

SOUTH AFRICA / JUDGMENT

Shames No and Others v Body Corporate of Victoria and Edward Court (3920/2012) [2016] ZAGPPHC 633 (29 July 2016)

[2016] ZAGPPHC 633

COURT

North Gauteng High Court, Pretoria

BEFORE

Rabie

CASE / FILE NUMBER

3920/2012

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HIGH COURT OF SOUTH AFRICA (GAUTENG DIVISION,
PRETORIA)

NOT REPORTABLE

NOT OF INTEREST TO OTHER JUDGES

REVISED

DATE: 29 JULY 2016

Case no. 3920/2012

In the matter

between:

K.D. SHAMES NO
First Plaintiff G.M. MARC
NO
Second Plaintiff
UCOSISELELO (PTY)LTD
Third Plaintiff
LEMASA INVESTMENTS
(PTY)LTD Fourth Plaintiff
WAVERLEY CENTENARY
(PTY)LTD Fifth Plaintiff
and
BODY CORPORATE OF
VICTORIA AND
EDWARD COURT
Defendant

JUDGMENT

RABIE, J

1. The first and second plaintiffs, as trustees of the BC Specialised Opportunities Fund Trust, claimed the amount of R 7 586 960, 92 from the defendant pursuant to a written loan agreement concluded between the fifth plaintiff and the defendant on 14 September 2005.
2. As security for its obligations in terms of the loan agreement the defendant ceded and assigned to fifth plaintiff all the defendant's rights, title and interest in and to all unpaid contributions due by members of the defendant to it as well as all future contributions to be levied upon the defendant's members. On 3 December 2009 the fifth plaintiff ceded its right title and interest in and to all amounts due and owing by the defendant to it, to the fourth plaintiff. On 1 June 2011 the fourth plaintiff ceded its right title and interest in and to its claim against the defendant to the third plaintiff. On 29 June 2011 the third plaintiff ceded its right title and interest to its claim against the defendant to the first and second plaintiffs. The plaintiffs claimed the aforesaid amount from the defendant as alternative plaintiffs. For the sake of brevity I shall refer to the plaintiffs merely as "the plaintiff" unless there is reason to refer to them specifically.
3. Apart from denying liability for the claim against it the defendant pleaded specifically that the claim against it had become prescribed and also that the in dulum rule applies insofar as the plaintiff seeks to recover more in respect of interest than the amount of the capital debt.
4. Before proceeding to the dispute between the parties it is necessary to refer briefly to certain background factors. The defendant is a sectional title scheme comprising 72 units situated in Rosettenville, Johannesburg. The scheme is governed by the Sectional Titles Act, 1986 ("the Act"). A body corporate was formed for the scheme of which all the owners were members. On 5 July 2005 the scheme was placed under administration by the Gauteng Division of the High Court and Mr J. van den Bos was appointed as Administrator of the scheme in terms of section 46 of the Act. The Administrator was granted the powers and duties provided for in section 37 and 38 of the Act which effectively suspended the body corporate and removed its rights, powers and duties in favour of the Administrator.
5. Shortly after his appointment the Administrator, on 14 September 2005, signed the aforesaid loan agreement with the fifth plaintiff and thus bound the body corporate to the terms of the loan agreement.
6. Mr J. Mason, who testified on behalf of the plaintiff, explained the background to the conclusion of the loan agreement. He testified that during or about 2004 he, together with some of the major banks, established a training programme with the aim of providing training to sectional title unit owners and bodies corporate to make them aware of their rights and obligations in terms of the Act. It emerged during the course of the training programme that one of the major challenges facing bodies corporate was that the owners

were not making their required contributions (levies). This resulted in the bodies corporate not having sufficient available funds to discharge their obligations, inter alia, to maintain the common property. This state of affairs also prejudiced the owners who were paying their levies and also resulted in the body corporate having to take legal action against the non-paying owners.

