

**IN THE HIGH COURT OF SOUTH AFRICA
EASTERN CAPE DIVISION, MAKHANDA**

CASE NO: 624/2020

In the matter between:

LONG BEACH OWNERS ASSOCIATION

Plaintiff

and

QUINTON MILES N.O.

Defendant

**(in his capacity as Trustee for the
time-being of the Haven Trust (I[...]))**

JUDGMENT: TRIAL

LOWE J:

INTRODUCTION

1. In this matter I shall refer to the plaintiff as plaintiff or the Association and the defendant as such for convenience.

2. In March 2020 plaintiff brought an action against defendant claiming payment of the sum of R600 216,15 together with interest thereon. Put simply, the cause of action is one in which plaintiff alleges that as a home owners' association and having regard to its resolutions and constitution, it legitimately incurred legal expenses *inter alia* as “*extraordinary expenses*” in pursuing litigation against the DEDEAT and the DAFF, including the Minister of the DAFF, on behalf of plaintiff, the home owners' association incurring legal expenditure in an amount of R4 201 513,03. Plaintiff

alleges that either on the basis of its first claim A and its alternative claim B defendant in his capacity as trustee for the time being of the Haven Trust N.O., is liable to plaintiff in the sum of R600 216,15 being its share, as a member of the plaintiff, of the said legal costs duly and legitimately incurred in one or other of the manners set out in the particulars of claim.

3. In response, at least initially, the defendant denied all liability herefore on a number of different bases relying inter alia on clause 5 of the Home Owners' Constitution of the plaintiff.

4. Later on, and after the matter had in fact been set down for trial and on 1 December 2022 defendant amended its plea to raise a special plea of prescription.

5. That plea of prescription followed its discovery that the debt upon which plaintiff sued had at least allegedly arisen on 25 April 2016, of which defendant became aware, so it is alleged much later, at least some time between 2 July 2021 and the discovery of the judgment which defendant (in argument) says it became aware of much later and closer to the date of its filing of its special plea upon discovery of the judgment relevant.

6. Unfortunately, the application to separate was launched very late on 6 March 2023, just before trial, the parties having been unable to agree on that separation.

7. At the commencement of the trial it became apparent that plaintiff alleged that the special plea, if successful, would be dispositive of all the issues between the parties as it would defeat its claim and that in this context it should be heard first and separately. The defendant resisted this separation application.

8. I heard argument on the separation application at the commencement of the trial and in a full ex tempore judgment concluded that a good basis had been set out for separation and that the application must succeed ordering accordingly that *“(b) The issues raised in the defendant’s special plea relevant to the prescription of plaintiff’s claim, are separated from the remaining issues between the parties, to be heard separately and first, merits and quantum to stand over for later determination if relevant.”*

9. I ordered that the costs of this separation application were to be costs in the cause.

10. Having so separated the issues the trial proceeded.

11. It should be said that in the separation application argument both applicant and respondent set out that no evidence would be required, but at the commencement of the trial on the separated issue, defendant indicated that it would in fact lead a witness.

SEPARATED TRIAL

12. To understand the issues to be decided I should again refer briefly to the pleadings.

13. I have already set out the cause of action above in sufficient detail, it being the special plea to which I must give attention.

14. A further Rule 37 conference, held at my insistence, on 7 March 2023 set out the issues to be determined in the entire trial.

15. It was the first issue (one of eight) which was required to be addressed in the separated trial, being *“whether or not the plaintiff’s claim has prescribed”*. The parties then agreed in the minute that the prescription issue could be argued on the pleadings as they stand *“... with the application in the Gauteng High Court under case number 624/2020 having commenced in April 2014 ... and judgment was handed down on 26 April 2016 ... and that the present action commenced on 5 March 2020, and the defendant was during this period and still remains a member of the plaintiff.”*

16. It was apparent from the minute that plaintiff would argue that the provisions of section 13 of the Prescription Act 68 of 1969 (The Prescription Act) apply, and interrupted prescription as the defendant was at all relevant times a member of the plaintiff, while defendant would argue that the provisions of section 10, as read with 11 and 12 of the Prescription Act apply such that plaintiff’s claim has prescribed.

