IN THE NORTH GAUTENG HIGH COURT, PRETORIA

[REPUBLIC OF SOUTH AFRICA]

A535/17

APPPEAL CASE NO: ~~74114/2016~~

(1) REPORTABLE: ~~YES~~ / NO
(2) OF INTEREST TO OTHER JUDGES: YES/NO
(3) REVISED.

2/12/2019
DATE

.....
SIGNATURE

In matter between:

SHAMES, KEVIN DAVID N.O.	**FIRST APPELLANT**
HAHN, GREGORY MARC N.O.	**SECOND APPELLANT**
UCOSISELELO (PTY) LIMITED	**THIRD PLAINTIFF**
LEMASA INVESTMENTS (PTY) LIMITED	**FOURTH PLAINTIFF**
WAVERLEY CENTENARY (PTY) LIMITED	**FIFTH PLAINTIFF**

and

BODY CORPORATE OF VICTIORIA AND EDWARD COURT	**RESPONDENT**

JUDGMENT

MAVUNDLA, J

[1] The appellants (as plaintiff's in the court *a quo*) appealed to this court with the leave of the court *a quo* against the whole of the judgment and order (including the costs order) handed down by Rabie J on 29 July 2016, in terms of which it was found that the plaintiff's claim had become extinguished by prescription and dismissing the claim with costs.

[2] The grounds of appeal are that the court *a quo* erred in finding that:

2.1 the plaintiffs' claim had become extinguished by prescription and in not finding that the defendant had not discharged the *onus* of establishing that the debt forming the subject matter of the action had become due on a date three years prior to the institution of the action and had further failed to discharge the *onus* of establishing when the plaintiffs had knowledge of the facts or could by the exercise of reasonable care have acquired such knowledge within the meaning of s12 of the Prescription Act No 68 of 1969 ("The Prescription Act");

2.2 since the last payment to the plaintiffs had been made on 16 February 2008, the plaintiffs' claim would have prescribed three years later which is a date prior to the institution of the action;

2.3 during the course of 2006 or 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;

2.4 insufficient reliable evidence had been presented by the plaintiffs to establish that the amount of R1 107 689. 57 had been paid on behalf of the defendants in accordance with clause 2.1 of the Loan Agreement dated 14 September 2005 (the loan agreement) and in not finding that:

2.4.1 the amount of R1 240 913. 13 recorded in clause 2.1 of the loan agreement represented the maximum amount that the lender would advance to the defendant as a result of arrear levy debts;

2.4.2 the amount of R1 240 913. 18 was equal to the amount of the defendant's arrear levy debts as at the date of the conclusion of the loan agreement;

2.4.3 the purposes of the loan amount in terms of clause 2.1 of the loan agreement was to make sufficient funds available to the defendant to meet any financial obligations that could not be discharged due to the fact that the defendant's members were in arrears with their levy contributions to the defendant;

2.4.4 at the time of the conclusion of the loan agreement, the defendant was indebted to the City of Johannesburg in respect of the arrear rates, taxes and municipal services.

2.4. 5 pursuant to the conclusion of the loan agreement, the defendant's administrator negotiated with the City of Johannesburg to structure the repayment of the arrear amounts owing to it by the defendant;

2.4.6 the fifth plaintiff made payments totalling R1 107679. 57 ("the initial loan") on behalf of the defendant to the defendant's creditors in accordance with the loan agreement;

2.4.7 the fact that the defendant did not utilise the full amount made available to it in terms of clause 2.1 of the loan agreement did not alter the nature of the loan, being that a total amount of R1 107 689. 57 was paid on defendant's behalf at its instance and request to discharge the defendant's arrear financial obligations;

2.4.8 the initial loan agreement accordingly could not have been advanced to the defendant in accordance with clause 2.2 as the amounts advanced were utilised to discharge the defendant's arrear financial obligations and not to cover month-to-month financial obligations after the date of conclusion of the loan agreement;

2.5 there was no or insufficient evidence as to how the amount of R7 586 960. 92 had been calculated and in not finding that:

2.5.1 the plaintiffs presented a detailed reconciliation of the loan recording all amounts advanced to and

repayments by the defendant, and detailing the interest accruing on the loan on a daily and monthly basis;

2.5.2 the plaintiffs used the detailed reconciliation of the loan to calculate the outstanding amount of the loan, together with interest thereon, as at the date of the hearing;

