THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Reportable
Case No.: 20231/2014

In the matter between:

OFF-BEAT HOLIDAY CLUB	**FIRST APPELLANT**
FLEXI HOLIDAY CLUB	**SECOND APPELLANT**
and	
SANBONANI HOLIDAY SPA SHARE BLOCK LIMITED	**FIRST RESPONDENT**
SANBONANI DEVELOPMENT (PTY) LIMITED	**SECOND RESPONDENT**
HANS MICHAEL HARRI	**THIRD RESPONDENT**
HANS MICHAEL HARRI NO	**FOURTH RESPONDENT**
HELEEN DUPORETHA HARRI NO	**FIFTH RESPONDENT**
VINCENT CHRISTOPHER CALACA NO	**SIXTH RESPONDENT**
SANBONANI HOTEL MANAGEMENT (PTY) LTD	**SEVENTH RESPONDENT**
THE REGISTRAR OF COMPANIES	**EIGHTH RESPONDENT**

Neutral citation: *Off-Beat Holiday Club v Sanbonani Holiday Spa* (20231/2014) [2016] ZASCA 62 (25 April 2016)

Coram: Maya ADP and Cachalia, Leach, Tshiqi and Zondi JJA

Heard: 27 August 2015

Delivered: 25 April 2016

Summary: Prescription **–** extinctive prescription – whether claims brought by minority shareholders under ss 252 and 266 of the Companies Act 61 of 1973 constitute 'debts' as envisaged in s 10 of the Prescription Act 68 of 1969 and are susceptible to prescription – whether s 13(1)*(e)* of the Prescription Act insulates a claim brought under s 266 of the Companies Act from prescription.

ORDER

On appeal from: North Gauteng High Court, Pretoria (Bertelsmann J sitting as court of first instance):

1 The applicants' condonation application is granted. They are ordered to pay the wasted costs including the costs of two counsel.

2 The application for leave to appeal is granted and the appeal is upheld, with costs including those consequent upon the employment of two counsel, to the extent that the order of the court a quo is amended by the addition to paragraphs 3 and 4 of sub-paragraph (iii) which, for purposes of paragraph 3, reads:

'the fact that the third respondent has wrongfully allowed or caused the first respondent to unjustifiably pay VAT refunds in the sums of R2 169 897.04 and R120 309.13 to the second respondent.'

JUDGMENT

Maya ADP (Cachalia, Tshiqi and Zondi JJA concurring):

[1] This application for leave to appeal, brought against the judgment of the North Gauteng High Court, Pretoria (Bertelsmann J), was referred for oral argument by this court.[1] It follows a series of legal skirmishes between the applicants and the first to seventh (and mainly the second and third) respondents in various fora[2] and is itself mired in procedural difficulties as described below. The basis of the disputes is essentially a complaint by the applicants, who are minority shareholders in the first respondent, that the majority shareholders (the second to seventh respondents) acted in various ways to the detriment of the first respondent which the third respondent allegedly 'treats like his own private fiefdom'.

[2] The applicants (the clubs) are associations not for gain and timesharing clubs.[3] The second applicant, Flexi Holiday Club (Flexi), carries on business as a timeshare points club and forms part of Club Leisure Group (Pty) Ltd.[4] The

1 In terms of s 21(3)*(c)*(ii) of the Supreme Court Act 59 of 1959.
2 Interdict proceedings were initially instituted in the Transvaal Provincial Division and were followed by arbitration proceedings which the parties ultimately settled in 2000.
3 The clubs' business is to sell points to consumers who become members of the clubs. The members are entitled to use the points in exchange for holidays at locations secured by the clubs and pay annual club membership fees and levies for the maintenance and services of the properties available to the clubs.
4 The Club Leisure Group began operating in 1990 with the formation of Flexi. It is a massive entity with 16 clubs of which Flexi is the biggest, a host of property, sales, service and management companies and a

property portfolio for the leisure and business accommodation clubs with an inventory of holiday destinations running into billions of rand in over 150 resorts. It shares half of its 200 000 members with Flexi and earns its income from the sale of points and management fees.

first respondent, Sanbonani Holiday Spa Share Block Ltd (Shareblock), carries on the business of a timeshare and share block resort and owns the land on which the resort is situated (the land).[5] The second respondent, Sanbonani Development (Pty) Ltd (Development), is a timeshare and share block resort and property owner and has been responsible for the development of the resort and the timeshare scheme. The third respondent, Mr Hans Michael Harri, is a property developer and a director of Shareblock and Development since their inception in 1987, save for a short spell between February 1992 and December 1993. He is also sued in his nominal capacity as trustee of the Duleda Family Trust (the trust) together with his co-trustees, the fifth and sixth respondents, Ms Heleen Duporetha Harri and Mr Vincent Christopher Calaca. The seventh respondent, Sanbonani Hotel Management (Pty) Ltd (Management),[6] is an hotelier which conducts a hotel and restaurant business on the resort under a lease it concluded with the trust in 1999. The Registrar of Companies was cited in his official capacity and no relief was sought against him.

[3] The clubs' respective principals are Messrs Stewart John Lamont and Anthony Nicholas Ridl who were founding members of the Club Leisure Group.[7] At all material times, Lamont was Shareblock's director and a director of the clubs. Ridl was a serving director of Flexi, Shareblock and Development. As mentioned above, the clubs are shareholders in Shareblock and own 29,14 per cent of its share capital. The trust and Development own substantial shares in Shareblock in respect of the hotel and central complex

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5 The resort is situated on immovable property, Portion 5, Perry's Farm, Number 171 Kruger Road, Hazyview at the confluence of the Sand and Sabie Rivers in the district of White River, Mpumalanga.
6 Previously known as Jade Hotel Management CC and converted into a limited company during 2000.
7 Lamont and Ridl each own a trust, the Lamont Trust and the Ridl Trust, which respectively own 50 per cent of the shares in the Club Leisure Group's holding company and sole owner, Club Leisure Holdings (Pty) Ltd.

forming part of the resort and other share blocks. Incidentally, Lamont is also the managing member of Resort Administration Services CC (RAS), Shareblock's company secretary and managing agent since 1994, which did the allocation of the shares held by Development and the trust in June 2000. Harri and his three daughters own approximately 80 per cent (Harri 5 per cent, his daughters 75 per cent) and Mr JNJ Koos Van Rensburg, the original owner of the land and Shareblock's founding director, 20 per cent of the shares in Development.

[4] A narrative of the events leading to the disputes is necessary to place the issues in their proper context. In the mid-1980s, Harri and Van Rensburg concluded a partnership with a view to develop the land,[8] which is situated in a prime tourist and holiday location near Hazyview and the Kruger National Park. Consequently, in September 1987, Shareblock was registered and incorporated as a share block company as defined in the Share Blocks Control Act 59 of 1980 (the Shareblocks Act).[9] It assumed ownership of the land, with Harri and Van Rensburg as its directors and shareholders, to establish 'a composite scheme with some accommodation being subject to permanent occupancy rights and other accommodation being used for time-sharing'. Thus, its articles of association provided for different categories of share blocks to which different rights attached: Shareblock would own the land and a share block developer,[10] Development, which was formed at this stage,[11] would develop the hotel facility (which Development and its

8 Then valued at R500 000.
9 Defined in s 1 of the Shareblocks Act as a company the activities of which comprise or include the operation of a share block scheme.
10 Defined in s 1 of the Shareblocks Act as 'any person by whom, on whose behalf or for whose benefit more than 50 per cent of the shares of a share block company are held or controlled and, where two or more persons, by whom, on whose behalf or for whose benefit more than 50 per cent of the shares of such a company are jointly held or controlled, act in concert in relation to or are jointly connected with the business of the company, each of such persons'.
11 Initially as a close corporation but later changed, in 1990, to a company with limited liability.

successors would own) and timeshare chalets which would be owned through timeshare owners on the basis of their shareholding in Shareblock. Accordingly, Development acquired more than 50 per cent of Shareblock's issued share capital upon its formation. It immediately commenced developing the land and constructed, in phases, 76 chalets operated on a timeshare basis; ten private chalets owned by itself, Lamont and Ridl and Harri; a central complex and common facilities[12] including the hotel, which would be available for use to timeshare owners of the chalets and the public, sports grounds and staff accommodation.

