THE SUPREME COURT OF APPEAL OF SOUTH AFRICA
JUDGMENT

Not Reportable
Case No: 20278/14

In the matter between:

THE ISIBAYA FUND **APPELLANT**

and

ERNUSTUS JACOBUS VISSER **FIRST RESPONDENT**

VAUGHN COETZEE **SECOND RESPONDENT**

Neutral citation: *The Isibaya Fund v Visser & another* (20278/14) [2015] ZASCA 183 (27 November 2015)

Coram: Shongwe, Tshiqi, Majiedt, Willis and Swain JJA

Heard: **20 November 2015**

Delivered: **27 November 2015**

Summary: Civil Procedure – s 424 of the Companies Act 61 of 1973 – special plea in terms of s 11*(d)* of Prescription Act 68 of 1969 – whether the appellant is the 'State' as contemplated in s 11*(b)* of Prescription Act – court concluding that the three-year period of prescription applies and not a fifteen-year period.

ORDER

On appeal from: Gauteng Division of the High Court, Pretoria (Preller J sitting as court of first instance):

The appeal is dismissed with costs.

JUDGMENT

Shongwe JA (Tshiqi, Majiedt, Willis and Swain JJA concurring)

[1] This appeal arises from an action instituted by the appellant, The Isibaya Private Equity Fund (the Fund), a fund governed by the provisions and in accordance with the Public Investment Corporation Act 23 of 2004 (PIC Act) as amended, against the respondents. The Fund sought an order holding the respondents liable for dereliction of their fiduciary duties to the Fund under the provisions of s 424 of the Companies Act 61 of 1973 (the Companies Act), which reads as follows:

'(1) When it appears, whether it be in a 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.'

The Fund also demanded, in its particulars of claim, payment of a sum of R80 million, jointly and severally, by the respondents for losses which had been suffered by the Fund, under their watch.

[2] The respondents were representatives of various companies which entered into a joint venture with the Fund. The Fund invested in the holding company, Lesiba Healthcare Holdings (Pty) Ltd, the name of which was subsequently changed to the Carewell Group of South Africa (Pty) Ltd (the holding company). The respondents were directors of the holding company and were sought to be held *personally responsible* for *recklessly carrying on of the business* of the holding company in terms of the above provision.

[3] The respondents filed a special plea alleging that the Fund's cause of action arose more than three years before the service of the summons and had therefore prescribed in terms of s 11*(d)* of the Prescription Act 68 of 1969 (the Act). At the hearing of the matter, the court a quo made an order in terms of Uniform rule 33(4), separating the determination of the special plea from the other relief claimed and postponing the other relief *sine die*. The special plea was upheld by the court a quo. This appeal, with the leave of this court, is against that determination.

[4] It is opportune, at this stage, to briefly deal with the factual background of this matter. On 22 February 1998, the Fund concluded what was called a 'shareholders agreement', with the first and second respondents and the third defendant a quo (who did not defend the action and who is not a party to the present appeal), and other legal entities and individuals. The conclusion of the agreement was for the purpose of forming a healthcare group to provide primary healthcare and to establish a network of primary healthcare clinics providing quality healthcare services at an affordable price under the control of the holding company.

[5] The Fund invested a sum of R35 million to purchase a 25 per cent shareholding in the holding company and a further sum of R35 million as a loan

to the holding company. To protect its interests the Fund was entitled to nominate and have two directors appointed to the board. The first directors were a representative of the Fund, together with the respondents and the third defendant.

[6] The Fund alleges that by the year 2001 the holding company was dormant, did not trade actively, had lost its share capital, had no employees and was unable to repay its loan. The holding company was finally wound up on 14 January 2005 at the instance of the Fund. An inquiry in terms of s 417 read with s 418 of the Companies Act was thereafter held into the affairs of the holding company. As a result, the Fund instituted the present action in terms of s 424 of the Companies Act.

[7] Initially, the Fund challenged the order of the court a quo, which upheld the plea of prescription, on three grounds, namely that: (a) the 15-year prescriptive period contemplated in s 11*(b)* of the Act applied because the debt was one owed to the State; (b) the Fund only acquired sufficient knowledge to formulate a claim under s 424 of the Companies Act during or upon the completion of the s 417 enquiry at the earliest around May 2006, and finally (c) the Fund relied upon a written acknowledgement of debt by the first respondent which interrupted the running of prescription.

[8] The respondents, on the other hand, contend that the Fund is not the State, and therefore the relevant period for prescription is three years and not 15 years as provided for in s 11*(d)* of the Act. They contend further that the Fund was fully aware of the alleged debtors and of the facts from which the debt arose more than three years prior to the institution of the action. In respect of the acknowledgement of debt, the respondents aver that it was not an acknowledgement of liability and did not have the result of interrupting the

running of prescription. In any event the offer was also dated after the claim had already been extinguished by the running of prescription.

[9] At the hearing of this appeal, counsel for the Fund indicated that he would not pursue the second ground of appeal and later conceded the third ground of appeal likewise would not be pursued. That left the first ground of appeal as the only point this court has to decide.

[10] Counsel for the Fund contended that when interpreting a statute, context is the key in determining the meaning of the words 'debt owed to the State' in s 11*(b)* of the Act. He nevertheless conceded that the term 'State' does not have a universal meaning. This concession, in my view, is consistent with the finding of this court in *Holeni v Land and Agricultural Development Bank of South Africa* 2009 (4) SA 437 (SCA) para 11. Counsel attempted to find a distinguishing factor between *Holeni* and the present case, but, in my view, was unable to do so.

[11] In *Holeni* this court had to decide whether the debts owed by Mr Holeni to the Land and Agricultural Development Bank of South Africa (the Bank) were extinguished after the lapse of a period of 15 years or three years had passed. In essence this court had to determine whether, for purposes of s 11*(b)* of the Act, the Bank could be classified as the 'the State' to enable it to rely on the advantage provided in s 11*(b)*. Navsa JA concluded (in para 38) that:

'… [the Land and Agricultural Development Bank Act 15 of 2002] makes it clear that the bank is a separate juristic person acting in its own name and right, … distinct from, although not entirely independent of, Government.'

Of importance is that the main object of the PIC Act which governs the Fund, is to be a financial service provider in terms of the Financial Advisory and Intermediary Services Act 37 of 2000 (s 4). It is a juristic person, and is an

institution falling outside the public service. In this context the Fund is controlled by the board appointed by the Minister responsible for finance. The board may establish such committees, consisting of directors, as it considers necessary (s 7 PIC Act). The board controls the business of the corporation (s 8 PIC Act), it may obtain authorisation as a financial services provider (s 9 PIC Act), it may (as it did in this case) invest a deposit in the Fund (s 10 PIC Act). As in *Holeni* therefore, the Fund cannot qualify as the State for the purposes of s 11*(b)* of the Act.

[12] The appeal accordingly fails. I make the following order:

The appeal is dismissed with costs.

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J B Z SHONGWE
JUDGE OF APPEAL

Appearances

For the Appellant:	N Cassim SC with him A Farber Instructed by: Nkosi Sabelo Incorporated, Bryanston; Matsepe Inc, Bloemfontein.
For the First and Second Respondents:	W F Pienaar (S D Wagner SC having drafted the Heads Instructed by: Coetzer & Partners, Pretoria; Honey Attorneys, Bloemfontein.