17. On the special plea itself defendant pleaded that:

17.1 Plaintiff's claim is premised upon a claim or obligation by defendant arising from a resolution purportedly taken by the members of plaintiff during December 2014 to pay a proportionate share of plaintiff's expenditure upon the legal costs already referred to above incurred in the Gauteng High court under case number 624/2020;

17.2 It is pleaded further that the plaintiff's application in the Gauteng High Court was determined by a judgment of that court delivered on 25 April 2016;

17.3 Accordingly, the debt claimed from defendant was due, in terms of section 12 of the Prescription Act, at the latest, on 25 April 2016 and plaintiff's claim had prescribed in terms of section 10 as read with section 11 of the Prescription Act on 26 April 2019;

17.4 Plaintiff's action against defendant having been issued on 5 March 2020 had by then prescribed, this accordingly unenforceable.

18. There was no replication, and effectively the relevant factual basis underlying the special plea was common cause, but not the consequential result relevant to prescription.

19. The evidence of Mr. Quinton Miles was led shortly, he being cited in his capacity as a trustee for the time being of the defendant trust (the Haven Trust).

20. I will only refer to his evidence briefly as, in my view, nor was it contended otherwise, that at the end of the day it took the agreed facts and the issues to be decided no further.

21. Mr. Miles is indeed a trustee of the Haven Trust which owns two erven in the Long Beach development of which plaintiff is purportedly the home owners' association. In short he contended that he at no time ever received any invitation to any meeting of the home owners' association nor had he ever attended such meeting. He referred to the judgment of Kollapen J in the Gauteng litigation, being a review of

two decisions taken by the MEC: Economic Development Environmental Affairs and Tourism, this being to uphold an appeal against the granting of an application for environmental approval granted by the Department of Economic Development, Environmental Affairs and Tourism and in so doing effectively denied the applicant an environmental authorisation relevant to the home owners' association and erven. The second decision related to the refusal to grant two forestry licences. Mr. Miles said he did not know of this in any way at all. He said he did not know of the appeal against the judgment of Kollapen J, in the Supreme Court of Appeal in any way at all (this relating to the forestry licences).

22. He said he had no knowledge of a resolution purportedly taken by plaintiff on 16 December 2014 relevant to this litigation, the members of the association again purportedly authorising the bringing thereof. He said that the Trust acquired his erven directly from a certain Mr. Crawford who had since passed away. He said that he did not even know who the purported chairman of the plaintiff's association was then or at any time, he having met that purported chair, or seen him, on the day of the trial. That chair was said to be Rick Tudhope, who was not himself an owner of any erf in the development. In my view the cross-examination which was limited, took the matter relevant to prescription no further at all.

THE PRESCRIPTION ISSUE

23. Generally, chapter III of the Prescription Act provides for the extinction of debt by prescription. Obviously the effect of prescription is to extinguish the debt after the lapse of the prescriptive period applied to that debt by the Act. The claim in this matter is indeed a "*debt*" as such relevant to the Prescription Act.

24. The litigant pleading prescription and alleging same has the onus of proving the date of the inception of the period of prescription¹. For the purposes of this matter prescription runs as soon as the debt is due, in terms of section 12(1) of the Prescription Act². This too is not contentious in this matter.

¹ Lancelot Stellenbosch Mountain Retreat (Pty) Ltd v Gore NO and Others [2015] ZASCA 37.

² Standard Bank of South Africa Ltd v Miracle Mile Investments 67 (Pty) Ltd and Another 2017 (1) SA 185 (SCA).

25. For this matter the debt prescribed after three years in terms of the Act.

26. The real issue is whether or not there was a delay of completion of prescription, the onus on the creditor (plaintiff) to allege and prove that the completion of prescription was delayed under the circumstances set out in section 13 of the Prescription Act³.

27. Section 13 of the Prescription Act, relevant to this matter, as to its relevant parts provides that:

“13(1) if –

- (a) ...
- (b) ...
- (c) ...
- (d) ...
- (e) *The creditor is a juristic person and the debtor is a member of the governing body of such juristic person; ...*
- (f) ...
- (g) ...
- (h) ...
- (i) ...

The period of prescription shall not be completed before a year has elapsed after the day referred to in paragraph (i).

28. The only issue relevant to the argument and decision in this matter is section 13(1)(e).

29. The claim is based upon the plaintiff's constitution which provides in summary that the plaintiff may raise levies to meet expenses associated with the maintenance, repair, improvement and keeping in proper order and condition of the property, and for the payment of rates and charges in respect of the common areas and services

³ Regering van die RSA v SA Eagle Versekeringsmaatskappy Bpk 1985 (2) SA 42 (O); Malcolm v Premier, Western Cape Government NO 2014 (3) SA 177 (SCA); Silhouette Investments Ltd v Virgin Hotels Group Ltd 2009 (4) SA 617 (SCA).

rendered to it, and for the payment of expenses necessarily or reasonably incurred in connection with the management of the plaintiff.