[5] Following notice of a special general meeting, given in August 1988 and the meeting subsequently held in September 1988, to consider the amendment of Shareblock's article among other resolutions,[13] Shareblock's articles were indeed amended. The original articles were replaced by a new set of articles (the current articles) on the ground that they did not adequately cater for the nature of the intended development. [14] Only 47 sales of share blocks conferring timeshare interests had been confirmed when notice was given of the intention to amend the original articles.[15] The holders of the shares did not object to the special resolution adopting the current articles which, thereafter, governed their rights. The clubs did not own shares in Shareblock at the time and appear to have acquired interest in Shareblock in 1991 when Ridl was appointed as one of its directors.

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12 Defined in the articles as 'the new Club House, existing facilities and laundry, new staff village referred to in Annexure A and any further improvements effected by [Shareblock] which are for the common benefit of all Holders'.

13 In addition to the resolution to substitute the original articles on that meeting's agenda were resolutions to increase Shareblock's share capital and replace the use agreement with a new one.

14 The articles were amended again in 2003 at a general meeting of Shareblock's shareholders but those amendments are not relevant to these proceedings.The current articles have, therefore, effectively remained unchanged since their registration in 1988.

15 These sales amounted to 1 410 shares ie 47 three-bedroom units.

[6] The current articles bore certain differences from the original articles which gave Development greater control over Shareblock.[16] For example, the definition of 'common facilities' was amplified. Previously it referred to 'the new Club House, existing facilities and laundry, new staff village . . . and any further improvements effected by [Shareblock] which are for the common benefit of all Holders'. The designation was now defined as meaning any area of the land 'on which improvements of a permanent nature may be erected by the [Development] which are only for the common benefit of all holders *and the public* in terms of and subject to the Management Regulations and which are situate or to be situate on the land marked . . . on Annexure "B"'. It would, therefore, refer to areas of the development in respect of which timeshare holders would have no particular rights above those of the public by virtue of their timesharing interest.

[7] Shareblock's authorised share capital was increased from 70 768 ordinary shares to 168 528 ordinary shares,[17] 145 600 of which Development was now granted the right to allot in terms of its articles without dividing them among the various sites on the resort. Towards that end, article 3.5 of the current articles conferred upon Development such interest as it may from time to time decide, 'including a permanent continuous right of use for permanent residential or commercial purposes', in the shares relating to a proposed staff area and sections of the land upon which timesharing units were to be built in accordance with an annexed diagram. This article further

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16 The main reason for the amendment was explained in Harri's answering affidavit as having been to provide for (a) a greater definition of Development's rights to extend the scheme in more detail to make it more flexible, (b) the creation of Shareblock's holders' rights of use for purchaser in perpetuity to make the scheme more marketable, and (c) the differentiation between categories of share blocks to accommodate the fact that Development was to finance the hotel and central complex construction on the basis that the commercial benefits flowing therefrom as compensation to it and its successor would not be for the particular benefit of timeshare shareblock holders.

17 Article 3.1.

gave Development the discretion

to consolidate the sites and to deal with individual sites or consolidated sites as the articles may provide and conferred upon it the rights to sub-divide a particular share block into as many shares as it decided in order to confer upon the holders of such sub-divided shares a timesharing interest in the relevant site or sites. Development was also given 'a permanent continuous right of use of the common facilities subject to the rights of other holders in terms of the Management Regulations until [Shareblock] is liquidated or the said Share Blocks are cancelled'.[18] No levy would be payable by Development as holder of the shareblock which confers the right of use in respect of the common facilities and the common property.[19] And these facilities would be made available to timeshare purchasers and the public at such charges as Development 'may from time to time determine'.

[8] The development of the resort took place from late 1987 until 1994. Its value was substantial. According to Harri, it was reflected in Shareblock's balance sheets for the year ended in 2003 at its historical cost, which was funded by unsecured loans to Shareblock by Development, in the sum of R40 608 000. (This alleged loan constituted a bone of contention between

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18 In Article 3.4. Management Regulations are defined in clause 1 of both sets of articles as 'such regulations, directions, procedures, rules or the like, made by the directors of the company, or the Managing Agent in terms of the Use Agreement referred to in Articles 3.2 and 3.3'.

19 Article 28.11. Section 13 of the Shareblocks Act provides that:

> (1) A shareblock company shall in respect of the share block scheme it operates establish and maintain a levy fund sufficient, in the opinion of its directors, for the repair, upkeep, control, management and administration of the company and of the immovable property in respect of which it operates the share block scheme, for the payment of rates and taxes and other local authority charges on the said immovable property, any charges for the supply of electric current, gas, water, fuel and sanitary and any other services to the said immovable property, and services required by the company, for the covering of any losses suffered by the company, for the payment of any premiums of insurance and of all expenses incurred or to be incurred to effect the opening under section 5 of the Sectional Titles Act of a sectional title register in relation to the said immovable property, and for the discharge of any other obligation of the company.

Save as otherwise provided in the memorandum or articles of a share block company or in any agreement or arrangement between the company and its members, every member of the company shall contribute monthly to the levy fund in the proportion of the number of his shares to the total number of issued shares of the company or, if the company does not have share capital, all its members shall so contribute equally.'

the parties because according to the clubs there was no corresponding entry in Development's own books of account and its existence was not supported by Shareblock's financial statements, which reflected a different amount of R40 620 000, listed as interest free unsecured loans from members repayable only by special resolution or in the event of Shareblock's winding-up.) When Harri's answering affidavit was filed in July 2012 the loan value attributed to the chalets alone was in the region of R28 million and the central complex and hotel built on it, which opened in 1990, were valued at about R30 million.

[9] During 1999 various disputes arose between Shareblock and Development and the trust. The disputes related to the payment by Shareblock to Development of a sum in excess of R2 million allegedly due to Shareblock in respect of a VAT refund; Shareblock's rights on the other hand, and the obligations of those holders to contribute towards the levy; and what the clubs viewed as an appropriation by Harri, as the controlling mind of both Shareblock and Development, of land meant to be used for the common benefit of all Shareblock's members. In respect of the latter dispute, Harri was accused of inducing Development to build otherwise than in accordance with a diagram forming part of the current articles and reflecting the allocation of various areas of the land to particular uses defined in the articles and instead building hotel rooms operated for its exclusive benefit on a portion of the land intended for the erection of a central complex the benefit of which would be enjoyed by all members of the company.

[10] The clubs were further aggrieved by Development's non-payment of the common levy or any levy at all.[20] They also challenged the allocation of

20 Article 28.3 of the current articles provides for a 'common levy' defined as generally comprising such

shares in the central complex. These shares were initially owned by Development as the developer. In May 1995, Development and two associated entity's in the Flexi Club Group[21] concluded an agreement termed 'the Delitrade agreement'.[22] In terms of this agreement Flexi agreed to purchase from Development shares in Shareblock, including the shares in the central complex and those relating to the hotel rooms. The clubs consequently purchased certain of these shares. It was declared on their behalf shortly thereafter that all disputes between Shareblock and Development, ie the dispute pertaining to Development's non-payment of the levy, had been resolved.

[11] The clubs also impugned the manner in which some of Shareblock's shares had been reallocated arising from the following facts. After Development's incorporation there was confusion regarding the number of shares which should have been allocated. By 1999 there were still shares pertaining to various sites on the resort which had been allocated to Development but remained undeveloped and unsold by it. In October 1999, Harri instructed RAS to reallocate the shares still retained by Development. Thereafter, in June 2000, RAS issued the share certificates evidencing Development's ownership of those shares. These allocations form part of the clubs' complaints which resulted in litigation between the parties.

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costs as land rates and taxes, water and electricity charges and the timeshare levy generally comprising all costs relating to timesharing interests such as management fees, costs of reception, costs of cleaning, maintaining, controlling and administering common property, common facilities and accommodation and such matters relating to the utilisation of timesharing interests.

