpansberg via email, whereafter the Zoutpansberg would effect payment of the purchase price by way of an electronic funds transfer into the bank account specified in the invoice. Upon receipt of payment, Zoutpansberg would take delivery of the vehicles.



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A representative of Intengo addressed email correspondence to Zoutpansberg, requesting invoicing details of Zoutpansberg. Zoutpansberg duly provided such details and Intengo issued invoices reflecting Intengo's correct banking details. However, after transmission, Intengo's email was intercepted and the banking details on the invoices were altered. Zoutpansberg proceeded to pay the full purchase price of both vehicles into the fraudster's account, believing it had made payment to Intengo. Intengo, having received the respective proofs of payment, and unaware that payment had not in fact been received, released both vehicles. Intengo later discovered that the funds had not been credited into its account and instituted proceedings for payment of the purchase price.

The issue before the court was therefore whether a debtor's payment into a fraudulent third-party account, mistakenly believed to be the creditor's account, constitutes a valid payment discharging the debtor's contractual obligation in terms of the agreement.

The matter was initially heard in the Regional Magistrates' Court, which held that Zoutpansberg was liable for the outstanding purchase price. In line with the reasoning of the SCA in the aforementioned case of *Edward Nathan Sonnenberg Inc*, the court *a quo* upheld the first principle of the law of delict, that everyone has to bear the loss that they suffer. As Zoutpansberg had failed to verify Intengo's banking details before making payment into the bank account contained in the fraudulent invoice, as Hawarden similarly had, it had to bear the loss suffered as a consequence of its negligent omission.

The High Court, however, overturned the decision of the court *a quo*, on the basis that Intengo bore the risk of any loss by choosing email, which had the potential for interception, as its mode of communication, together with an electronic funds transfer as its mode of payment.

In view of the finding of the High Court, Intengo petitioned the SCA. The SCA reasoned that payment by a debtor by way of an EFT is only effected when the funds are received in the creditor's bank account. The debtor's obligation is not discharged when payment is made into an account which the debtor believes to be the correct bank account. Payment into an unauthorised account, even where induced by fraud, does not amount to payment to the creditor.

The SCA also emphasised that where a debtor pleads payment as a defence, the onus rests on the debtor to prove actual payment to the creditor. In this regard, the court held that Zoutpansberg was unable to prove that Intengo's account had been credited, and accordingly its defence failed.

The SCA therefore did not deviate from its long-standing position that debtors are responsible for taking reasonable steps to ensure that funds are transferred to the correct bank account. The responsibility lies with the debtor to ascertain the banking details and ensure that the funds are credited to the correct bank account. By extension, purchasers should be wary of holding financial institutions liable for losses suffered due to a fraudulent substitution of banking details through business email compromise, in circumstances where such loss could have been prevented by exercising caution and confirming the correct banking details before making payments.

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