2.5.3 the plaintiffs confirmed that the amount of R7 586 960. 92 constituted the total outstanding amount of the loan as at the date of the hearing. This evidence stood uncontroverted;

2.6 the loan agreement applies to both the initial amount advanced in terms of clause 2.1 as well as the monthly amounts advanced in terms of clause 2.2 and in not finding that:

2.5.1 the purposes of the loan was to enable the body corporate to meet its financial obligations to discharge its statutory duties imposed in terms of the Sectional Titles Act of 1986 ("the Act") in a manner which does not prejudice the defendant's paying members by imposing an additional burden on them to repay the loan and which affords the defendant the opportunity to recover the arrear levy debts over an extended period of time;

2.5.2 in order to protect the defendant's paying members and comply with the provisions of the Act, the loan agreement does not specify a monthly instalment for

repayment nor does it provide a date by which the full amount of the loan must be repaid;

2.5.3 on a proper construction of the loan agreement, having regard to the background and surrounding circumstances, a distinction should be maintained between the initial advance in terms of clause 2.1 and the monthly advances in terms of clause 2.2 to give proper effect to the loan agreement;

2.5.4 the amount in terms of clause 2.1 is advanced to discharge the defendant's historical debts that could not be paid due to the defendant's members failing to make their prescribed levy contributions from time to time ("the arrear levy debt");

2.5.5 on a proper construction of clause 7.1, the amounts advanced to cover the arrear levy debt is payable on the earlier of collecting arrear levies or the termination of the loan agreement;

2.5.6 clause 7.1.1 of the loan agreement only governs repayment of monthly amounts advanced in terms of clause 2.2 and repayment thereof is limited to the monthly levies actually collected;

2.5.7 the shortfall, if any, between the monthly amount advanced in terms of clause 2.2 and the receipts in that month forms part of the arrear levy debt that is repaid on the earlier of the events provided in clause 7.1.2 and 7.1.3;

2.5.8 clause 7.2 is expressly limited to repayment of monthly levies actually collected and on a proper construction of clause 7.2, read with clause 7.1.1, it only applies where a monthly amount was advanced in terms of clause 2.2;

2.5.9 interpreting clause 7.2 to apply to both monthly amounts and repayment of arrear levy debt would contravene the provisions of the Act and lead to absurdity;

2.7 that the debt to the fifth plaintiff became due each time that a levy was paid to the defendant and in not finding that:

2.7.1 the defendant is obliged in terms of the Act to have sufficient funds at its disposal to discharge its obligations in terms thereof to, *inter alia*, maintain the common property;

2.7.2 in terms of the Act, properly construed, the defendant cannot be compelled to pay all collected levies to a lender, thereby leaving it unable to discharge its financial obligations in terms of the Act;

2.7.3 on a proper construction of the loan agreement, the arrear levy debt only becomes due owing and payable on the earlier of the date on which arrear levies are collected (limited to the amount of such receipt) or the date of termination thereof;

2.8 that the defendant had collected R925 594. 00 in levies for the year ending December 2006 and in not finding that:

2.8.1 the amount of R925 594. 00 does not reflect amounts actually received from levy debtors and is only an accounting entry representing what should have been collected from its members. The fact that the financial statements record both arrear levy debtors and the loan evidences that the amount of R925 594. 00 was not actually collected from levy debtors;

2.8.2 the defendant should have presented its bank statements to the amount of levies actually collected;

2.8.3 the defendant did not make its bank statement available and it accordingly failed to prove the levies which it actually collected during 2006;

2.9 the plaintiff knew or could have established with reasonable care what the capital amount of the loan was and in not finding that:

2.9.1 according to the defendant's pleaded defence of prescription, the defendant contended that the prescription of the debt commenced on the date of conclusion of the loan agreement or on the date that it made the last payment to the fifth plaintiff on 16 February 2008;

2.9.2 the *onus* was on the defendant to prove its pleaded defence of prescription;

2.9.3 the defendant did not persist with its argument that prescription commenced on the date of conclusion of the loan agreement nor did it persist with its argument

that prescription commenced when the last payment was made;

2.9.4 the defendant was not entitled to advance an entirely new case on prescription in closing argument that it had received levy payments in the amount R925 594. 00 in 2006 and that this amount should have been paid to the plaintiff and its new case of prescription should accordingly not have been allowed;

2.9.5 the defendant did not present any evidence demonstrating that the plaintiffs knew that the amount of R925 594. 00 had, in fact, been collected in 2006;