21 Delitrade 2 (Pty) Ltd and Vacation (Pty) Ltd.

22 Development subsequently terminated the agreement when the clubs failed to meet turnover guarantees set out therein.

[12] The other source of conflict related to a lease concluded by Development and the trust in 1999 pursuant to which Management became the lessee of the hotel. In 1997 the trust had signed a five-year lease agreement in respect of the hotel and central complex, effective from January 1995 and terminating in November 1999, with Online Hotel Management CC. Shortly before the expiration of this lease Shareblock, represented by its directors including Lamont and Ridl, launched an urgent application in the high court seeking to interdict the trust, Management and Development from interfering in the management of the hotel and from placing Management in possession of the hotel or any other portion of the land. The application was opposed but the parties subsequently settled their issues in terms of an agreement which provided that Management would operate the central complex comprising the hotel and the conference pending arbitration proceedings between the parties.[23]

[13] The arbitration was ultimately settled in May 2000 on the basis of a settlement agreement (which ultimately lapsed although it was implemented to a limited extent) concluded by Shareblock, represented by Lamont (and Mr SM Rothbart) who was also involved in the proceedings in his personal capacity and on RAS' behalf, and Development. The arbitration agreement provided, inter alia, that by 31 December 2000 the shareblock scheme would be converted to a sectional title development to be owned by Shareblock including certain common facilities.[24] This was meant to ensure that the hotel, convention centre,

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23 In the latter proceedings Shareblock claimed, inter alia, ownership of the land and the improvements thereon, control over areas of the land and the common facilities thereon to which certain share blocks related, the right to determine the purpose of those common facilities and the right to operate them or in its discretion to appoint a person to do so.

24 The contemplated sectionalisation did not take place. At an annual general meeting held in 2006 the clubs, represented by Ridl, voted against its approval because, according to Harri, the general body of shareholders was misinformed as to the real reasons for the sectionalisation. This is what led to the agreement's lapse as was resolved by Development's board of directors and Shareblock.

administration and central complex building and other facilities owned by Development and the trust would be excised from Shareblock and constitute sectional title units owned by the latter entities. Moreover, Shareblock acknowledged that the trust is the holder of the share blocks relating to the essential services' equipment, hotel suites and single rooms, restaurant and staff quarters on the central complex. In terms of the agreement Shareblock and the trust would commission RAS to prepare use agreements, some which had been delivered to the latter, relating to the facilities and areas on the land owned by or under the control of the trust.

[14] The arbitration agreement also provided for the settlement of a claim by Shareblock against Development relating to alleged misappropriation by the latter of certain VAT refunds in the sum of R2 169 897.04 due to Shareblock.[25] According to Flexi these tax input credits, which Harri sought in Shareblock's name for Development's benefit without consulting Shareblock's board or managing agent, were an asset in Shareblock's hands because the South African Revenue Service (SARS) decreed that they could be claimed only by the share block company and not by the share block developer. Development, on the other hand, claimed the funds on the basis that it had initially paid the VAT which Shareblock was reclaiming and argued that Shareblock had a legal duty by virtue of its position as operator of the share block scheme to cooperate with the developer in order to claim the funds and pay them over to the developer. In this scheme, Development would retain a sum of R1 059 125 paid over by SARS as VAT input credit to Shareblock in its capacity as the registered owner of the land, which Shareblock had then paid over to Development. Shareblock would also pay Development a sum of R1 111 814.81 which it had received from SARS as a

25 Clause 10 of the arbitration agreement.

VAT refund in May 1999 in respect of the development of the hotel. Harri was further accused of creating fictitious entries in Shareblock's books in order to inflate Development's loan account artificially and facilitate procuring the refund to which it was not in law entitled.

[15] From about 2001 a dispute arose between Shareblock, on the one hand, and Development and the trust on the other regarding the implementation of the arbitration agreement. The issues in dispute concerned whether the common facilities holder (initially Development then the trust) was obliged, on conversion to sectional title, to make a contribution to the levy in respect of the facilities and the rights of the holder of the common facility share blocks. In order to have the dispute resolved once and for all Harri, with the support of his co-directors in Shareblock and RAS, then sought expert advice.[26] The primary question was whether in law a shareblock in a shareblock scheme, here Development's or the trust's, can be so structured that it is not obliged to contribute to the levy. In the expert's view, the creation of different categories of share blocks and the powers conferred upon Development under clauses 3.4 and 3.5 of the current articles were proper. He was also of the opinion that the current articles legitimately absolve the holder of share blocks relating to the common facilities and the common property from paying levies and that Development's obligations in this regard would be treated differentially from those of ordinary timeshare holders.[27]

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26 From Professor DW Butler, a law academic at Stellenbosch University at the time and a co-author of *Sectional Titles Share blocks and Time-sharing* (1985) and author of 'Time-sharing and shareblocks' in 27 *Lawsa* 2 ed.

27 In terms of article 28.11 thereof which provides that '[t]he [registered owner of the shares comprising the share block in terms of Section 133 of the Companies Act] acknowledges that no levy is payable by the holder of the Share Blocks which confer the right of use in respect of the common facilities and the common property.'

[16] Tensions continued to simmer and erupted in 2003 when the clubs launched unsuccessful interdict proceedings in the Durban and Coast Local Division (the Durban proceedings) to prevent Shareblock's shareholders and Development or the trust from voting certain of their shares at a general meeting of the company held in October 2003. The clubs had threatened in their affidavits to seek the expungement of the disputed shares from the share register and apply for the appointment of a curator in terms of s 266 of the Companies Act 61 of 1973 (the Companies Act)[28] to investigate the matter which gave rise to the disputes. But no such steps were taken and nothing of significance happened until the clubs launched these proceedings in October 2008.

[17] The proceedings were brought under ss 266 and 252 of the Companies Act on the basis of various unlawful acts allegedly perpetrated by Harri. Section

28This Act has since been repealed by the Companies Act 71 of 2008.

266[29] created a remedy for minority shareholders to act on behalf of a company 'whereby delinquent officers of a company can be compelled to compensate the company for a wrong committed by them, whilst seeking to minimise the risk of unmeritorious claims being brought against the company by disaffected shareholders . . . [through] a dual screening process'.[30] At the first stage an order for the appointment of a provisional curator *ad litem* could be granted to the aggrieved shareholder if the court was satisfied that prima facie grounds existed for the proceedings that the shareholder sought to institute against the company and that an investigation into those grounds and the desirability of the institution of the proposed proceedings was justified. At the second stage, on the return day, the court would have the advantage of the curator's report in deciding whether to

29 These provisions read:

'**266 Initiation of proceedings on behalf of company by a member**

(1) Where a company has suffered damages or loss or has been deprived of any benefit as a result of any wrong, breach of trust or breach of faith committed by any director or officer of that company or by any past director or officer while he was a director or officer of that company and the company has not instituted proceedings for the recovery of such damages, loss or benefit, any member of the company may initiate proceedings on behalf of the company against such director or officer or past director or officer in the manner prescribed by this section notwithstanding that the company has in any way ratified or any act or omission relating thereto, condoned any such wrong, breach of trust or breach of faith or any act or omission relating thereto.

(2) (*a*) Any such member shall serve a written notice on the company calling on the company to institute such proceedings within one month from the date of service of the notice and stating that if the company fails to do so, an application to the Court under paragraph (*b*) will be made.

(*b*) If the company fails to institute such proceedings within the said period of one month, the member may make application to the Court for an order appointing a *curator ad litem* for the company for the purpose of instituting and conducting proceedings on behalf of the company against such director or officer or past director or officer.

(3) The Court on such application, if it is satisfied –

(*a*) that the company has not instituted such proceedings;

(*b*) that there are *prima facia* grounds for such proceedings; and

(*c*) than an investigation into such grounds and into the desirability of the institution of such proceedings is justified,

may appoint a provisional *curator ad litem* and direct him to conduct such investigation and to report to the Court on the return day of the provisional order.

(4) The Court may on the return day discharge the provisional order referred to in subsection (3) or confirm the appointment of the *curator ad litem* for the company and issue such directions as to the institution of proceedings in the name of the company and the conduct of such proceedings on behalf of the company by the *curator ad litem*, as it may think necessary and may order that any resolution ratifying or condoning the wrong, breach of trust or breach of faith or any act or omission in relation thereto shall not be of any force or effect.'

30 *Ghersi & others v Tiber Developments (Pty) Ltd & others* [2007] ZASCA 43; 2007 (4) SA 536 (SCA) para 3.

discharge the provisional order or confirm the curator's appointment. Section 252,[31] on the other hand, vested a shareholder with the right to institute a personal action against a company where the shareholder's rights in terms of the contract created between the company and its shareholders by virtue of the memorandum and articles of association had been infringed by the company's act.

