

SOUTH AFRICA / JUDGMENT

Long Beach Owners Association v Miles N.O - Trial (624/2020) [2023] ZAECKMKHC 71 (30 May 2023)

[2023] ZAECKMKHC 71

COURT

Eastern Cape High Court, Makhanda

BEFORE

Lowe

CASE / FILE NUMBER

624/2020

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IN THE HIGH COURT OF SOUTH AFRICA

EASTERN CAPE DIVISION, MAKHANDA

CASE NO: 624/2020

In the matter between:

LONG BEACH OWNERS ASSOCIATION Plaintiff and QUINTON MILES N.O. Defendant (in his capacity as Trustee for the time-being of the Haven Trust (I[...]))

JUDGMENT: TRIAL

LOWE J:

INTRODUCTION

1. In this matter I shall refer to the plaintiff as plaintiff or the Association and the defendant as such for convenience.
2. In March 2020 plaintiff brought an action against defendant claiming payment of the sum of R600 216,15 together with interest thereon. Put simply, the cause of action is one in which plaintiff alleges that as a home owners' association and having regard to its resolutions and constitution, it legitimately incurred legal expenses inter alia as "extraordinary expenses" in pursuing litigation against the DEDEAT and the DAFF, including the Minister of the DAFF, on behalf of plaintiff, the home owners'

association incurring legal expenditure in an amount of R4 201 513,03. Plaintiff alleges that either on the basis of its first claim A and its alternative claim B defendant in his capacity as trustee for the time being of the Haven Trust N.O., is liable to plaintiff in the sum of R600 216,15 being its share, as a member of the plaintiff, of the said legal costs duly and legitimately incurred in one or other of the manners set out in the particulars of claim.

3. In response, at least initially, the defendant denied all liability herefore on a number of different bases relying inter alia on clause 5 of the Home Owners' Constitution of the plaintiff.
4. Later on, and after the matter had in fact been set down for trial and on 1 December 2022 defendant amended its plea to raise a special plea of prescription.
5. That plea of prescription followed its discovery that the debt upon which plaintiff sued had at least allegedly arisen on 25 April 2016, of which defendant became aware, so it is alleged much later, at least some time between 2 July 2021 and the discovery of the judgment which defendant (in argument) says it became aware of much later and closer to the date of its filing of its special plea upon discovery of the judgment relevant.
6. Unfortunately, the application to separate was launched very late on 6 March 2023, just before trial, the parties having been unable to agree on that separation.
7. At the commencement of the trial it became apparent that plaintiff alleged that the special plea, if successful, would be dispositive of all the issues between the parties as it would defeat its claim and that in this context it should be heard first and separately. The defendant resisted this separation application.
8. I heard argument on the separation application at the commencement of the trial and in a full ex tempore judgment concluded that a good basis had been set out for separation and that the application must succeed ordering accordingly that "(b) The issues raised in the defendant's special plea relevant to the prescription of plaintiff's claim, are separated from the remaining issues between the parties, to be heard separately and first, merits and quantum to stand over for later determination if relevant."
9. I ordered that the costs of this separation application were to be costs in the cause.
10. Having so separated the issues the trial proceeded.
11. It should be said that in the separation application argument both applicant and respondent set out that no evidence would be required, but at the commencement of the trial on the separated issue, defendant indicated that it would in fact lead a witness.

SEPARATED TRIAL

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

13. I have already set out the cause of action above in sufficient detail, it being the special plea to which I must give attention.
14. A further Rule 37 conference, held at my insistence, on 7 March 2023 set out the issues to be determined in the entire trial.
15. It was the first issue (one of eight) which was required to be addressed in the separated trial, being “whether or not the plaintiff’s claim has prescribed”. The parties then agreed in the minute that the prescription issue could be argued on the pleadings as they stand “... with the application in the Gauteng High Court under case number 624/2020 having commenced in April 2014 ... and judgment was handed down on 26 April 2016 ... and that the present action commenced on 5 March 2020, and the defendant was during this period and still remains a member of the plaintiff.”
16. It was apparent from the minute that plaintiff would argue that the provisions of section 13 of the Prescription Act 68 of 1969 (The Prescription Act) apply, and interrupted prescription as the defendant was at all relevant times a member of the plaintiff, while defendant would argue that the provisions of section 10, as read with 11 and 12 of the Prescription Act apply such that plaintiff’s claim has prescribed.
17. On the special plea itself defendant pleaded that:
 - 17.1 Plaintiff’s claim is premised upon a claim or obligation by defendant arising from a resolution purportedly taken by the members of plaintiff during December 2014 to pay a proportionate share of plaintiff’s expenditure upon the legal costs already referred to above incurred in the Gauteng High court under case number 624/2020;
 - 17.2 It is pleaded further that the plaintiff’s application in the Gauteng High Court was determined by a judgment of that court delivered on 25 April 2016;
 - 17.3 Accordingly, the debt claimed from defendant was due, in terms of section 12 of the Prescription Act, at the latest, on 25 April 2016 and plaintiff’s claim had prescribed in terms of section 10 as read with section 11 of the Prescription Act on 26 April 2019;
 - 17.4 Plaintiff’s action against defendant having been issued on 5 March 2020 had by then prescribed, this accordingly unenforceable.
18. There was no replication, and effectively the relevant factual basis underlying the special plea was common cause, but not the consequential result relevant to prescription.
19. The evidence of Mr. Quinton Miles was led shortly, he being cited in his capacity as a trustee for the time being of the defendant trust (the Haven Trust).
20. I will only refer to his evidence briefly as, in my view, nor was it contended otherwise, that at the end of the day it took the agreed facts and the issues to be decided no further.