2.9.6 the defendant further did not present any evidence from which it could reasonably have been inferred that the plaintiff ought to have known that an amount of R925 594. 00 had been collected and should have been paid over to the plaintiff;

2.9.7 the plaintiffs' loan is reflected in the defendant's 2006 financial statements as a long-term liability, indicating that the loan would not fall due for payment within the next twelve months of the defendant's 2006 financial year end. It was accordingly reasonable for the plaintiff to assume that the debt was not due, owing and payable at the time;

2.9.8 the plaintiffs' loan is reflected in the defendant's 2007 financial statements as a long-term liability, indicating that the loan would not fall due for payment within the next twelve months of the defendant's 2007 financial

year end. It was accordingly reasonable for the plaintiff to assume that the debt was not due, owing and payable at the time;

2.9.9 on the plaintiff's interpretation of the loan agreement, the arrear levy debt would only become due, owing and payable upon collection of arrear levies (limited to the extent of such collection) or upon the date of termination of the loan agreement. It was accordingly reasonable for the plaintiff's to have assumed that the debt only became due, owing and payable upon termination of the loan agreement;

2.9.10 the defendant did not establish its defence of prescription as pleaded or argued at the conclusion of the hearing.

[3] The parties are *ad idem* that the appeal revolves on the interpretation of clause 7 of the common cause loan contract concluded between the fifth plaintiff ("Waverley") and the respondent ("the body corporate") on the 14 September 2005.

[4] In regard to interpretation, I find it apposite to cite the matter of *Natal Joint Municipal Pension Fund v Endumeni Municipality*[1] where the Supreme Court of Appeal held that: "The recent state of the rule 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 a contract, having regard to the context provided by reading the particular provisions or provisions in light of the document as a whole and circumstances attendant upon its coming into existence. Whatever the nature of the document, consideration must be given to the language used

[1] 2012 (4) SA 593 (SCA) para 18.

in the light of ordinary rules of grammar and syntax; context in which 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. 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... The inevitable point of departure is the language of the provision itself, read in context and having regard to the purposes of the provision and the background and to the language together, with neither predominating of the other." *Vide also Coopers & Lybrand and Others v Bryant.*[2]

[5] It is indeed correct that the loan agreement contemplated payments by Waverley to the body corporate in two distinct categories:

5.1 an initial payment in the maximum amount of R1 240 913.13;

5.2 monthly payments for the purposes of the body corporate meeting its monthly financial commitments.

[6] The appellants pleaded that Waverley had lent and advanced to the body corporate both the initial amount and subsequent monthly amounts. It is now contended by the appellants in their heads of argument that no monthly advances were paid by Waverley to the body corporate in terms of clause 2.2 of the loan agreement.

[7] The appellants further contended that it is upon termination of the agreement that the capital, arrears and interest became due and payable.

[2] 1995 (3) SA 762 (A) at 767.

[8] For purposes of interpreting clause 7, it is necessary to also have regard to clause 4, so as to have a sensible, logical and businesslike meaning.[3] In terms of clause 4 the outstanding capital shall bear interest calculated on daily basis on the outstanding balance and charged monthly in arrears on the last day of each month when it shall be immediately due and payable in terms of clause 7. Any interest which is unpaid on the due date, will be capitalized to the body corporate's loan on that date. *In casu*, the parties were specific about when the interest becomes due, therefore *ex contractu* a debt arose when rights arose on the specific date and *mora* interest commenced to run from that date; *vide Griffiths v Janse van Renburg and Another NNO*[4]. Besides, it was conceded on behalf of the appellants that interest runs daily, it therefore follows in my view that the debt in respect of interest became due and payable immediately after signing of the agreement and payment of the capital loan amount. In *Scoin Trading v Bernstein*[5] where the Supreme Court of Appeal held that: "[14] If a debtor's obligation is to pay a sum of money on a stipulated date and he is in *mora* in that he failed to pay on or before the time agreed upon, the damages that flow naturally from such failure will be interest *a temporae* or *mora* interest. The purpose of *mora* interest is to place the creditor in the position he would have been if the debtor had performed in terms of the undertaking.' *vide Bellairs v Hodnett and Another*[6]. The calculated interest on each last day of the month shall be immediately due and payable. This leaves no room for the contention that payment

---

[3] See also *Coopers & Lybrand and Others v Bryant* 1995 (3) SA 762 (A) at 767; *Natal Joint Municipal Pension Fund v Endumeni Municipality* 2012 (4) SA 593 (SCA) para 18.
[4] 2016 (3) SA 389 (SCA).
[5] 2011 (2) SA 118 (SCA) at 121 C-D
[6] 1978 (1) SA 1109 (A) at 1145D-G.

is due and payable at the termination of the contract. Clause 4 in so far as its reference to clause 7 is concerned, merely deals with the manner of payment.