[18] The clubs mainly attacked the substance of Shareblock's articles, which they contended were unlawfully registered and oppressive to Shareblock's minority shareholders, and certain allocations of the shares.

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31 The section provides as follows:

252 Member's remedy in case of oppressive or unfairly prejudicial conduct

'(1) Any member of a company who complains that any particular act or omission of a company is unfairly prejudicial, unjust or inequitable, or that the affairs of the company are being conducted in a manner unfairly prejudicial, unjust or inequitable to him or to some part of the members of the company, may, subject to the provisions or subsection (2), make an application to the Court for an order under this section.

(2) Where the act complained of relates to –

(*a*) any alteration of the memorandum of the company under section 55 or 56;

(*b*) any reduction of the capital of the company under section 83;

(*c*) any variation of rights in respect of shares of a company under section 102; and

(*d*) a conversion of a private company into a public company or of a public company into a private company under section 22,

an application to the Court under subsection (1) shall be made within six weeks after the date of the passing of the relevant special resolution required in connection with the particular act concerned.

(3) If on any such application it appears to the Court that the particular act or omission is unfairly prejudicial, unjust or inequitable, or that the company's affairs are being conducted as aforesaid and if the Court considers it just and equitable, the Court may, with a view to bringing to an end the matters complained of, make such order as it thinks fit, whether for regulating the future conduct of the company's affairs or for the purchase of the shares of any members of the company by other members thereof or by the company and, in the case of a purchase by the company for the reduction accordingly of the company's capital, or otherwise.

(4) Where an order under this section makes any alteration or addition to the memorandum or articles of a company –

(*a*) the alteration or addition shall, subject to the provisions of paragraph (*b*), have effect as if it had been duly made by special resolution of the company; and

(*b*) the company shall, notwithstanding anything contained in this Act, have no power, save as otherwise provided in the order, to make any alteration in or addition to its memorandum or articles which is inconsistent with the order, except with the leave of the Court.

(5) (*a*) A copy of any order made under this section which alters or adds to or grants leave to alter or add to the memorandum or articles of a company shall, within one month after the making thereof, be lodged by the company in the form prescribed with the Registrar for registration.

(*b*) Any company which fails to comply with the provisions of paragraph (*a*), shall be guilty of an offence.'

Accordingly, they sought orders declaring (a) certain provisions of Shareblock's articles invalid and (b) certain shares in Shareblock to have been improperly issued and to have the holders of those shares barred from voting them. On that basis they asked for an order, in terms of s 252, to substitute certain provisions in Shareblock's articles for the allegedly invalid ones. The clubs further invoked s 266 to have a curator *ad litem* appointed to Shareblock for the purpose of instituting a claim 'for the recovery of damages or loss and the compensation for the deprivation of benefits suffered by [Shareblock] as a result of wrongs, breaches of trust and breaches of faith by [Harri]'.

[19] The court a quo issued a rule nisi as prayed and granted an order provisionally appointing Martin Chaitowitz SC as a curator *ad litem* to conduct an investigation into the grounds for the envisaged litigation on behalf of Shareblock against Harri. The curator duly furnished a report in which he made various findings. Regarding the VAT refund paid to Development, he found that it remained an asset in the hands of Shareblock and was wrongfully transferred to Development as a result of Harri's manipulations. He advised that Shareblock should take steps against Harri for the recovery of the amount and the interest thereon. The curator further found that the construction of the hotel was in conflict with Shareblock's registered plan and the diagram prepared for the development of the shareblock scheme as the common facilities were diverted to the hotel run by Management for its sole benefit, without an amendment to Shareblock's articles to provide for a compliant diagram.

[20] Harri had also transferred shares relating to the original common

property to Development, then into his own name and thereafter to the trust contrary to Shareblock's articles. Thus, he appropriated common facilities for his or his entities' exclusive benefit to the prejudice of Shareblock's other members. In addition to not receiving rental from Management, which is Harri's alter ego, for the use of its land to which it was entitled, Shareblock did not share in the profits of the hotel operation or receive any levies for the use of the common property as contemplated by its articles. Instead, it had to pay annual rental in excess of R500 000 for the use of the hotel's laundry, linen storage and shelving.[32] Ordinary members were therefore subsidising the upkeep of the hotel and central complex without deriving any financial benefit in return. And Harri planned to expand the hotel in a manner which would further encroach upon Shareblock's common facilities and common property. As to the R40 million loan purportedly advanced by Development to Shareblock, the curator found no evidence thereof in either entity's books. According to Development's financial statements it was never in a financial position to make such a loan and in the curator's view the entry was made to facilitate a claim which would accrue through Development to Harri, if it was ever liquidated, to the loss of Shareblock and its shareholders. The curator also found the entries in Shareblock's financial statements relating to the valuation of the improvements to its land arbitrary and suspect.

[21] On the basis of this report, the court a quo confirmed the curator's final appointment to institute action against Harri for damages or loss suffered by Shareblock arising from the non-payment of rental by the hotel and being caused to pay rental to the hotel operators for the use of the hotel's facilities which the court considered as continuing wrongs. However, the

32 In the curator's view, Shareblock ought to have received rental from the various hotel operators, from 1992 until 2011, of the sum of R36 380 381 and was entitled to claim back the rental it had paid for the use of the hotel facilities totalling R2 522 344.

court found that 'the VAT claim, the claims arising from the wording of the articles and the allocation of shares as well as the construction of the hotel and the manipulation of the financial statements . . . and the invocation of s 252' were debts within the meaning envisaged in the Prescription Act 68 of 1969 (the Prescription Act) and were susceptible to extinctive prescription. In its view they constituted single acts, albeit with long term consequences, which had become prescribed after three years. The application was accordingly dismissed without the adjudication of the merits of the causes of action.

[22] On 2 October 2012, the clubs filed two applications for leave to appeal which the court a quo heard and dismissed on 7 December 2012.[33] This court thereafter granted them leave to argue the present proceedings. But the parties were at odds about the precise grounds of appeal arising largely from the clubs' unprecedented piecemeal approach of filing several notices of applications for leave to appeal. According to the respondents neither the Uniform Rules of Court nor the Supreme Court of Appeal Rules permit a multiplicity of applications for leave to appeal and notices of appeal. (This unfortunate trend carried on in the appeal proceedings during which a proliferation of documents meant to patch the clubs' case was filed on their behalf right up to the hearing.) Thus, they argued, the only question properly before this court is that relating to the claim for statutory relief under s 266 argued in the court a quo on 6 December 2012 ie whether the court a quo was correct in dismissing the VAT input refund claims on the basis that any rights which the clubs might have to seek, derivatively and in terms of s 266, to enforce this relief, have become prescribed.

33 The respondents also sought leave to appeal against the relief granted to the clubs conditional upon the grant of the clubs' application for leave to appeal but this was not argued.

[23] In the court a quo, two notices of applications for leave to appeal dated 2

October 2012, were filed. The first one was directed only at the discharge of the rule nisi in respect of the claim arising from the VAT refund claim (the s 266 issue) and the order authorising the institution of an action in respect of Shareblock's payment of rental to the hotel operators. It made no reference at all to the clubs' attack on Shareblock's articles and the contested allocation of shares (the s 252 issue). These issues were raised in the second notice, of which, as it turned out, the respondents' attorneys of record and counsel were unaware and which the clubs did not argue in court a quo.[34] Pursuant to the dismissal of this application the clubs filed a further application for leave to appeal and condonation, out of time, on 12 December 2012 in respect of the rule pertaining to the s 252 issue. They sought condonation on the basis that they had made a bona fide mistake with regard to the effect of the court a quo's silence on whether or not the rule nisi was confirmed and erroneously believed that it survived the dismissal of the proceedings. The court a quo dismissed the application. The clubs have not sought leave to appeal this decision and properly conceded that the application was misconceived.

