



**IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE DIVISION, CAPE TOWN)**

Case No: **11463/2023**

In the matter between:

LUCAS EBAI ASHU

First Applicant

HAZEL ASHU

Second Applicant

and

BODY CORPORATE OF LONDON PLACE

First Respondent

STILUS UNDERWRITING MANAGERS (PTY) LTD

Second Respondent

ONE INSURANCE UNDERWRITING

MANAGERS (PTY) LTD t/a ONE

Third Respondent

REGISTRAR OF DEEDS: CAPE TOWN

Fourth Respondent

Coram: Justice J Cloete

Heard: 20 February 2024, supplementary note of first and third respondents
delivered on 23 February 2024

Delivered electronically: 27 March 2024

JUDGMENT

CLOETE J:**Introduction**

- [1] This matter involves the determination of a question of law. This is whether a subrogated “debt” of R134 225.05, alleged to be due and owing by the applicants to the first respondent body corporate (“BC”), has become prescribed in terms of s 10 read with s 11 of the Prescription Act,¹ which in turn involves a consideration of whether prescription has been delayed as provided in s 13(1)(e) thereof. The applicants seek a declaratory order that the claim has prescribed. The first and third respondents contend it has not.
- [2] The applicants are ex-spouses who are the registered owners of a sectional title unit in Salt River, Cape Town. They were previously married in community of property and divorced on 6 September 2011. In terms of the Consent Paper incorporated in their Decree of Divorce the first applicant purchased the second applicant’s undivided half share in the unit. However the transfer has not been able to proceed since the BC of the sectional title scheme in which the unit is situated has refused to issue a levy clearance certificate due to the amount allegedly owed to it.
- [3] The second respondent has been deregistered and its insurance underwriting business taken over by the third respondent (“the underwriters”). The latter (or its predecessor) has paid the total sum claimed to the BC in terms of an insurance policy taken out by the BC for such purpose, and the “debt” is thus

¹ No 68 of 1969.

subrogated. On the available information the total sum allegedly owed by the applicants to the BC is comprised of arrear levies, interest accrued thereon and collection charges, predominantly during the period 2011 to 2016. For convenience the parties have referred to the total amount as the “historic arrear levies”. The fourth respondent has only been cited by virtue of any interest it may have in the proceedings and has filed a report confirming it has no objection to the relief sought.

- [4] The applicants, BC and underwriters have sensibly agreed that in the event of this court finding the historic arrear levies have not prescribed, the first applicant will pay the full amount into his attorney’s trust account as security pending finalisation of the BC’s claim; the attorney will provide a bank guarantee in that amount; and upon receipt thereof the BC will issue the required clearance certificate, so that the transfer of the second applicant’s undivided half share in the unit to the first applicant can proceed. This agreement is not only because of the *quantum* involved (which falls within the monetary jurisdiction of the District Court) but also because there is a factual dispute pertaining to payments allegedly made by the first applicant, who also contends that of the total amount claimed, some of it is subject to the *in duplum* rule.

Procedural history

- [5] This application was launched on 13 July 2023 for hearing on 24 August 2023. On that date an order was granted by agreement postponing the matter

to the semi-urgent roll for hearing on 20 February 2024, when it came before me. The order also provided that the applicants would deliver their replying affidavit by 28 September 2023. That affidavit was only delivered on 23 January 2024 and contained a single sentence requesting condonation for late filing. The sole explanation for the delay was set out by the first applicant as follows:

'...The reason for the late filing of the affidavit is because I travelled out of the country and came back on 15 December 2023. The Respondents have not been prejudiced by the late filing of the affidavit.'

- [6] The delivery of the replying affidavit caused the BC and underwriters to apply for the striking out of certain paragraphs thereof, coupled with a conditional prayer for leave to file an affidavit in answer if the striking out application was refused. The striking out application was opposed by the applicants but they did not object to the conditional relief sought.
- [7] Given the “explanation” for the late filing of the replying affidavit counsel were requested to address the court on why condonation should be granted at all. After some debate counsel for the applicants accepted that the request for condonation fell far short of the required threshold which the applicants had to meet.² I thus ordered that condonation be refused, which then dispensed with both the striking out application as well as the conditional relief, save for costs which the applicants were also ordered to pay. For taxation purposes this will

² *Grootboom v National Prosecuting Authority* 2014 (2) SA 69 (CC) at paras [33] to [35], referring to *eThekweni Municipality v Ingonyama Trust* 2013 (3) BCLR 497 (CC) and *Van Wyk v Unitas Hospital (Open Democratic Advice Centre as Amicus Curiae)* 2008 (2) SA 472 (CC).

again be incorporated in my order at the end of this judgment. Argument then proceeded on the cases made out in the founding and answering affidavits.

