

Is a Body Corporate insulated from prescription of levy debts owed by its members?

In the recent case of *Body Corporate of Santa Fe v Bassonia Four Zero Seven CC*¹ the Body Corporate applied for liquidation of the respondent Unit Owner (a close corporation) based on outstanding arrear levies due to it in respect of two units owned by the respondent in the Santa Fe Sectional Title Scheme. The focus of this article is on the specific defence of prescription raised by the Unit Owner, Bassonia Four Zero Seven CC (“the respondent”). The respondent argued that the outstanding levies had prescribed in terms of section 11(d) of the Prescription Act² (“the Prescription Act”) which provides that “the period of prescription of debts shall be, save where an Act of Parliament provides otherwise, three years in respect of any other debt”.

The court application was dismissed and it was held that the institution of liquidation proceedings does not interrupt the prescription of a debt.³ Section 15(1) of the Prescription Act provides that for judicial interruption of prescription, unless the debtor acknowledges liability, prescription shall “be interrupted by the service on the debtor of any process whereby the creditor claims payment of the debt.” The court reinforced the position in law that winding-up proceedings, such as liquidation proceedings, are not considered to be proceedings whereby “the creditor claims payment of the debt”. While this principle in relation to whether or not liquidation proceedings are proceedings where a creditor claims payment of the debt, may be correct in law, as the court provides case precedent (authority) for this principle, there are additional underlying issues with the way that the court dealt with the levy debts and the claims in question.

The Body Corporate applied for leave to appeal the judgment on several grounds, notably for purposes of this article, the following grounds:

- a. That the Unit Owner’s indebtedness, or alternatively a part of that indebtedness, was the subject of a judgment in favour of the Body Corporate (the first Body Corporate action) and as such, the period of prescription in respect of such indebtedness is 30 years from the date of judgment, as per section 11(a)(ii) of the Prescription Act; and
- b. That, in any event, the outstanding levies, for which no judgment had yet been obtained, or for which no action had yet been instituted by the Body Corporate, had not prescribed as a result of the provisions of section 13(1)(e) and (i) of the Prescription Act. These provisions provide that the period of prescription would be delayed until a year after the debtor (the Unit Owner) who is a member of the governing body of a creditor (the Body Corporate) a juristic person, ceases to be a member of the juristic person.

¹ (Case No: 35593/2018) [2019] ZAGPJHC 54 (6 March 2019). Available at: <http://www.saflii.org/za/cases/ZAGPJHC/2019/54.html>.

² Act 68 of 1969.

³ Para 17 of the judgment.

It is important to note that the High Court application for leave to appeal was also dismissed, and the Body Corporate has therefore petitioned the Supreme Court of Appeal (“the SCA”) to hear the appeal under a special application for leave to appeal. The parties await the outcome of this special leave to appeal application to the SCA as the proceedings have not yet been finalised.

In addition to the above, a significant part of the indebtedness due to the Body Corporate had not prescribed, so it is argued, as not only had the Body Corporate obtained judgment against the Unit Owner, in the first Body Corporate action, but also served summons in the second Body Corporate action. The Body Corporate argues that it instituted actions in the Magistrate’s Court against the Unit Owner for the payment of levies, one of which was granted thus falling within section 11(a)(ii) of the Prescription Act (being a judgment debt) and the other which is still pending and was therefore interrupted in accordance with section 15 of the Prescription Act when summons was served on the Unit Owner. The SCA, if it agrees to hear this appeal, would need to adjudicate on the above, and it does appear that the Body Corporate has good prospects of success on these grounds.

Let’s explore one of the initial grounds of appeal relating to prescription, that is whether prescription is delayed until one year after the Unit Owner ceases to be a member of the Body Corporate, in accordance with sections 13(1)(e) and (i) of the Prescription Act.

The question arises as to who is considered to be “a member of the governing body” for purposes of sections 13(1)(e) and (i) of the Prescription Act and its application to bodies corporate. Is this exception referring only to the Trustees of a Body Corporate or to the Unit Owners themselves who are members of the body corporate? It is submitted that the answer to this question hinges on (a) the functions and duties of Trustees and (b) on the question as to whom ultimately has the power to manage and administer this unique legal entity known as the body corporate. If you consider the proposed mischief which this particular provision of the Prescription Act seeks to ameliorate, it is to prevent a person in power or control of a juristic person, to obstruct and otherwise benefit from inaction against them on behalf of the juristic person for the collection or enforcement of debt owed by them to the juristic person. Does this provision only protect the Body Corporate from prescription in respect of levy debts owed by Trustees or by ordinary members of the Body Corporate too?

It is submitted that Unit Owners are members of the governing body in terms of sections 2(1) and (3) of the Sectional Titles Schemes Management Act⁴ (“the STSMA”) which states that any person who becomes an owner within a sectional title scheme is regarded as being a member of the body corporate, and ceases to be a member of the Body Corporate when such member ceases to be an owner of a unit within the scheme in question. It is trite that the Body Corporate (and the Unit Owners who are members thereof) are responsible for the management and administration of the sectional

⁴ Act 8 of 2011.

title scheme and are given extensive functions and powers in terms of sections 3, 4 and 5 of the STSMA, albeit that these functions are carried out by elected Trustees of the body corporate.