[24] In their application for leave to appeal against the judgment of 7 December 2012 before this court, filed on 19 June 2014, the clubs also sought condonation for the late filing of the application which included the s 252 issue. The basis of the condonation application, which was accompanied by a tender of wasted costs, was that the late filing was caused by their attorney's erroneous

34 The grounds thereof were that '[i]n prayer 2 of the Notice of Motion the applicants sought a rule nisi for the relief contemplated in paragraphs 2(a), 2(b), 2(c), 2(d) of the Notice of Motion . . . The learned judge granted a provisional order and thereafter on the return day discharged the order . . . The learned judge erred in law and/or in fact in discharging the order inasmuch as [he] held that the relief sought in the rule nisi had prescribed . . . [and] erred in law and /or in fact in finding that the relief (the claims) sought in the rule nisi constituted "a debt" or "debts" as contemplated in section 12 of the Prescription Act.'

belief initially that the court a quo had not considered the s 252 issue on 7 December 2012. Also, the attorney had arranged with his opponent for an extension of the relevant time limits in respect of the s 252 issue whilst awaiting the court a quo's judgment on the ill-fated third application for leave to appeal. He had then calculated the time period within which to file the application for leave to appeal from the date of the dismissal of the third application, brought on the advice of the clubs' erstwhile counsel, on 19 May 2014.

[25] It was contended on the clubs' behalf that they amply demonstrated their intention to pursue the s 252 issue throughout and that the errors which resulted in the delay were reasonable. Both notices dated 2 October 2012 were served on the correspondents of the respondents' attorneys. But the one dealing with the s 252 issue, which was overlooked because the correspondent attorneys did not anticipate two discrete notices, was not forwarded to the instructing attorneys. Both notices were nonetheless filed with the court a quo. And the indications are that they were both considered by the court as its judgment of 7 December 2012, refusing leave to appeal, made reference to 'the various notices filed' and the heads of argument in which the s 252 issue was raised. It was also contended that the respondents had not suffered any prejudice and neither had this court been inconvenienced by the slip-ups.

[26] Condonation of the non-observance of the rules is by no means a mere formality and the power of the court to grant the relief should be exercised with proper judicial discretion and upon sufficient and satisfactory grounds being shown.[35] It is firmly established that an applicant for condonation must give a full explanation for the delay which must not only cover the

35 *Reeders v Jacobz* 1942 AD 395 at 396.

period of the delay but must also be reasonable.[36] Prospects of success on appeal, the importance of the case, absence of prejudice to the parties, the respondent's interest in the finality of its judgment and the convenience of the court are some of the factors that the appeal court will weigh, one against the other, in deciding whether or not to grant condonation.

[27] The clubs have accounted for the entire period from the delivery of the judgment of 7 December 2012 to the one dismissing the third application almost two years later. They were not responsible for the intervening time lapse because although the latter application was filed on 12 December 2012, as indicated, it was heard only a year later. Judgment thereon was delivered six months later. And having been acting on legal advice, bad as it was, in pursuing the ill-conceived application, once they realised that it was a *brutum fulmen* they promptly launched this application. There does not seem to be any prejudice to the respondents that could not be ameliorated by an appropriate award of costs if condonation were to be granted in all the circumstances.

[28] But the question remains whether Uniform Rule 49, the Supreme Court of Appeal Rules 6, 7, 8 and 10 and ss 16 and 17 of the Superior Courts Act 10 of 2013,[37] which govern appeal procedure, permit more than one application for leave to appeal and notice of appeal to accommodate grounds of appeal which were initially omitted. The court a quo answered this question by assuming, without deciding, that such a procedure 'may be permissible if the circumstances are such that the interests of justice demand that an extraordinary leave to appeal be granted'. I too incline towards that approach particularly

36 *Van Wyk v Unitas Hospital & another (Open Democratic Advice Centre as Amicus Curiae)* [2007] ZACC 24; 2008 (2) SA 472 (CC) para 22.
37 The successor of the Supreme Court Act 59 of 1959.

in the present circumstances where the applications in issue were simultaneously set down for hearing and duly considered at that same hearing. And in the view I take of the proposed appeal's prospects of success, that the claims are arguable, I would allow the condonation application in its entirety, with an appropriate costs order against the clubs.

[29] Turning to the merits, the following contentions were made on the clubs' behalf. It was argued, first, that the knowledge of the relevant disputes by Ridl and Lamont long before the proceedings were launched could not be attributed to the clubs and that the relief sought by the clubs did not, in any event, constitute a 'debt' susceptible to prescription as contemplated in ss 10, 11 and 12 of the Prescription Act.[38] Regarding the s 252 issue, it was argued

38 These provisions read, in relevant part:

'10 Extinction of debts by prescription

(1) Subject to the provisions of this Chapter and of Chapter IV, a debt shall be extinguished by prescription after the lapse of the period which in terms of the relevant law applies in respect of the prescription of such debt.

(2) By the prescription of a principal debt a subsidiary debt which arose from such principal debt shall also be extinguished be prescription.

(3) Notwithstanding the provisions of subsections (1) and (2), payment by the debtor of a debt after it has been extinguished by prescription in terms of either of the said subsections, shall be regarded as payment of a debt.

11 Periods of prescription of debts

The periods of prescription of debts shall be the following:

(*a*) thirty years in respect of –

(i) any debt secured by mortgage bond;

(ii) any judgment debt;

(iii) any debt in respect of any taxation imposed or levied by or under any law;

(iv) any debt owed to the State in respect of any share of the profits, royalties or any similar consideration payable in respect of the right to mine minerals or other substances;

(*b*) fifteen years in respect of any debt owed to the State and arising out of an advance or loan of money or a sale or lease land by the State to the debtor, unless a longer period applies in respect of the debt in question in terms of paragraph *(a)*;

(*c*) six years in respect of a debt arising from a bill or exchange or other negotiable instrument or from a notarial contract, unless a longer period applies in respect of the debt in question in terms of paragraph (*a*) or (*b*)

(*d*) save where an Act of Parliament provides otherwise, three years in respect of any other debt.

12 When prescription begins to run

(1) Subject to the provisions of subsections (2), (3), and (4), prescription shall commence to run as soon as the debt is due.

(2) If the debtor wilfully prevents the creditor from coming to know of the existence of the debt, prescription shall not commence to run until the creditor becomes aware of the existence of the debt.

(3) A debt shall not be deemed to be due until the creditor has knowledge of the identity of the debtor and of the facts from which the debt arises: Provided that a creditor shall be deemed to have such knowledge if

that it was not the enforcement of a right or the performance of an obligation that was sought. They sought a declarator that the creation and allocation of the shares were invalid and the offending articles liable to be cancelled because the existence of share blocks, which were created unlawfully, constituted 'a continuous wrong in the course of being committed'. The right to bring the s 252 application was akin to a claim for rectification and has no correlative debt which can be extinguished by prescription. As to the s 266 issue, it was argued that a debt arises under these provisions only upon the provisional appointment of the curator ad litem to investigate and compile a report and after the court has assessed the contents of the report and confirmed the provisional appointment. Thus the question of prescription did not arise on the present facts. A new point of law was also raised to the effect that because of s 13(1)*(e)* of the Prescription Act, in terms of which prescription is delayed if 'the creditor is a juristic person and the debtor is a member of the governing body of such juristic person, the payment of the VAT refund amount, which is a debt owing to Shareblock by Harri, its director (in respect of which the defence of prescription had not been raised in any event) had not prescribed.[39]

[30] It is evident from the narrative set out above that the disputes between the parties, which the court a quo correctly characterised as 'single acts, albeit with long-term consequences', have dogged Shareblock and the timesharing resort for many years, long before the institution of these proceedings.[40] As far back as

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he could have acquired it by exercising reasonable care.'

39 In terms of s 17(2) of the Prescription Act '[a] party to litigation who invokes prescription, shall do so in the relevant document filed of record in the proceedings: provided that a court may allow prescription to be raised at any stage of the proceedings.'

40 For example, the clubs were aware of the VAT input claims and the payments to Development as early as 7 June 1999 or at the latest by May 2000 when a settlement agreement of an arbitration between Shareblock and Development was concluded.