Issue for determination

[8] The issue for determination is whether a member of a body corporate in a sectional title scheme (such as the first and second applicants) is also a member of its governing body for purposes of s 13(1)(e) of the Prescription Act. On the available information neither applicant has ever been a trustee of the BC.

[9] Section 13(1) of the Prescription Act provides in relevant part as follows:

'13. Completion of prescription delayed in certain circumstances.—(1)
If...

(e) the creditor is a juristic person and the debtor is a member of the governing body of such juristic person; or...

(i) the 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,

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

[10] Ultimately it was not in dispute that it is the BC, and not the underwriters, which is the entity that may claim against the applicants. The nature, powers and duties of a body corporate were neatly summed up in *Harbour Terrace*

*Body Corporate (SS401/1998) v Minister of Public Works and Others*³ as follows:

'The body corporate is a juristic person with perpetual succession capable of suing and of being sued in its corporate name in respect of any matter in connection with the land or building(s) for which the owners therein are jointly liable, any matter arising out of the exercise of any of its powers or the performance of any of its duties under the Act, any contract made by it and any damage to the common property. The body corporate is required to control, manage and administer the common property for the benefit of all owners and to properly maintain the common property in a state of good and serviceable repair. To carry out its duties in this regard it may require the owners to pay levies to a fund sufficient for the repair, upkeep, control, management and administration of the common property, and for the payment of rates and taxes and any other local authority charges for the supply of utilities and services to the building(s) or land, as well as any insurance premiums which are applicable thereto.'

[11] It is common cause that in the ordinary course the applicable period of prescription is three years from the date upon which the "debt" became due in terms of s 10 read with s 11(d) of the Prescription Act. Section 13(1) sets out several impediments which will delay (or suspend) the completion of prescription. One of these is s 13(1)(e). In *C G Van der Merwe: Sectional Titles Share Blocks and Time-sharing*⁴ the author writes that:

'...The sectional title body corporate is undoubtedly also a body corporate for the purposes of section 13(1) of the Prescription Act. The crucial question is whether an ordinary member of the body corporate as opposed to a trustee, is a member of the governing body of the body corporate. If such an

³ [2016] 3 All SA 766 (WCC) at para [24], referring to s 36 and s 37 of the Sectional Titles Act 95 of 1986.

⁴ At pp14-129 and 130.

impediment exists, prescription is only completed after a year has elapsed after the impediment no longer exists. The rationale for this provision is that the close relationship would impede the creditor's decision to sue. Therefore, one must wait until a year after the impediment has been removed, before prescription is completed. In the case of a company it has been held that section 13(1) does not apply in respect of claims against shareholders but only in respect of claims against directors, because shareholders will not normally affect the decision to sue. Under a sectional title scheme, a board of trustees is comparable to a board of directors. A trustee may, by his or her mere presence, impede a decision by the board of trustees to institute an action against him or her for arrear levies. The legislature combatted this mischief by providing that, in respect of levies owed by a trustee, prescription should be completed only after expiry of a year after the trustee has ceased to be a trustee. Consequently, claims for arrear levies against a trustee, will only prescribe after three years plus one year added after he or she has ceased to be a trustee.

If this means that claims for levies owed by ordinary members prescribe after a period of three years, trustees should pay heed to the potential effects of prescription of levy claims and should take timeous action to safeguard the body corporate against avoidable losses by interrupting prescription by the service of summons.