[9] Clause 7 deals with payment of interest and repayment of capital provides as follows:

"The interest and 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 receipt;

7.1.2 the date of receipt of collected arrear levies;

7.1.3 termination / cancellation of the agreement."

[10] Clause 7.2 provides that: "In reduction of its indebtedness (capital and accrued interest) to the Company, the Body Corporate shall, on a monthly basis, pay 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...." In the context of the prescription debate there is no dispute between the parties that for the purposes of section 12 (1) of the *Prescription Act*, the relevant date on which a debt is due is that on which that debt is immediately claimable by the creditor and the debtor is under an obligation to perform.[7]

[11] It needs pointing out that the wording in both clauses 4 and 7 demonstrate that it was peremptory that payment be effected on a monthly basis in terms of clause 4, namely the interest, and the arear interest will be capitalized to the body corporate's loan on that date; and in terms of clause 7, the interest owed by the

[7] Benson v Waiters 1984 (1) SA 73 (A) at p 82.

respondent and capital shall be paid off from: (i) the monthly levies received; (ii) received payment of collected arrear levies. Again, a reading of clauses 4 and 7 clearly demonstrates that it is not only on termination of the agreement that payment becomes due and payable, but on receipt of payment of the levies and collected arrear levies. All this demonstrates that payment is not dependent on termination of the agreement as contended by the appellant.

[12] Clause 11 of the agreement specifically debars cancellation of the agreement for a period of a year after commencement of the agreement. This clause further spells out the circumstances which would amount to breach of the agreement, justifying cancellation. Until there is cancellation pursuant to a breach, the parties are expected to abide by the agreement, which would entail, *inter alia*, payment in accordance with the contract, not only upon termination.

[13] It will be noted that both clauses 4 and 7 are couched in peremptory terms by the use of the word "shall".

[14] According to Waverley, the respondent's obligation to pay Waverley becomes due and payable at termination of the agreement. However, the court *a quo* found otherwise, with respect, quite correctly so in my mind. The respondent disagrees with the appellants' proposition and contends, correctly so in my view, that it is the receipt by the body corporate (or its managing agent) of any levies (either current or arrear) which triggered the obligation on the part of the body corporate to pay that amount to Waverley. The portion of the debt owing by the body corporate to Waverley that became due for payment (as contemplated in

section 12(1) of the Prescription Act)[8] was that sum received by the body corporate, i.e. the capital amount.

[15] The reference in that sub-clause to "capital" does not distinguish between the initial capital paid in terms of clause 2.1 of the agreement and any further monthly advances referred to in clause 2.2 thereof. The appellants contended that no monthly advances were paid by Waverley to the body corporate in terms of clause 2.2 of the loan agreement.

[16] It is common cause that the loan agreement per clause 3.1 compelled the body corporate, simultaneously with the signing of the loan agreement to grant in favour of Waverley the security cession in terms of which the body corporate ceded to Waverley all of the body corporate's right title and interest in and to:

(a) all unpaid contributions due by members;

(b) all future levies, including special levies due and to become due to the body corporate.

[17] It will be noted that in terms of clause 8, the Body Corporate appointed the Company as its collection agent to collect all current unpaid, future unpaid and future monthly (unpaid levies) due to the Body Corporate by the owners of the scheme[9] and the company as the Body Corporate's managing agent, in its sole and absolute discretion mandated the Body Corporate to collect the arrear unpaid levies.[10]

---

[8] "12 When prescription begins to run—(1) subject to the provisions of subsection (2), (3) and (4), prescription shall commence to run as soon as the debt is due."
[9] Vide 8.1 of clause 8.
[10] Vide 8.3.1 read with 8.4 of clause 8.

[18] Clause 7.1 of the loan agreement refers to both interest and capital owed by the Body corporate to Waverley from time to time. The reference in that sub-clause to "capital" does not distinguish between the initial capital paid in terms of clause 2.1 of the agreement and any further monthly advances referred to in clause 2.2 thereof.