21. Mr. Miles is indeed a trustee of the Haven Trust which owns two erven in the Long Beach development of which plaintiff is purportedly the home owners' association. In short he contended that he at no time ever received any invitation to any meeting of the home owners' association nor had he ever attended such meeting. He referred to the judgment of Kollapen J in the Gauteng litigation, being a review of two decisions taken by the MEC: Economic Development Environmental Affairs and Tourism, this being to uphold an appeal against the granting of an application for environmental approval granted by the Department of Economic Development, Environmental Affairs and Tourism and in so doing effectively denied the applicant an environmental authorisation relevant to the home owners' association and erven. The second decision related to the refusal to grant two forestry licences. Mr. Miles said he did not know of this in any way at all. He said he did not know of the appeal against the judgment of Kollapen J, in the Supreme Court of Appeal in any way at all (this relating to the forestry licences).
22. He said he had no knowledge of a resolution purportedly taken by plaintiff on 16 December 2014 relevant to this litigation, the members of the association again purportedly authorising the bringing thereof. He said that the Trust acquired his erven directly from a certain Mr. Crawford who had since passed away. He said that he did not even know who the purported chairman of the plaintiff's association was then or at any time, he having met that purported chair, or seen him, on the day of the trial. That chair was said to be Rick Tudhope, who was not himself an owner of any erf in the development. In my view the cross-examination which was limited, took the matter relevant to prescription no further at all.

THE PRESCRIPTION ISSUE

23. Generally, chapter III of the Prescription Act provides for the extinction of debt by prescription. Obviously the effect of prescription is to extinguish the debt after the lapse of the prescriptive period applied to that debt by the Act. The claim in this matter is indeed a "debt" as such relevant to the Prescription Act.
29. The claim is based upon the plaintiff's constitution which provides in summary that the plaintiff may raise levies to meet expenses associated with the maintenance, repair, improvement and keeping in proper order and condition of the property, and for the payment of rates and charges in respect of the common areas and services rendered to it, and for the payment of expenses necessarily or reasonably incurred in connection with the management of the plaintiff.
30. It provides in addition that the plaintiff may require members to pay an additional levy to cover "extraordinary expenses" necessarily incurred.

31. The constitution provides that the plaintiff is “its own legal persona, quite separate and distinct from its members”. It is entitled to institute action for all and any of the obligations and duties imposed on the members in terms of the constitution. For the purposes of this proceeding it must be assumed that the debt claimed is one in terms of the constitution, its prescription being the issue relevant.
32. The claim refers to section 29(2)(b) of the Land Use Planning Ordinance 15 of 1985 (“LUPO”). Section 29(2)(b) providing that plaintiff shall have a constitution for various purposes, and section 29(2)(c) that the owners of land units arising from the sub-division of property shall be members of the home owners’ association and shall be “jointly liable for the plaintiff’s expenditure”.
33. The haven trust as I have said is the owner of two subdivided portions of the property relevant and it is alleged that in terms of LUPO that defendant is a member of plaintiff and jointly liable for the plaintiff’s expenditure accordingly. It is further alleged that by the constitution and resolution, previously referred, the litigation commenced and was approved by the members they becoming jointly liable via LUPO for plaintiff’s expenditure in a proportionate share. The alternative claim relies simply on the resolution alleged.
34. As per the dates, and from the further minute already referred to above it is common cause that:
 - 34.1 The Gauteng litigation commenced in April 2014;
 - 34.2 The judgment by Kollapen J was handed down on 26 April 2016 – the costs relevant thereto being the origin of the claim;
 - 34.3 The present action commenced on 5 March 2020;
 - 34.4 Defendant was a member of plaintiff at all times relevant;
 - 34.5 Effectively that prescription commenced to run on 25 April 2016 (which is common cause);
 - 34.6 That unless delayed, in terms of section 13 of the Prescription Act the claim would long have expired and become prescribed by 5 March 2020 when the claim was issued.
35. It is not disputed that plaintiff’s claim is clearly a debt as contemplated by section 12 of the Prescription Act[4].
36. It’s prescription period is three years.
37. It is thus that the parties accept that the claim has prescribed as a matter of law in terms of sections 10 and 11 of the Prescription Act, but for the delay argument.
38. It comes down then to whether, for the purposes of section 13(1)(e) of the Prescription Act, plaintiff is a juristic person as contemplated in the Act and the defendant a member of its governing body.