However, in my opinion it is not so clear that claims for levies owed by ordinary members are not covered by this impediment and that such claims will also only expire one year after a member had ceased to be a member of the body corporate. The Companies Act does not apply to sectional title schemes. The body corporate is not a company but a unique juristic person born of statute and the shareholders of a company do not have the same share in the governing of the body corporate as the sectional title members have. The members are in this respect closer to the members of a close corporation which has been judicially pronounced⁵ to be covered by section 13(1)(g) of the Prescription Act. This means that in practice the levy debt of a member will almost never prescribe particularly in view of the embargo on the

⁵ Van Deventer and Another v Nedbank Ltd 2016 (3) SA 622 (WCC).

transfer of a unit unless all debts in respect of the unit have been paid.' (my emphasis)

[12] In terms of s 2(1) of the Sectional Titles Schemes Management Act ("STSMA")⁶ any person who becomes an owner of a unit in a given scheme is a member of the body corporate, and s 2(5) of that Act provides that the body corporate is, subject to the provisions of the Act, responsible for the enforcement of the rules and for the control, administration and management of the common property for the benefit of all owners.

[13] Section 3(1) of the STSMA makes it mandatory for a body corporate to perform the functions entrusted to it by or under that Act and its rules, and such functions include requiring *'the owners'*, whenever necessary, to make contributions to administrative and reserve funds (i.e. levies). Section 7 deals with trustees of a body corporate and prescribes in s 7(1) that *'(t)he functions and powers of the body corporate must, subject to the provisions of this Act, the rules and any restriction imposed or direction given at a general meeting of the owners of sections, be performed and exercised by the trustees of the body corporate holding office in terms of the rules'*.

[14] In turn s 8(1) of the STSMA provides that each trustee stands in a fiduciary relationship to the body corporate and *'must avoid any material conflict between his or her own interests and those of the body corporate'* (s 8(2)(b)). Although the STSMA does not contain a prohibition on such an individual continuing to act as trustee, it does render that trustee liable to the body

⁶ No 8 of 2011.

corporate for monetary compensation in terms of s 8(3) for loss incurred as a result; and s 8(4) stipulates that such conduct will not constitute a breach of that trustee's fiduciary duty *'if such conduct was preceded or followed by the written approval of all the members of the body corporate where such members were or are cognisant of all the facts'*. Accordingly there is a close relationship between the trustees and members, and members have a measure of control in relation to how the trustees execute their powers and functions.

[15] What then is the "governing body" of a body corporate for purposes of s 13(1) (e) of the Prescription Act? When regard is had to the legislative scheme of the STSMA described above, it must be the trustees. I accept that s 4(i) empowers the body corporate, not the trustees, to *'do all things necessary for the enforcement of the rules and for the management and administration of the common property'*; and s 7(1) is clear that the powers and functions of the body corporate must be performed and exercised by the trustees (a) subject to the provisions of the STSMA; (b) the rules; and (c) any restriction imposed or direction given at a general meeting of owners of sections (or units).

[16] However, as I see it, the unavoidable fact remains that it is the trustees of the body corporate upon whom the STSMA confers the exercise of the powers and the functions of the body corporate, albeit with the aforementioned limitations. Applying the established principles of interpretation, if it was the body corporate comprising of every member who had to exercise those powers and functions, then s 7 of the STSMA would be rendered nugatory. It

also makes sense that in a sectional title scheme, potentially consisting of hundreds of unit owners, the only feasible way for the body corporate to function effectively is through its elected body, i.e. the trustees. And the ordinary members are not left without a remedy should the trustees fail in their duties in relation to a debtor of the body corporate, since s 9(1) of the STSMA empowers such a member to initiate proceedings on behalf of a body corporate in these circumstances in the manner prescribed therein. To my mind this is another indicator that a member of a body corporate is not (automatically) a member of its governing body, since if this were so, s 9(1) would also be superfluous. It matters not that the trustees and body corporate stand in a much closer relationship than a company and its directors, or even a close corporation and its members.

- [17] Counsel for the BC and underwriters echoed the sentiments of the learned author to whom I have referred, when he submitted that the object of s 13(1) (e) appears to be to delay prescription in a situation where a debtor could influence the decision of a juristic person to sue him or her. He submitted that in respect of bodies corporate, trustees are often also resident in the sectional title scheme. As such, a particularly difficult member could intimidate or influence his neighbour (the trustee) to delay or avoid the institution of collection proceedings against him or her for arrear levies. I accept this is notionally possible in a small scheme; but it should be borne in mind that there would always be other trustees to counter that potential influence. It is different where a trustee is also a defaulter and has far more direct interaction with his or her other trustees, where the potential for influence is greater.