2003 the clubs, which acquired their shares in Shareblock well aware of the articles and the allocation of shares they now challenge, clearly knew what legal options were available to them to resolve the disputes. This knowledge is shown, for example, by a statement made by Mr RB Brandt, then a trustee of the clubs and one of Shareblock's directors, in the clubs' papers in the Durban proceedings to which he deposed. He said:

'The Applicants are at present faced with a choice of instituting proceedings for the expungement of the disputed shares . . . from the share register or they may, seek to initiate proceedings in terms of section 266 of the Companies Act for the appointment of a curator ad litem to investigate the matters which form the subject matter of the disputes raised above. In view of the history of the disputes between the parties the Applicants take the view that it would be preferable that they initiate proceedings in terms of section 266 of the Companies Act for the appointment of a curator to investigate the matters described in this application.'

[31] The attempt to hide behind Ridl and Lamont is therefore difficult to fathom in the circumstances. And the description of the relief sought by the clubs as a mere request for a declarator does not tally with what is set out in their Notice of Motion and is patently wrong. So too is the clubs' contention that the defence of prescription was not alleged in the respondents' papers. It is factually wrong as was ultimately conceded in argument before us. The defence was pertinently raised in the answering affidavits as a general defence to all the s 266 and s 252 claims brought by the clubs. To my mind, the real issues are rather whether the claims are 'debts' susceptible to extinctive prescription under s 11(*d*) of the Prescription Act, which stipulates a general prescriptive period of three years in respect of most debts, and the impact of s 13(1)(*e*) thereof, if any, for purposes of the s 266 claims.

[32] As our courts have frequently observed, the Prescription Act does not

define the term ‘debt’. However, it is established that for purposes of this Act the term has a wide and general meaning; that it includes an obligation to do something or refrain from doing something and entails a right on one side and a corresponding obligation on the other.[41] The answer to whether a claim is a debt susceptible to prescription after a period of three years is to be found in the basic distinction in our law, which has its origin in Roman law, between a real right (*jus in re*), and a personal right (*jus in personam*).[42]

[33] Our case law[43] has steadfastly acknowledged the distinction between real rights, which are primarily concerned with a relationship between a person and the thing he claims, and personal rights, which are concerned with the relationship between two persons, ie a creditor and a debtor who is under a legal obligation to pay the creditor what is due to him.[44] This distinction was explained as follows in *National Stadium South Africa (Pty) Ltd & others v Firstrand Bank Ltd* [2010] ZASCA 164; 2011 (2) SA 157 (SCA) para 31:

‘Real rights have as their object a thing (Latin: *res*; Afrikaans: saak). Personal rights may have as their object performance by another, and the duty to perform may . . . arise from a contract. Personal rights may give rise to real rights, for instance, a personal obligation to grant someone a servitude matures into a real right on registration. Real rights give rise to competencies: ownership of land entitles the owner to use the land or to give others rights in respect thereof.’ (Footnote omitted)

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41 *Electricity Supply Commission v Stewarts and Lloyds of SA (Pty) Ltd* 1981 (3) SA 340 (A) at 344F-G; *Oertel en Andere NNO v Direkteur van Plaaslike Bestuur en Andere* 1983 (1) SA 354 (A) at 370A-C; *Desai NO v Desai & others* [1995] ZASCA 113; 1996 (1) SA 141 (A) at 146I-J; *Bester NO v Schmidt Bou Ontwikkelings* [2012] ZASCA 125; 2013 (1) SA 125 (SCA) para 9.

42 See *Staegemann v Langenhoven & others* 2011 (5) SA 648 (WCC) para 16; *Absa Bank Ltd v Keet* [2015] ZASCA 81; 2015 (4) SA 474 (SCA) para 20.

43 See for example, *Smith v Farrelly’s Trustee* 1904 TS 949 at 958; *Ex Parte Geldenhuys* 1926 OPD 155 at 164; *Lorentz v Melle & others* 1978 (3) SA 1044 (T) at 1050D-F; and *Erlax Properties (Pty) Ltd v Registrar of Deeds & others* [1991] ZASCA 187; 1992 (1) SA 879 (A) at 884H-885A.

44 Reinhard Zimmerman *The Law of Obligations* (1990) at 6-7; CG van der Merwe ‘Things’ in 27 *Lawsa* 2 ed para 59.

[34] In *Absa Bank Ltd v Keet* Zondi JA took the discussion further and said:[45]

'The person who is entitled to a real right over a thing can, by way of vindicatory action, claim that thing from any individual who interferes with his right. Such a right is the right of ownership, If, however, the right is not absolute, but a relative right to a thing, so that it can only be enforced against a determined individual or a class of individuals, then it is a personal right. . .

The obligation which the law imposes on a debtor does not create a real right . . . but gives rise to a personal right. . . . In other words, an obligation does not consist in causing something to become the creditor's property, but in the fact that the debtor may be compelled to give the creditor something or to do something for the creditor or to make good something in favour of the creditor.

The manner in which the Prescription Act is structured reflects this distinction – acquisitive prescription of real rights is dealt with in Chapters 1 and 2 and the extinctive prescription of obligations is dealt with in Chapter 3.' (Footnote omitted.)

He concluded (para 25):

'In the case of acquisitive prescription one has to do with real rights. In the case of extinctive prescription one has to do with the relationship between a creditor and a debtor. The effect of extinctive prescription is that a right of action vested in the creditor, which is a corollary of a "debt", becomes extinguished simultaneously with that debt. In other words, what the creditor loses as a result of operation of extinctive prescription is his right of action against the debtor, which is a personal right.'

[35] It is clear from this exposition that the clubs' s 252 claims are founded on personal rights. For their attempt to equate the claims to rectification claims, the clubs relied upon decisions of this court which held that claims for the rectification of (a) a contract (*Boundary Financing Ltd v Protea Property Holdings (Pty) Ltd* [2008] ZASCA 139; 2009 (3) SA 447 (SCA)), (b) a deed of

45 At paras 20 and 23 to 25.

transfer (*Bester NO & others v Schmidt Bou Ontwikkelings CC* [2012] ZASCA 125; 2013 (1) SA 125 (SCA)); and (c) a company's register of members in terms of s 115 of the Companies Act where the dominium of the shares in issue always remained in the estate which sought to have its ownership reflected in the register (*Gafoor & another NNO v Vangates Investments (Pty) Ltd & others* [2012] ZASCA 52; 2012 (4) SA 281 (SCA)) do not have correlative debts which could be extinguished by prescription.

[36] Indeed, in principle all rights are susceptible to prescription except for rectification claims (and other claims rooted in real rights) in the case of extinctive prescription. The basis for this exclusion is that this type of common law claim has no correlative debt within the meaning of the word. Thus, it does not alter the rights and obligations of the parties and create a new contract for the parties – it merely corrects the erroneous reflection of those rights or obligations in the written memorial to accord with the true facts and give effect to what has always been the actual intention of the parties.[46]

[37] But the clubs' case is entirely different from the rectification cases discussed above. The golden thread running through them is that the rectification would neither constitute any delivery of property nor alter the rights and obligations of the parties – it would simply correct the erroneous recordal of those rights. Here, there is no question of such a correction (of Shareblock's articles) because they do not reflect an incorrect state of affairs in the above sense. And, in my view, the very fact that the claims were

46 See for example, *Boundary Financing v Protea Property Holdings (Pty) Ltd* [2008] ZASCA 139; 2009 (3) SA 447 (SCA); *Gaffoor & another NNO v Vangates Investments (Pty) Ltd & others* [2012] ZASCA 52; 2012 (4) SA 281 (SCA) paras 34 and 35*; Bester NO & others v Schmidt Bou Ontwikkelings CC* [2012] ZASCA 125; 2013 (1) SA 125 (SCA) at 130B-131G.

brought under the

aegis of the oppression remedy provisions of s 252 instead of s 115 of the Companies Act (which provides for rectification of the register of members by a court, upon application, where 'the name of a person is, without sufficient cause, entered in or omitted from [it] or if there is default or unnecessary delay in 'entering in the register the fact of any person having ceased to be a member'), for which no case was made out in any event, signals the clubs' cognizance of this position.