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

40. It must be emphasised, and always remembered, that in the current day, interpretation of a document, including a statute, requires careful regard to context. When a court determines the nature of the party's rights and obligations in a contract it is involved in an exercise of contractual interpretation. There is now a settled approach to the interpretation of contracts, documents and indeed statutes.[5] In that matter the following was said:

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

41. As was emphasised this approach to interpretation requires that from the outset one considers the context and language together, with neither predominating over the other.
42. In *Chisuse v Director - General Director of Home Affairs*[6] (at paragraph 52) the Constitutional Court speaking in the context of statutory interpretation held that this "now settled" approach to interpretation, is a "unitary" exercise. This means said the court in *University of Johannesburg v Auckland Park Theological Seminary* and another[7], that interpretation is to be approached holistically: simultaneously considering the text, context and purpose. To make it clear, it has been explicitly pointed out in cases subsequent to *Endumeni* that context and purpose must be taken into account as a matter of course whether or not the words used in the contract (or statute) are ambiguous.[8]

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

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

- (a) that statutory provisions should always be interpreted purposively;
 - (b) the relevant statutory provision must be properly contextualised; and
 - (c) all statutes must be construed consistently with the Constitution, that is, where reasonably possible, legislative provisions ought to be interpreted to preserve their constitutional validity. This proviso to the general principle is closely related to the purposive approach referred to in (a).”
44. In considering section 13(1)(e) it is relevant to note that as the Prescription Act was promulgated during 1969, at that time, the 1926 Companies Act was in operation. Subsequently the 1973 Companies Act was promulgated

neither giving a definition of a “juristic person”.

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

“Juristic person” includes –

- (a) A foreign company; and
- (b) A Trust, irrespective of whether or not it was established within or outside the Republic.”

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

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

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

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

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

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

- (a) Shall be a body corporate;
- (b) ...”

50. It goes on to provide at section 29(2)(c) that the home owners' association shall have as its members the owners of the land units involved.
51. LUPO does not define the term "body corporate".
52. Counsel for plaintiff, Mr. Naidoo, did not suggest for a moment that the use of the words "shall be a body corporate" in LUPO were such as to be a deeming provision establishing thereby the existence of a body corporate in respect of a home owners'

association regardless of its origin or form factually present.

53. In this matter factually, the plaintiff home owners' association is most certainly not on the face of it, or on what is before me, in any form, an incorporated association, but simply one arising from an agreement between its members having a separate legal personality with perpetual succession, a "universitas" the ability to sue and be sued in its own name with the purpose of furthering the common interest of its members[10].
54. The question to be answered is whether the home owners' association is somehow however a "juristic person" as envisaged in section 13 of the Prescription Act.

- [1] Lancelot Stellenbosch Mountain Retreat (Pty) Ltd v Gore NO and Others [2015] ZASCA 37.
- [2] Standard Bank of South Africa Ltd v Miracle Mile Investments 67 (Pty) Ltd and Another 2017 (1) SA 185 (SCA).
- [3] Regering van die RSA v SA Eagle Versekeringsmaatskappy Bpk 1985 (2) SA 42 (O); Malcolm v Premier, Western Cape Government NO 2014 (3) SA 177 (SCA); Silhouette Investments Ltd v Virgin Hotels Group Ltd 2009 (4) SA 617 (SCA).
- [4] Duet and Magnum Financial Services (in liquidation) v Koster 2010 (4) SA 499.
- [5] Natal Joint Municipal Pension Fund v Endumeni Municipality 2012 (4) SA 593 (SCA).
- [6] 2020 (6) SA 14 (CC).
- [7] 2021 ZACC 13 at [65].
- [8] Novartis SA (Pty) Ltd v Maphil Trading (Pty) Ltd 2016 (1) SA 518 (SCA).
- [9] 2014 (4) SA 474 (CC).
- [10] Nelson Mandela Metropolitan Municipality v Greyvenouw cc 2004 (2) SA 81 (SECLD) [58 – 60].
- [11] Extinctive Prescription 2nd Ed Loubser Juta 198.
- [12]
- [1993] ZASCA 198; 1994

(2) SA 128 (A) at 133 F.

[13] 1999 (3) SA 924 (SCA) at 930D.

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Prepared on 11 October 2026 · Esheria