[18] The predecessor to s 7 of the STSMA was s 39 of the Sectional Titles Act.⁷ In *Body Corporate of 22 West Road South v Ergold Property Number 8 CC*⁸ the court dealt with the same question before me in relation to s 39 of that Act. The learned Judge, after quoting Professor J C De Wet, found as follows:

'It is clear from the writings of Professor De Wet, which I accept, that section 13(1)(e) of the Act was intended to obviate the problems that arise from the potential conflict of interest where a debtor sits on the governing body or board of a juristic person and delays or prevents the juristic person from recovering that which is lawfully due to it.

In my view, the mere fact that the defendant, as owner of a unit, is a member of the body corporate, does not place him in the position of the governing body of the scheme as envisaged in the Act. The governing body of a body corporate are the trustees; it is they who are empowered to administer the affairs of the body corporate. It is common cause that the defendant was not a trustee at any stage and thus not a member of the governing body of the body corporate...'

[19] Counsel for the BC and underwriters submitted that the learned Judge misinterpreted Professor De Wet in reaching his conclusion since the Professor's comments were not limited only to instances of conflict of interest. Indeed they were not but that is also not the point the court in *22 West Road South* was making. Using my own loose translation, Professor De Wet wrote that s 13(1)(e) of the Prescription Act is directed at eliminating the potential of a '*bestuurslid*' (committee or board member) of a juristic entity influencing other committee or board members against taking timeous action against him

⁷ No 56 of 1986.

⁸ 2014 JDR 2258 (GJ) at pp14-16.

or her. The learned Judge thus did not misinterpret the Professor's comments. In addition the literal translation of "governing body" is "bestuursliggaam".

[20] I accordingly agree with the court's finding in *22 West Road South*, applied to s 7(1) of the STSMA. It follows that the failure of the trustees of the BC to take timeous steps against the applicants for the historic arrear levies the BC claims is owed to it has resulted in that claim against the applicants having prescribed, and the BC is precluded from relying on s 15B(3)(a)(i)(aa)⁹ of the Sectional Titles Act in refusing to issue the levy clearance certificate. In this regard I disagree with the submission made by counsel for the BC and underwriters that no purpose would be served by the aforementioned subsection if historic arrear levies owed by an ordinary member of the scheme could prescribe. To my mind this overlooks the duties imposed on the trustees by the STSMA in relation to collection of levies and the like. Put differently the purpose of prescription is not to punish an inability to act but rather to prevent unreasonable inaction.

[21] It follows that the declaratory relief sought by the applicants must be granted. As to the balance of the relief contained in the notice of motion, namely to compel the first respondent to issue a levy clearance certificate following upon a calculation of current levies which have not prescribed upon payment

⁹ (3) The registrar shall not register a transfer of a unit or of an undivided share therein, unless there is produced to him---

(a) a conveyancer's certificate confirming that as at date of registration---

(i) (aa) if a body corporate is deemed to be established in terms of section 2(1) of the Sectional Titles Schemes Management Act, that body corporate has certified that all moneys due to the body corporate by the transferor in respect of the said unit have been paid, or that provision has been made to the satisfaction of the body corporate for the payment thereof;...'

thereof by the applicants, failing which compelling the fourth respondent to effect transfer, I am not persuaded that the applicants have made out a sufficient case at this stage.

Costs

[22] It is fair to say that the BC and underwriters were put to unnecessary expense in having to fend off a number of points raised in argument which were not based on the applicants' case or were meritless. Accordingly it is appropriate that the BC and underwriters should not be mulcted with costs despite having been unsuccessful.

[23] **The following order is made:**

- 1. It is declared that the subrogated "debt" of R134 222.05 alleged by the first respondent to be owing to it by the first and second applicants in respect of historic arrear levies has prescribed in terms of section 10 read with section 11(d) of the Prescription Act 68 of 1969;**
- 2. The first respondent is thus precluded from relying on the "debt" referred to in paragraph 1 above for purposes of section 15B(3)(a)(i) (aa) of the Sectional Titles Act 95 of 1986;**
- 3. The applicants shall pay the costs of the first and third respondents' application to strike out and their conditional application for leave to**

file an affidavit in answer to the applicants' replying affidavit on the scale as between party and party as taxed or agreed; and

4. Save as aforesaid each party shall pay their own costs.

J I CLOETE

For applicants: Adv D Petersen

Instructed by: A Fotoh and Associates Inc. (Mr A Fotoh)

For first and third respondents: Adv D Whitcomb

Instructed by: BDP Attorneys (Mr M Naude)