While Trustees must be appointed to perform the said functions and powers on behalf of the body corporate, subject to the STSMA and the management and conduct rules of the body corporate, it is the Unit Owners that have sufficient and ultimate power to elect and remove the Trustees, and the Trustees must abide by any restriction imposed or direction given at a general meeting of the Unit Owners.⁵ The Trustees must exercise the body corporate's powers and functions assigned and delegated to them in accordance with the resolutions taken at general meetings and at meetings of Trustees.⁶ In substantiation of the above, a member of the Body Corporate may nominate any person for the office of trustee,⁷ and at the annual general meeting the Trustees are elected by the Unit Owners.⁸ A trustee ceases to hold office if that trustee is removed from office by ordinary resolution of a general meeting of owners, provided that the intention to vote on the proposed removal was stated in the notice calling the meeting.⁹ It is therefore submitted that the true and ultimate power of the Body Corporate lies with the Unit Owners.

Section 4(i) of the STSMA specifically states that the Body Corporate has the power to do all things reasonably necessary for the enforcement of the rules and for the management and administration of the common property. Furthermore, section 10(2) of the STSMA allows for the Body Corporate to amend management or conduct rules by unanimous and special resolution, respectively.

Governing bodies generally govern the actions and conduct of a particular juristic person, such as the board of directors of a company. A sectional title Body Corporate is not a company though, it is a unique juristic person born of statute.¹⁰ Trustees are not directors of a company. The shareholders of a company are not the same as members of a body corporate. The term 'body corporate' and 'governing body' are synonymous in nature given the practical and unique operation of a Body Corporate in the sectional title environment. It is a necessary and logical conclusion that a member of a Body Corporate is a member of a governing body within the meaning of section 13(1)(e) and (i) of the Prescription Act and this will ensure the achievement of the purpose for which the provision was enacted.

One must bear in mind that when the Prescription Act became effective in South Africa on 1 December 1970, sectional title bodies corporate did not exist. The legislature may not have contemplated the interplay between the prescription provisions so enacted in 1970, and the body corporate's members'

⁵ Section 7(1) of the STSMA read with Prescribed Management Rule ("PMR") 17(6)(m) of the Sectional Titles Schemes Management Regulations, 2016 ("the STSMA Regulations"). At the first (inaugural) general meeting, PMR 16(2)(h) of the STSMA Regulations is applicable to the motion detailing any restrictions to be imposed or directions to be given in terms of section 7(1) of the STSMA or confirming that there are no such restrictions or directions.

⁶ Prescribed Management Rule ("PMR") 9(b) of the STSMA Regulations.

⁷ PMR 7(1) of the STSMA Regulations.

⁸ PMR 17(6)(j)(viii) of the STSMA Regulations. At the first (inaugural) general meeting, PMR 16(2)(g) of the STSMA Regulations is applicable for the election of trustees.

⁹ PMR 6(4)(g) of the STSMA Regulations.

¹⁰ Section 2(6) of the STSMA specifically states that the provisions of the Companies Act 71 of 2008 does not apply in relation to the body corporate.

debts owed to it, as the first Sectional Titles Act¹¹ was only promulgated on 30 June 1971 and only came into operation on 30 March 1973.

As far as functions and duties of the Trustees are concerned, the Trustees exist to manage the Body Corporate effectively and in accordance with the STSMA, the management and conduct rules, and any directive given to them by the members of the body corporate, and are confined by the restrictions imposed on them by the members of the body corporate, in general meeting.

It is therefore submitted that the ultimate seat of power lies with the Unit Owners in general meeting (but not in individual members) who can by general meeting, remove Trustees who seek to launch legal action against them for non-payment of levies, and elect Trustees who may not seek to collect the levies from them.

In amplification of the above, it is also conceivable that Unit Owner(s) with sufficient participation quotas (power), equalling 25% of the total quotas of all sections, could force Trustees to call a general meeting with the sole purpose of removing one or more of them as Trustees and appointing new Trustees in their place, and if they fail to call the meeting, the members are entitled to call the meeting for that stated purpose.¹²

However, it could also be argued that “a member of the governing body” is in this instance, reference to a trustee only, who may, by their mere presence, impede a decision by the board of Trustees to institute an action against him or her for arrear levies. It is submitted that this is an overly restrictive interpretation of the Prescription Act.

Look back at the proposed mischief which s 13(1)(e) and (i) of the Prescription Act seeks to address, viewed against the backdrop of the unique nature of a Body Corporate made up of its members. The body corporate’s claim against the member of the body corporate, whether they are an ordinary owner or a trustee, should be insulated by this delay in extinctive prescription until one year after they cease to be a member of the body corporate. The Unit Owners can obstruct and delay the implementation of levy collection activities and the institution of legal action against them as defaulting levy debtors, inasmuch as a trustee could do so for a debt which he personally owes to the body corporate.

Practically, therefore, the levy debts of a member should rarely prescribe due to the effect of the levy clearance certificate as per s 15B(3)(a)(i)(aa) of the Sectional Titles Act¹³ which requires that all debts in respect of the unit must have been paid, or provision has been made to the satisfaction of the Body Corporate for the payment thereof, before transfer can be registered in the name of a new owner.

¹¹ Act 66 of 1971.

¹² PMR 17(4)(a) and(b) of the STSMA Regulations.

¹³ Act 95 of 1986.

Whatever the outcome of this argument is, it will have wide industry impact on the collection of levies where a member of a governing body either as a Unit Owner or a trustee may be prevented from relying on prescription as an absolute defence to a claim for arrear levies while they are still members of the said body corporate. The Body Corporate of Santa Fe and its legal representatives, and ultimately the SCA, have an opportunity to finally argue and carefully pronounce on the prescription of levies owed to sectional title bodies corporate by its members. They should take the opportunity.

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