7. In order to address the aforesaid problem a loan structure was developed to address these very financial challenges facing bodies corporate. The lending model which was developed had as its main purpose the advancement of a loan which would enable the body corporate to perform its functions and duties required in terms of the Act. At the inception of the loan transaction an amount equal to the arrear levies owing at that point would be made available to the body corporate. A facility was also made available to finance the shortfall, if any, in monthly levy collections. No fixed monthly instalments were payable and the loan debt would be repayable by levies collected. The advantage of this type of loan agreement would be the protection of the paying owners as well as allowing the body corporate to rehabilitate their finances without prejudicing other owners' rights.
8. In casu the Administrator concluded the written loan agreement with the fifth respondent on 14 September 2005. According to paragraph 2 of the agreement the loan consisted of two portions. The first, in terms of paragraph 2.1, was a loan in the amount of R 1 240 913, 18 which amount reflected the arrear or unpaid levies at date of signature of the agreement. This portion of the loan was referred to as the "initial payment". The second portion, in terms of paragraph 2.2 was described as follows: "thereafter on a monthly basis, during the currency of this Agreement; sufficient monies to enable the Body Corporate to meet its monthly financial commitments, subject to the terms and conditions set out in this Agreement (monthly amount)."
9. Both the aforesaid amounts were subject to the following proviso stated in paragraph 2 as follows:

"provided that the total amount in respect of the initial payment and the monthly amount, including interest to accrue thereon, shall never exceed the sum of all unpaid levies (including interest, administration charges, collection fees and legal fees) throughout the duration of this Agreement and provided further that all advances in respect of the monthly amount and accrued interest on the loan shall be made by the Company in its sole discretion."
10. Under the heading "Payment of Interest and Repayment of Capital" paragraph 7 of the agreement provided as follows:

"7.1 The interest and the capital owed by the Body Corporate to the Company from time to time shall be repayable from time to time on the earlier of:

7.1.1 the date of receipt of monthly levies from time to time, limited to the amount of such a receipt

7.1.2 the date of receipt of collected earlier levies

7.1.3 the termination/cancellation of this agreement.

7.2. In the reduction of its indebtedness (capital and accrued interest) to the Company, the Body Corporate shall, on a monthly basis, pay the interest in terms of paragraph 4 and repay the capital owed to the Company by way of paying to the Company all the monthly levies and interest thereon collected by or on behalf of the Body Corporate. The Body Corporate shall instruct the Managing Agent to effect payment of all monthly levies (including interest, administration charges, collection commission and legal costs) collected, to the Company, on a monthly basis, by paying same in the Company's bank account, within 7 (seven) days from receipt thereof, but not later than the 5th day from the Managing Agent's monthly close-off date, failing which an administration fee of R 1000, 00 per month shall apply for the duration of such failure and/or breach and which amount shall be capitalised to the loan without notice to the Body Corporate.

7.3 All payments made by the Body Corporate in the reduction of its indebtedness shall be apportioned:

7.3.1 FIRSTLY towards administration charges, collection commission and legal costs; and

7.3.2 THEREAFTER towards interest not yet capitalised; and

7.3.3 THEREAFTER in the reduction of the capital outstanding."

11. In terms of paragraph 8 the "Company", which was the fifth plaintiff for purposes of the agreement, was appointed by the body corporate as the collection agent to collect all current unpaid, future unpaid and future monthly levies due to the body corporate by the owners of the sections in the scheme. However, in terms of the same paragraph the fifth plaintiff granted the body corporate the power to collect unpaid levies.
12. In terms of paragraph 4 interest was due to the fifth plaintiff on outstanding amounts due. Paragraph 4 provided as follows:

"The outstanding balance due to the Body Corporate from time to time in respect of amounts lent and advanced by the Company to the Body Corporate in terms of this Agreement shall bear interest at the Interest Rate and such interest payable by the Body Corporate shall be calculated on a daily basis on the outstanding balance and charged monthly in arrears on the last day of each month when it shall immediately be due and payable in terms of clause 7. Any interest which is unpaid on the due date, will be capitalised to the Body Corporate's loan on that date."

According to paragraph 1.1.8 the "interest rate" meant interest on the loaned amount at the rate of 10% above the prime lending rate of the Standard Bank of South Africa Limited per annum calculated on a daily basis on the outstanding balance and charged monthly in arrears on the last day of each month when it becomes due and payable.