[38] Shareblock's articles were amended and registered in 1988 with the consent and intention of the members. The reallocation of the disputed shares to Development, which the latter now holds, occurred in accordance with the current articles (which were approved at a general meeting of Shareblock) with the consent and intention of Shareblock and RAS. The clubs' success in obtaining the s 252 relief, ie cancellation, rectification and amendment of the articles, would obviously result in the alteration of rights and obligations of the parties. That is the very antithesis of the rationale underlying the exclusion of rectification claims from the operation of extinctive prescription. Interestingly, what the clubs effectively seek is a new set of articles and, therefore, a new contract which the parties should perhaps have concluded but patently did not. That is impermissible.[47]

[39] It remains to consider whether s 13(1)(*e*) of the Prescription Act insulates a shareholder's right to seek relief under s 266 of the Companies Act from extinctive prescription. We are at large to consider this point of law despite the fact that it was raised for the first time in this court as it has a foundation in the affidavits and its adjudication will not prejudice the

47 *Burroughs Machines Ltd v Chenille Corporation of SA (Pty) Ltd* 1964 (1) SA 669 (W) at 670F-671B.

respondents.[48] And even though the point was not argued a quo, that court made the following comments which are apposite:

'[I]t is important to remember that both [ss 252 and 266 of the Companies Act] grant the right to institute proceedings to a member, albeit on behalf of the company where s 266 is concerned. The rationale of granting these rights to a member is clear – only a person having a direct and usually financial interest in the orders that the court might make should be allowed to set the law in motion.

It follows that the fact that the company itself is unable to institute action because it is in the hands of the majority cannot suspend the running of prescription until the composition of its board has changed. The actions that are available in terms of the above sections of the old Companies Act to prevent or terminate abusive exploitation of the company accrue to aggrieved members'.

[40] As indicated above, the provisions of s 266 vest a shareholder with the right to compel a company to take action against its delinquent directors or officers. It was rightly not disputed that the company's claim against the delinquent director or officer, does not prescribe in the circumstances envisaged by the plain wording of s 13(1)(*e*) of the Prescription Act. What is in issue is the nature of the minority shareholder's right to compel the company to take action against the delinquent directors or officers and whether the right imposes a corresponding obligation on the company to take such action. In the respondents' submission, the minority shareholder is the creditor and the company is the debtor. Therefore, the company's obligation falls within the definition of the debt envisaged in the Prescription Act and a minority shareholder who becomes aware of a director's wrongdoing in the company is therefore obliged to invoke the s 266 mechanism within a period of three years. I do not agree.

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48 *Quartermark Investments (Pty) Ltd v Mkhwanazi & another* [2013] ZASCA 150; 2014 (3) SA 96 (SCA) para 20.

[41] It is settled that a claim brought under s 266 is a statutory derivative action which a shareholder may invoke, on the company's behalf, where the company's management is unwilling to enforce its rights for illegitimate reasons or due to the fact that the directors or officers are themselves the wrongdoers, to have the delinquent directors or officers compelled to compensate the company for loss suffered as a result of their wrongdoing.[49] The claim belongs to the company and the shareholder vindicates it only to recover not his or her own damages but those suffered by the company itself.[50] In that case the company (Shareblock in this instance), and not the shareholder (the clubs), is the creditor and the delinquent director or officer (Harri) is the debtor. The debt arises only when the court grants the relief sought by the shareholder under s 266 and appoints a curator *ad litem* to launch the relevant proceedings on the company's behalf[51] or the delinquent directors or officers are no longer members of the company's governing body in control of thereof. Those are the only stages at which prescription can start running. As Harri's debt to Shareblock has not prescribed, by reason of s 13(1)(*e*), the clubs' entitlement to invoke the s 266 remedy as Shareblock's minority shareholders, which has no correlative debt, remains extant alongside Shareblock's own right to sue Harri. The clubs must

49 *Wimbledon (Pty) Ltd v Gore NO & others* 2002 (2) SA 88 (C); *McCrae v ABSA Bank Ltd* [2009] ZAGPJHC 7 para 54; *Louw & others v Richtersveld Agricultural Holdings Company (Pty) Ltd & others* [2010] ZANCHC 54; Helena H Stoop 'The derivative action provisions in the Companies Act 71 of 2008' (2012) 129 SALJ 527.

50 *Prudential Assurance Co Ltd v Newman Industries Ltd & others* (No 2) [1982] 1 All ER 354 (CA) at 366-367; *Itzikowitz v Absa Bank Ltd* [2016] ZASCA 43 para 10; Lindi Coetzee 'A comparative analysis of the derivative litigation proceedings under the Companies Act 61 of 1973 and the Companies Act 71 of 2008' (2010) *Acta Juridica* 290 at 294.

51 In terms of s 266(4) of the Companies Act.

succeed in this regard and in light of their substantial success in these proceedings they are entitled to the costs thereof.

[42] In the result the following order is made:

'The applicants' condonation application is granted. They are ordered to pay the wasted costs including the costs of two counsel.

2 The application for leave to appeal is granted and the appeal is upheld, with costs including those consequent upon the employment of two counsel, to the extent that the order of the court a quo is amended by the addition to paragraphs 3 and 4 of sub-paragraph (iii) which, for purposes of paragraph 3, reads:

'the fact that the third respondent has wrongfully allowed or caused the first respondent to unjustifiably pay VAT refunds in the sums of R2 169 897.04 and R120 309.13 to the second respondent.'

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MML Maya

Acting Deputy President

Cachalia JA

[43] I agree with the order of Maya ADP and her reasoning in coming to this conclusion. I wish to add my own reasons for why I differ with the finding of the high court that the VAT claim instituted under s 266 of the

Companies Act had prescribed. In my view a shareholder's entitlement to approach a court to appoint a *curator ad litem* under this section to recover a 'debt' from a delinquent director *on behalf* of a company is not susceptible to prescription where the company's claim remains extant, as in this case.

[44] In disallowing the VAT claim to proceed following the curator's final appointment on the ground of prescription, the high court considered that the entitlement to approach a court to appoint a curator under s 266 fell into the same category as a liquidator's right under the Insolvency Act 24 of 1936 to reclaim assets removed from an estate before insolvency in certain circumstances. And, therefore it is capable of prescription just as a liquidator's right to recover assets from impeachable transactions is.[52] The 'debt' arising from this claim was thus held to have prescribed because the shareholders – the appellants – were aware of the circumstances giving rise to it more than three years before they had launched the present application.

[45] In my view the two situations are not comparable. The provisions of the Insolvency Act (ss 26-31) and of the Companies Act (s 424(1)) referred to in *Duet and Magnum Financial Services v Koster*,[53] which the high court considered comparable to a shareholder's entitlement under s 266, dealt with declarations that had the effect of bringing into existence a debt that did not previously exist.[54] The liquidator's right to approach the court for such relief arises when certain events occur, for example, a disposition of property

52 *Duet and Magnum Financial Services CC (in liquidation) v Koster* [2010] ZASCA 34; 2010 (4) SA 499 (SCA) paras 12, 13 and 27.
53 Ibid para 13.
54 Ibid para 11

under ss 26-31 of the Insolvency Act. The liquidator becomes entitled to approach the

court to set the disposition aside and to declare the liquidator entitled to recover the property. And the corresponding 'obligation' or 'liability' of the debtor arises immediately upon the liquidator's entitlement to recover the property.

[46] However, under s 266 of the Companies Act, a shareholder's 'right of action' to institute proceedings for a curator to be appointed does not have a correlative 'debt' within the meaning of the Prescription Act. This is because the exercise of this right does not itself bring any debt into existence; it calls for no immediate action on the part of the 'debtor' – the delinquent director – or obligation to submit to this right. Put differently no 'obligation' or 'liability' arises on the part of the debtor[55] until the court acts under s 266(4) to authorise the curator to institute proceedings in the name of the company and on the company's behalf.

[47] By invoking s 266 of the Companies Act, the remedy a shareholder seeks is to vindicate a wrong done to the company and the consequent loss it has suffered. The loss is not the shareholder's. As this court said recently in *Itzikowitz v Absa Bank Ltd*[56] when referring to *Prudential Assurance Co Ltd v Newman Industries Ltd (No 2)* [1982] 1 All ER 354 (CA) at 366-367, that:

'. . . [s]uch a "loss" is merely a reflection of the loss suffered by the company. The shareholder does not suffer any personal loss. His only "loss" is through the company, in the diminution in the value of the net assets of the company . . . . The plaintiff's shares are merely a right of participation in the company on the terms of the articles of association. The shares themselves, his right of participation, are not directly affected by the wrongdoing. The plaintiff still holds all the shares as his own absolutely unencumbered property.'