30. It provides in addition that the plaintiff may require members to pay an additional levy to cover “*extraordinary expenses*” necessarily incurred.

31. The constitution provides that the plaintiff is “*its own legal persona, quite separate and distinct from its members*”. It is entitled to institute action for all and any of the obligations and duties imposed on the members in terms of the constitution. For the purposes of this proceeding it must be assumed that the debt claimed is one in terms of the constitution, its prescription being the issue relevant.

32. The claim refers to section 29(2)(b) of the Land Use Planning Ordinance 15 of 1985 (“LUPO”). Section 29(2)(b) providing that plaintiff shall have a constitution for various purposes, and section 29(2)(c) that the owners of land units arising from the sub-division of property shall be members of the home owners’ association and shall be “*jointly liable for the plaintiff’s expenditure*”.

33. The haven trust as I have said is the owner of two subdivided portions of the property relevant and it is alleged that in terms of LUPO that defendant is a member of plaintiff and jointly liable for the plaintiff’s expenditure accordingly. It is further alleged that by the constitution and resolution, previously referred, the litigation commenced and was approved by the members they becoming jointly liable via LUPO for plaintiff’s expenditure in a proportionate share. The alternative claim relies simply on the resolution alleged.

34. As per the dates, and from the further minute already referred to above it is common cause that:

34.1 The Gauteng litigation commenced in April 2014;

34.2 The judgment by Kollapen J was handed down on 26 April 2016 – the costs relevant thereto being the origin of the claim;

34.3 The present action commenced on 5 March 2020;

34.4 Defendant was a member of plaintiff at all times relevant;

34.5 Effectively that prescription commenced to run on 25 April 2016 (which is common cause);

34.6 That unless delayed, in terms of section 13 of the Prescription Act the claim would long have expired and become prescribed by 5 March 2020 when the claim was issued.

35. It is not disputed that plaintiff's claim is clearly a debt as contemplated by section 12 of the Prescription Act⁴.

36. It's prescription period is three years.

37. It is thus that the parties accept that the claim has prescribed as a matter of law in terms of sections 10 and 11 of the Prescription Act, but for the delay argument.

38. It comes down then to whether, for the purposes of section 13(1)(e) of the Prescription Act, plaintiff is a juristic person as contemplated in the Act and the defendant a member of its governing body.

IS THE PLAINTIFF A JURISTIC PERSON CONTEMPLATED IN SECTION 13(1)(E) OF THE PRESCRIPTION ACT?

39. In interpreting the Prescription Act, it is not disputed that the approach is as set out below.

40. It must be emphasised, and always remembered, that in the current day, interpretation of a document, including a statute, requires careful regard to context. When a court determines the nature of the party's rights and obligations in a contract it is involved in an exercise of contractual interpretation. There is now a settled

⁴ **Duet and Magnum Financial Services (in liquidation) v Koster** 2010 (4) SA 499.

approach to the interpretation of contracts, documents and indeed statutes.⁵ In that matter the following was said:

“[18] Over the last century there have been significant developments in the law relating to the interpretation of documents, both in this country and in others that follow similar rules to our own. It is unnecessary to add unduly to the burden of annotations by trawling through the case law on the construction of documents in order to trace those developments. The relevant authorities are collected and summarised in *Bastian Financial Services (Pty) Ltd v General Hendrik Schoeman Primary School*. The present state of the law can be expressed as follows. Interpretation is the process of attributing meaning to the words used in a document, be it legislation, some other statutory instrument, or contract, having regard to the context provided by reading the particular provision or provisions in the light of the document as a whole and the circumstances attendant upon its coming into existence. Whatever the nature of the document, consideration must be given to the language used in the light of the ordinary rules of grammar and syntax; the context in which the provision appears; the apparent purpose to which it is directed and the material known to those responsible for its production. Where more than one meaning is possible each possibility must be weighed in the light of all these factors.¹⁵ The process is objective not subjective. A sensible meaning is to be preferred to one that leads to insensible or unbusinesslike results or undermines the apparent purpose of the document. Judges must be alert to, and guard against, the temptation to substitute what they regard as reasonable, sensible or businesslike for the words actually used. To do so in regard to a statute or statutory instrument is to cross the divide between interpretation and legislation. In a contractual context it is to make a contract for the parties other than the one they in fact made. The ‘inevitable point of departure is the language of the provision itself’,¹⁶ read in context and having regard to the purpose of the provision and the background to the preparation and production of the document.”