13. Paragraph 9 of the agreement contained a "security session". According to this provision the Body Corporate ceded and assigned to the fifth plaintiff, as security for the indebtedness of the Body Corporate to the fifth plaintiff, all the Body Corporate's right, title and interest in and to all unpaid contributions due by members and all and any rights of action, which the Body Corporate may have, including, but not limited to, rights of action against the defaulting owners of units in the scheme; and all future levies, including special levies due and to become due to the Body Corporate, including such charges and costs payable in terms of the Act.
14. The agreement also contained a breach and an acceleration clause should the defendant fail to comply with its obligations under the agreement.
15. It is appropriate to deal with the defendant's plea of prescription first. In terms of section 12 (1) of the Prescription Act, 68 of 1969, prescription commences to run from the date upon which the debt became due. A date of this nature becomes prescribed after three years. It was submitted on behalf of the plaintiff that the earliest that the debt could have become due was the date of termination of the agreement. Notice of termination was given in the summons that was served on 26 January 2012.
16. Before referring to the agreement itself, something needs to be said about the nature and extent of the amount claimed. Despite the evidence of Mr Mason and Mr Shames, who testified on behalf of the plaintiff, I find it difficult to form a clear picture of what amounts had actually been paid to the defendant and what amounts had actually been repaid to the plaintiff or had been collected as levies and/or alleged unpaid levies. Despite what was mentioned in paragraph 2.1 of the agreement and the initial evidence that the amount of R1 240 913,13 was paid as the initial payment in respect of unpaid levies, it appeared later that only the amount of R 1 107 689,57 had actually been paid to or on behalf of the defendant. Firstly, it appears that this amount comprise different payments not to the defendant but rather to creditors of the defendant. Secondly, although it was submitted on behalf of the plaintiff that the aforesaid amount constituted the initial payment which was supposed to reflect unpaid levies at the date of signature of the agreement, there was simply not sufficient reliable evidence to prove this fact. There is no reason why the aforesaid payments to creditors could not equally be taken as payments in terms of paragraph 2.2 of the agreement relating to monies which would enable the defendant to meet its monthly financial commitments.
17. Furthermore, the amount originally claimed from the defendant was the amount of R 3 549 395,
23. During the trial this amount was amended to the amount of R 7 586 960, 92. There was no evidence as to exactly how any of these amounts were made up and calculated. During final argument it was submitted on behalf of the plaintiff that there was no amount due or that there had been no evidence to support a claim for monies due in respect of paragraph 2.2 of the agreement which relates to monies paid to enable the defendant to meet its monthly

financial commitments. It was submitted that all the amounts paid on behalf of the defendant was done in terms of paragraph 2.1 of the agreement which related to so-called unpaid levies at the time of signature of the agreement. It was submitted on behalf of the defendant that this argument was not supported by the evidence and was simply put forward in order to avoid the plea of prescription. In this regard it was further submitted that the

plaintiff endeavoured to place an interpretation on paragraph 2.1 of the agreement which would have the effect that there was no due date for the repayment of the initial payment and that this could only be brought about by the cancellation of the agreement.

18. In order to establish if and when any amount became due by the defendant to the plaintiff it is necessary to refer to the agreement. It has been mentioned above that paragraph 2 of the agreement identifies two components of the loan. The one being an initial payment and the other monthly payments to the defendant. Paragraph 7 of the agreement does not, however, draw any distinction in respect of the repayment of the loan. Paragraph 7.1 clearly provides that the interest and the capital owed by the defendant shall be repayable on the earlier of the date of receipt of monthly levies, the date of receipt of collected arrear levies or the termination of the agreement, whichever occurs first. More importantly, paragraph 7.2 provides that the reduction of the indebtedness of the defendant shall occur by way of payment of all the monthly levies and interest thereon collected from the owners. The word "capital" is defined in the agreement as meaning "the initial payment and monthly amounts advanced by the company to the body corporate from time to time". It thus refers to both components of the loan. Payment by way of the levies is similarly clear. Paragraph 1.1.10 defines "the levies" as meaning "the levies contemplated in Section 37
- (1) (b) of the Act and special levies in terms of Management Rule 31
- (4) ...". No distinction is made in the source of the money to pay back the debt namely, for example, from money received for levies which were in arrears or which were not. The defendant's obligation was to pay all levies received to the fifth plaintiff in reduction of the debt which constitutes, inter alia, the capital, which, in turn, is made up from the initial payment as well as the monthly amounts advanced. Paragraph 7.1 and 7.2 of the agreement consequently apply to the first component namely the initial payment as well as the second component being the monthly amounts.
19. I agree with the submission on behalf of the defendant that the only reason for the reference to the "unpaid levies" in paragraph 2 of the agreement was probably to define it for purposes of security as set out in section 38 (f) of the Act and to bring the loan under the auspices of that section. The fifth plaintiff secured the loan by taking a security cession of all unpaid contributions and all future levies due and becoming due to the defendant.
20. The debt to the fifth plaintiff consequently became due every time a levy was paid to the defendant.