55 Ibid. Compare para 24.
56 *Itzikowitz v Absa Bank Ltd* [2016] ZASCA 43 para 10.

[48] The right to institute proceedings for the loss arising from the wrong done to the company therefore vests in the company, and not the shareholder. And, as I have mentioned above, until the curator is authorised to step into the shoes of the company to institute proceedings for recovery of the loss, no obligation or liability on the part of the debtor can arise.

[49] So under s 266 no 'debt' – an obligation or liability on the part of the debtor – exists until a court confirms the curator's appointment under s 266(4) for the purpose of instituting proceedings against its directors or officers. And only then does prescription begin to run.

[50] Relevant to this appeal is ss 13(1)(*e*) and 13(1)(*i*) of the Prescription Act, which was not drawn to the attention of the high court and featured for the first time in this appeal. Read together they provide:

'(1) If . . .

(e) The creditor is a juristic person and the debtor is a member of the governing body of such juristic person . . . the period of prescription shall not be completed before a year has elapsed after the date referred to in para (*i*)'

And s 13(1)(*i*):

'(T)he relevant period of prescription would, but for the provisions of this subsection, be completed before or on, or within one year after, the day on which the relevant impediment referred to in paragraph . . . (*e*) . . . has ceased to exist. . . .'

[51] The payment of the VAT amount is a debt the third respondent (Harri) owes to the company (the first respondent). Harri is a director of the first respondent. Harri, not the company, is therefore the debtor. And the company, not the appellants, is the creditor. The 'debt' Harri owes to the company has thus not prescribed by virtue of s 13(1)(*e*) of the Prescription Act. Prescription may only begin to run against this debt if the impediment to the institution of proceedings against Harri is removed by a court sanctioned appointment of a curator, who is authorised to institute proceedings on behalf of the company against him, or if he ceases to be a director, which would place the company in a position to institute proceedings against him. Under s 13(1)(*i*) prescription would be completed before or on, or within one year after, the day on which the relevant impediment referred to in paragraph (*e*) has ceased to exist.

[52] To conclude, in my view a shareholder's entitlement or right to use s 266 to protect the company, and indirectly itself, from delinquent directors and officers cannot prescribe where the 'debt' to the company itself has not prescribed. This entitlement does not have a correlative debt, whereas the right of a company (the first respondent) to sue Harri does. A shareholder's 'right' to bring this action therefore remains alive so long as the company is capable of enforcing its rights, as it does in this case.

[53] Were it otherwise anomalies would abound. If the shareholder's 'right' to institute proceedings for the appointment of a curator under s 266 is capable of prescription, what would happen to a company that has many shareholders? Would their claims also prescribe at the same time? What if the shareholder's claim were delayed for a reason not affecting the other

minority shareholders? Or what if the appellants sold their shares; would the new shareholder not have a ‘right’ to institute such proceedings because the debt arising from the predecessor’s claim had prescribed?

[54] For these additional reasons I concur with Maya ADP that the appellants’ right to institute proceedings under s 266 of the Act for the appointment of a curator has not prescribed.

A Cachalia

Judge of Appeal

Leach JA

[55] I have read the judgments of my colleagues, and I too agree with the order proposed by Maya ADP. However my views differ, to a limited extent, from theirs in regard to prescription of the claim relating to the VAT refund brought under s 266 of the Companies Act 61 of 1973. I should immediately record that to a large extent our views overlap on this issue, but in my opinion it is unnecessary, for the reasons I shall set out, to deal with whether prescription can only start running once a curator is appointed under the section.

[56] It is common cause that the alleged delinquent director, Mr Harri, has been a director of Shareblock at all material times. Consequently, as Cachalia JA correctly points, under the provisions of s 13(1)(*e*) of the

Prescription Act 68 of 1969 the debt which Mr Harri allegedly owes the company in respect of the VAT claim has, by reason of his directorship, not prescribed. As a result, Mr Harri could not offer a plea of prescription to such a claim if sued by the company (an unlikely event considering his position on the board of the company - and it is precisely to deal with eventualities such as this that s 266 was created). Indeed, as pointed out by Maya ADP, the respondents did not contend that any claim Shareblock might have against Mr Harri has prescribed.

[57] That being the case, the effect of the respondents' argument is that although the debt allegedly owed by Mr Harri to the company is extant and may be enforced by the company, it cannot be enforced by shareholders acting 'on behalf of the company' under s 266 as in their hands the same claim has prescribed. That this would be anomalous is self-evident, and I can think of no reason why the legislature would have envisaged that an enforceable debt owed to a company would not be enforceable under the specific provisions it provided to enable shareholders to take action to recover such a debt on behalf of a company.

[58] The answer to this conundrum is in my view clear. It has been recognised both by the courts[57] and in academic writings[58] that a claim under s 266 is a statutory derivative action. Prof Blackman, in his seminal work M Blackman *Commentary on the Companies Act* vol 2,[59] explains that the section was introduced on the recommendation of the Van Wyk De Vries Commission as the common law derivative action, and its procedural aspects, were associated with so many difficulties that it was felt necessary

57 See eg *Wimbledon Lodge (Pty) Ltd v Gore NO & others* 2002 (2) SA 88 (C) at 97 C-D.
58 Eg H H Stoop 'The derivative action provisions in the Companies Act 71 of 2008' (2012) SALJ 527.
59 At 9-177.

to create a statutory remedy under which delinquent directors could be compelled to compensate companies for loss suffered as a result of their wrongs.[60] That being so, the section provides a remedy described as being 'unique' in that it allows a person to bring an action that in fact belongs to someone else[61] (and it is for this reason that the leave of the court is required to commence action, which would not have been required in the event of the shareholder seeking to recover for a personal wrong[62]).

[59] That the claim in the present case is the claim of the company and not of its shareholders has been made abundantly clear in *Johnson v Gore Wood*[63] in which Lord Bingham, in a passage subsequently quoted with approval in this court,[64] said:

'Where a company suffers loss caused by a breach of duty owed to it, only the company may sue in respect of that loss. No action lies at the suit of a shareholder suing in that capacity and no other to make good a diminution in the value of the shareholder's shareholding where that merely reflects the loss suffered by the company. A claim will not lie by a shareholder to make good a loss which would be made good if the company's assets were replenished through action against the party responsible for the loss, even if the company, acting through its constitutional organs, has declined or failed to make good that loss.'[65]

[60] Consequently the derivative action the appellants seek to bring under the section must be distinguished from any personal action they might have to enforce a debt owed to them. It is brought not to recover damages suffered

60 See further L Coetzee 'A Comparative analysis of the derivative litigation proceedings under the Companies Act 61 of 1973 and the Companies Act 71 of 2008' (2010) *Acta Juridica* 290 at 294-295.
61 L Griggs 'The Statutory Derivative Action: Lessons that may be learnt from the Past!' (2002) 4 *University of Western Sydney Law Review* para 1.2 [Coetzee 292].
62 Griggs part 3.
63 *Johnson v Gore Wood & Co (a firm)* [2001] 1 All ER 481.
64 *Itzikowitz v Absa Bank Ltd* (20729/2014) [2016] ZASCA 43 (31 March 2016) para 11.
65 At 503.

by the shareholders due to the wrongs of a director but damages suffered by the company itself.

[61] For this reason, in regard to the issue of prescription of a claim under s 266, it would be wrong to regard the shareholder as effectively being the creditor and the company the debtor in respect of the claim. At all times the company remains the creditor and the delinquent director the debtor. All the section does is to allow the shareholder to bring the claim on behalf of the company. And as long as that claim exists it may be enforced, either by the company itself or by an aggrieved shareholder acting under s 266.

[62] In these circumstances, for these reasons alone, as Shareblock's claim against Mr Harri has not prescribed, the appellants are entitled to invoke s 266 to enforce it on behalf of the company. In my view this conclusion, in itself, renders it unnecessary to consider whether my learned colleagues are correct in their conclusion that no obligation or liability arises until the court acts under s 266 to authorise the curator to institute proceedings in the name of the company and on the company's behalf. I do not necessarily disagree with that conclusion; I merely find it unnecessary to deal therewith. On all the remaining issues we are ad idem.

L E Leach
Judge of Appeal

APPEARANCES

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