⁵ **Natal Joint Municipal Pension Fund v Endumeni Municipality** 2012 (4) SA 593 (SCA).

41. As was emphasised this approach to interpretation requires that from the outset one considers the context and language together, with neither predominating over the other.

42. In **Chisuse v Director - General Director of Home Affairs**⁶ (at paragraph 52) the Constitutional Court speaking in the context of statutory interpretation held that this “*now settled*” approach to interpretation, is a “*unitary*” exercise. This means said the court in **University of Johannesburg v Auckland Park Theological Seminary and another**⁷, that interpretation is to be approached holistically: simultaneously considering the text, context and purpose. To make it clear, it has been explicitly pointed out in cases subsequent to Endumeni that context and purpose must be taken into account as a matter of course whether or not the words used in the contract (or statute) are ambiguous.⁸

43. In **Cool Ideas 1186 CC v Hubbard**⁹ the court in dealing with the interpretation of statutes said the following:

“[28] A fundamental tenet of statutory interpretation is that the words in a statute must be given their ordinary grammatical meaning, unless to do so would result in an absurdity. There are three important interrelated riders to this general principle, namely:

- (a) that statutory provisions should always be interpreted purposively;
- (b) the relevant statutory provision must be properly contextualised; and
- (c) all statutes must be construed consistently with the Constitution, that is, where reasonably possible, legislative provisions ought to be interpreted to preserve their constitutional validity. This proviso to the general principle is closely related to the purposive approach referred to in (a).”

⁶ 2020 (6) SA 14 (CC).

⁷ 2021 ZACC 13 at [65].

⁸ **Novartis SA (Pty) Ltd v Maphil Trading (Pty) Ltd** 2016 (1) SA 518 (SCA).

⁹ 2014 (4) SA 474 (CC).

44. In considering section 13(1)(e) it is relevant to note that as the Prescription Act was promulgated during 1969, at that time, the 1926 Companies Act was in operation. Subsequently the 1973 Companies Act was promulgated neither giving a definition of a “juristic person”.

45. The new Companies Act of 2008 does have a definition of “juristic person” as follows:

“Juristic person” includes –

(a) A foreign company; and

(b) A Trust, irrespective of whether or not it was established within or outside the Republic.”

46. The Close Corporation Act 69 of 1984 simply defines a close corporation as a juristic person on its registration.

47. Defendant’s counsel, Mr. De la Harpe, argued that:

“What is relevant, it is submitted, is that no statutory provision was in effect when the prescription was promulgated which recognised or provided that a home owners’ association or any association of its nature, was a juristic person.”

48. This is certainly correct, or at least was not contested by plaintiff.

49. As was pointed out in argument plaintiff was established purportedly in terms of section 29 of LUPO, which, as I have already set out above, provides that:

“29(2) A home owners’ association coming into being by virtue of the provisions of subsection (1) –

(a) Shall be a body corporate;

(b) ...”

50. It goes on to provide at section 29(2)(c) that the home owners’ association shall have as its members the owners of the land units involved.

51. LUPO does not define the term “body corporate”.

52. Counsel for plaintiff, Mr. Naidoo, did not suggest for a moment that the use of the words “*shall be a body corporate*” in LUPO were such as to be a deeming provision establishing thereby the existence of a body corporate in respect of a home owners’ association regardless of its origin or form factually present.

53. In this matter factually, the plaintiff home owners’ association is most certainly not on the face of it, or on what is before me, in any form, an incorporated association, but simply one arising from an agreement between its members having a separate legal personality with perpetual succession, a “*universitas*” the ability to sue and be sued in its own name with the purpose of furthering the common interest of its members¹⁰.

54. The question to be answered is whether the home owners’ association is somehow however a “*juristic person*” as envisaged in section 13 of the Prescription Act.

55. Mr. Naidoo for plaintiff, advanced the argument that section 13(1)(e) of the Prescription Act was indeed relevant and applicable referring to both LUPO and the Sectional Titles Act.

56. He argued in essence that read with LUPO the provisions of clause 7 of the plaintiff’s constitution provided clearly that it was a body corporate.

57. Clause 7 provides that:

¹⁰ Nelson Mandela Metropolitan Municipality v Greyvenouw cc 2004 (2) SA 81 (SECLD) [58 – 60].