[19] Clause 7.2 makes no distinction in the manner which the body corporate would reduce its indebtedness to Waverley in respect of both capital and interest.

19.1 In the context of the prescription debate there is no dispute between the parties that for the purposes of section 12 (1) of the Prescription Act, the relevant date on which a debt is due is that on which that debt is immediately claimable by the creditor and the debtor is under an obligation to perform[11];

19.2 Clause 7.1 contemplates the repayment by the body corporate of both interest and capital by means of two different methods:[12]

19.2.1 on the date of receipt of monthly levies from time to time;

19.2.2 the receipt by the body corporate, or Waverley as its collection agent, of arrear levies;

---

[11] Benson v Waiters 1984 (1) SA 73 (A) at p 82.

[12] Clause 1.1.4 at p15—Vol 1 defines "capital" means: the initial payment and monthly amounts advanced by the company to the body corporate from time to time.

19.2.3 "arrear levies" are not defined in the loan agreement. Nor are "unpaid levies" as referred to in clause 2.1 of the loan agreement. There is, in the circumstances, no legitimate basis for limiting (as the appellants seek to do) the concept of "arrears" as used in clause 7.1.2 of the loan agreement to those "unpaid levies' which existed on the date of the signature of that document.

19.2.4 the proposition that it was incumbent on the body corporate, for the purposes of its special plea of prescription, to prove receipt of arrear premiums after the date of the conclusion of the agreement has no merit.

19.2.5 both current and arrear levies are "monthly levies" as contemplated in clause 7.2 of the loan agreement.

[20] It is trite that the court on appeal, has very limited powers to offset the factual findings of the trial court, unless such findings are demonstrably from the record palpably incorrect; *vide R v Dhlumayo and another.*[13] It was submitted on behalf of the appellants that various advances were made by the fifth appellant with the final advance made on 3 August 2007 in the amount of R75 644. 41, all totalling an amount of R1 107 689. 57. It was conceded by Mr Blou that the *court a quo* found that this was the total amount paid and they therefore accept as correct that finding.

[21] The Court *a quo* also held that:

[13] 1948 (2) SA 677 (A).

21.1 according to the evidence the defendant collected R925 594 in levies for the financial year ending December 2005. However, during the same period the defendant only paid over to the fifth appellant the amount of R196814, 95. This shortfall of R728 779, 04 was clearly due and payable to the fifth appellant at the relevant times during 2006;

21.2 At the very least, and on the appellants' version, the interest which had accrued on the outstanding amount was payable by the respondent from the levies received and not solely from unpaid levies which had been collected;

21.3 The respondent consequently became indebted to the fifth appellant during the course of the first year of the loan agreement, but at least at the beginning of 2007 the fifth appellant knew or could have established with reasonable care what the capital amount of the loan was, that the financial statements of the respondent for the year ending 2006 would have reflected that the respondent had collected a large amount of levies and that the respondent had not paid all the levies collected to the fifth appellant. The same can be said of the following year. It was common cause that the last payment made by the respondent was on 18 February 2008;

21.4 The court *a quo* concluded that the appellant's claim had prescribed.

[22] The above findings and conclusion of the court *a qou*, cannot be gainsaid nor set aside by this court. It stands to reason that the appeal must fail.

[23] Both parties engaged, *inter alia*, the services of senior counsel, justifiably so, regard being had to the importance of the matter to the respective parties as well as the fine point in law. Accordingly, the respondent is entitled to the costs, *inter lia*, attendant to engaging the services of senior counsel.

[24] In the result the following order is issued;

1. That the appeal is dismissed;

2. That the appellants, are jointly and severally, the one paying the other to be absolved, ordered to pay the costs of the appeal, which costs to include the costs of engaging the services of senior counsel.

N.M. MAVUNDLA

JUDGE OF THE HIGH COURT

I AGREE

J.W. LOUW

JUDGE OF THE HIGH COURT

I AGREE

P. D. KEKANA

ACTING JUDGE OF THE HIGH COURT

DATE OF JUDGMENT: 02 / 12 /2019

APPELLANTS' ADV : ADV. J BLOU SC

With : ADV E. RUDOLPH

INSTRUCTED BY : WERSKMANS ATTORNEYS

RESPONDENT'S ADV : ADV. A.R.G. MUNDELL SC

INSTRUCTED BY : J M CLAASEN ATTORNEYS