21. There is an alternative way of approaching this issue. In terms of paragraph 4 of the agreement the outstanding balance due by the defendant from time to time in respect of amounts lent and advanced in terms of the agreement, shall bear interest at the rate of 10% above prime per annum. Any interest which is unpaid on the due date, will be capitalised to the defendant's loan.
22. According to paragraph 7.2 of the agreement the defendant was obliged to pay to the fifth applicants all the monthly levies and interest thereon which were collected, in the reduction of its indebtedness in respect of capital and accrued interest. This had to be paid on a monthly basis in the fifth plaintiffs bank account within 7 days from receipt thereof but not later than the fifth day from the Managing Agent's monthly close-off date.
23. According to the evidence the defendant collected R925 594,00 in levies for the financial year ending December 2006. However, during the same period the defendant only paid over to the fifth plaintiff the amount of R196 814,96. This shortfall of R728 779,04 was clearly due and payable to the fifth plaintiff at the relevant times during 2006. It is not relevant whether the amount paid to the fifth plaintiff related to unpaid levies or to monthly amounts in terms of paragraph 2.2 of the agreement. At the very least, and on plaintiffs version, the interest which had accrued on the outstanding amount was payable by the defendant from the levies received and not solely from unpaid levies which had been collected. Even if all the unpaid levies referred to in paragraph 2.1 of the agreement had been collected, it would not have been enough to pay the interest in respect thereof to the fifth plaintiff. In any event, all interest not paid promptly in terms of paragraph 4 was capitalised and became payable as such in terms of paragraph 7.2 from the monthly levies. In terms of paragraph 7.1 of the agreement the interest and the capital were repayable from the date of receipt of the monthly levies from time to time, limited to the amount of such a receipt.
24. The defendant consequently became indebted to the fifth plaintiff during the course of the first year of the loan agreement. During the course of that year but at least at the beginning of 2007 the fifth plaintiff knew or could have established with reasonable care what the capital amount of the loan was, that the financial statements of the defendant for the year ending 2006 would have reflected that the defendant had collected a large amount of levies and that the defendant had not paid all the levies collected to the fifth plaintiff. The same can be said of the following year. It was common cause that the last payment made by the defendant was on 16 February 2008.
25. For the above

reasons

the plaintiff's claim had become prescribed. It does not matter what the exact outstanding amount was or how it was computed. Both the capital and the interest became due to the extent of the monthly levies as and when they were received. Since the last payment to the plaintiff had been made on 16 February 2008, the plaintiff's claim would have prescribed three years later which is a date prior to the institution of the action.

26. Even if the payment on 16 February 2008 could be regarded as an acknowledgement by the defendant of its indebtedness towards the fifth plaintiff, in respect of which I make no finding, prescription would have commenced running on 19 February 2008. The fifth plaintiff's claim would consequently have prescribed on 19 February 2011 which is also prior to the date of the institution of the action.
27. The argument on behalf of the plaintiff that the debt fell due on cancellation of the agreement which occurred in the summons, must consequently be rejected. This was even accepted according to the letter of the plaintiff's attorneys who wrote on 14 December 2011 that they were instructed that "the current balance due, owing and payable" to their client amounts to R3 472 041,52.
28. It was not in dispute that the plaintiff was at all times in a position to establish all aspects relating to the finances of the defendant. It was consequently at all times in a position to establish the facts from which the debt arose. A creditor is not allowed to postpone the running of prescription by his failure to take the necessary steps. See *Gunase v Anirudh* 2012(2) SA 398 (SCA); *Macleod v Kweyiya* 2013(6) SA 1 (SCA).
29. As far as costs are concerned there is no reason why costs should not follow the event save that such costs should be awarded against the first and second plaintiffs who was mainly responsible for the institution of the action.
30. In the result the following order is made:
 1. The plaintiffs' claim is dismissed.
 2. The first and second plaintiffs are ordered to pay the defendant's costs of suit jointly and severally.

C.P. RABIE

JUDGE OF THE HIGH COURT

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Prepared on 9 October 2026 · Esheria