“7 LEGAL PERSONA AND INSTITUTION OF ACTION

It is recorded that this Association constitutes its own legal persona, quite separate and distinct from the members who constitute the Association. The Association shall be entitled to Institute action out of any Court, having jurisdiction for all or any of the obligations and duties imposed upon members in terms thereof.”

58. On a plain reading of this in context, it simply cannot, and does not, have the effect contended for by Mr. Naidoo. It, at the most, creates a *universitas*.

59. Mr. Naidoo conceded that this was a novel point for which there was no prior authority.

60. He argued that the purpose of section 13(1)(e) was to prevent the abuse by members of a juristic person in claiming prescription of a debt in the context of section 13(1)(e) of the Prescription Act. He contended that the same principle applied to home owners’ associations.

61. Again, I am unable to agree herewith either as to the premise of the argument, let alone the authorities upon which Mr. Naidoo relied to establish the basis thereof as to this matter.

62. In short, section 13 provides for eight instances in which the completion of extinctive prescription is delayed referred to as “*impediments*” citing various legal or practical “*hindrance*” which makes it difficult for a creditor to institute proceedings for the enforcement of its claim against the debtor¹¹.

63. In **Leipzig v Bankorp Ltd**¹² the then Appellate Division described the section as follows:

“This inept section is by no means clear and presents obvious problems of interpretation.”

¹¹ Extinctive Prescription 2nd Ed Loubser Juta 198.

¹² 1994 (2) SA 128 (A) at 133 F.

64. A detailed interpretation however of section 13 was set out by the Supreme Court of Appeal in **ABP 4X4 Motor dealers (Pty) Ltd v Igi Insurance Company Ltd**¹³ bringing clarity. At paragraph [8] “...it is a provision which provides for neither interruption nor the suspension of the running of prescription in the normally understood sense. Yet, traces of the elements of interruption and suspension are not entirely absent from it. They are present to a greater or lesser degree as will be become apparent when some concrete examples of its field of application are considered.”

65. There is no direct authority on the point in question, either way, but it seems to me that a proper interpretation of the relevant subsection presents no difficulty, being simply whether in context, and as described above, properly interpreted plaintiff is a juristic person as envisaged in the Act.

66. It seems to me having carefully considered the arguments of both counsel, that fundamentally plaintiff in this matter is not a juristic person as contemplated in the Prescription Act, but a *universitas* falling outside the provisions thereof, this unaffected by section 29(2)(a) of LUPO. This conclusion is dispositive of the issue.

67. Quite apart from the above, another issue relates to the question as to what the association’s governing body is.

68. Mr. de la Harpe argued with some justification that it had not been established by plaintiff, nor was it apparent from the documents or the constitution that the resolution was by the actual governing body of plaintiff. He argued that all that was indicated from the documentation before me was that the purported resolution taken by the members of the Long Beach Home Owners’ Association on 16 December 2014 was that Mr. Tadhope (referred to in paragraph 1.2 thereof as its chairperson) was not a member of the association and not in any way that the so-called resolution was one taken by the association itself, that is by its governing body.

¹³ 1999 (3) SA 924 (SCA) at 930D.

69. The point made was that there is no evidence, documentary or otherwise, before me indicating that the actual governing body, the plaintiff home owners' association, took the decision or resolution referred to, Mr. Tadhope, not being a member by virtue of being an erf owner, and the purported decision not established as that of the home owners' association necessarily at all.

70. Indeed, if I am incorrect on the issue as to whether the home owners' association is a juristic person, there is considerable merit in this alternative argument.

CONCLUSION

71. In the result, on what I have said above, it is clear, on a proper interpretation, that plaintiff in this matter, does not fall within the provisions of section 13(1)(e) of the Prescription Act, and prescription was not delayed accordingly.

72. In the result, the special plea falls to be upheld, plaintiff's claim having prescribed on the common cause dates.

73. As to costs, the parties were not in dispute that should the special plea succeed defendant should have its costs. Those of the separation application are costs in the cause.

ORDER

74. The following order shall issue:

1. Defendant's special plea, as to prescription of the debt claimed, succeeds.
2. Plaintiff's claim is dismissed with costs, including the costs of the separation application.

M.J. LOWE
JUDGE OF THE HIGH COURT

Appearing on behalf of Plaintiff:
Instructed by

Mr. Naidoo,
Neville Borman and Botha Attorneys, Mr.
Powers.

Appearing on behalf of Defendant:
Instructed by

Mr. De la Harpe S.C.,
Whitesides Attorneys, Mr. Barrow.

Date heard: 8 – 9 March 2023.
Date delivered: 30 May 2023.