NOT REPORTABLE

IN THE HIGH COURT OF SOUTH AFRICA

KWAZULU-NATAL DIVISION, PIETERMARITZBURG

Appeal Case No: AR77/2020

In the matter between:

GWENDOLYN BUYISIWE MLARISI TEMBO N.O.	**1ST APPELLANT**
SHUMANI TEMBO N.O.	**2ND APPELLANT**
VIONNE KHAROTA TEMBO N.O.	**3RD APPELLANT**

and

BODY CORPORATE OF THE BUILDING KNOWN AS VALLEN LODGE	**RESPONDENT**

ORDER

The following order is made:

1. **The appeal is dismissed with costs.**

J U D G M E N T

Delivered: This judgment was handed down electronically by circulation to the parties' legal representatives by email and publication on SAFLII. The date and time for hand down is deemed to be on 21st January 2021.

Olsen J (Balton J concurring)

1. This appeal comes to us from the magistrates' court for the district of Lower Tugela, held at KwaDukuza. In that court the body corporate of the building

known as Vallen Lodge (the respondent before us) instituted action against the three appellants in their capacities as Trustees of the Tembo Family Trust. The claim was a money claim. The appellants took a special plea of prescription. The learned magistrate in the court *a quo* dismissed the special plea. The appellants ask us to overturn the decision and uphold the plea of prescription.

2. Although the judgment of the court *a quo* by no means disposed of the entire case, it did dispose of a defence raised quite independently of the plaintiffs claim, and the allegations made by the plaintiff in support of its claim. For that reason, and despite the fact that the proceedings in the magistrates' court are not yet over, the order made by the magistrate is appealable. (See *Durban's Water Wonderland (Pty) Limited v Botha and Another* 1999 (1) SA 982 (SCA) at 992 – 993.)

3. The appellants own a unit in Vallen Lodge which has an outside patio. It is set over a unit below owned by the Lane family. The Lane family complained that it was experiencing damp problems which they feared was attributable to the failure of the waterproofing on the appellants' patio. Before its repeal s 44(1)(c) of the Sectional Titles Act, No. 95 of 1986 provided that it is the duty of an owner of a unit to repair and maintain the unit in a good state of repair. The section was repealed in 2011 and a like duty was imposed in terms of s 13(1)(c) of the Sectional Titles Schemes Management Act No. 8 of 2011.

4. Rule 70 of the management rules of Vallen Lodge provides as follows.

> "If an owner –
>
> (a) fails to repair or maintain his section in a state of good repair as required by s 44(1)(c) of the Act; or
>
> (b) …,
>
> and any such failure persists for a period of 30 days after the giving of written notice to repair or maintain given by the trustees or the managing agent on their behalf the Body Corporate shall be entitled to

remedy the owner's failure and to recover the reasonable costs of doing so from such owner."

5. In its particulars of claim the respondent pleaded that the 30 days written notice contemplated by the management rule was given to the appellants requiring them to repair their section by waterproofing the patio, and that the appellants failed to comply with the notice. The respondent pleaded further that in those circumstances it carried out the necessary repairs at a cost of some R176 000 which had to be refunded by the appellants to the respondent, something they refused to do.

6. In their special plea the appellants asserted that the respondent knew of the leaking problem at the latest by 9 July 2012 (this allegation is implicit in the references to an email and reports attached to it in paragraphs 1 and 2 of the special plea). The appellants went on to plead that the respondent accordingly "knew all the material facts concerning its claim for damages against the defendants by, at the latest, 9 July 2012". (The fact that the claim is not one for damages can be overlooked.) The plaintiff goes on to plead that summons was only served on 1 June 2016, a date "more than 3 years after the date upon which the plaintiff's claim arose".

7. It was agreed in the court below that the special plea would be dealt with separately and first; and that neither party had any need to lead evidence. The lawyers would argue off bundles of documents which were handed in and which recorded the history of the matter.

8. There is no need to go into the details of the history of the matter beyond the following.

   (a) Following the refusal of the appellants to allow the respondent access to the patio in order to determine whether it was the origin of the damp problem experienced by the Lane family, the respondent obtained a court order allowing such access in December 2013.

(b) Following a report from an expert dated February 2014 advising the respondent that the origin of the problem was the appellants' patio, on 31 March 2014 the appellants were provided with 30 days notice in terms of management rule 70 to make the requisite repairs.

(c) The appellants failed to do so as a result of which the respondent engaged a contractor to do the work and made various payments in that regard to the contractor from May 2014 through to September 2014.

(d) The summons was then issued and served in 2016, well within a 3 year period after the respondent had incurred the costs of repairing the appellants' patio.

9. On the plain wording of management rule 70 the respondent had a right, but no expressed duty, to repair (ie waterproof) the appellants patio. It may be arguable that in particular circumstances a body corporate has a duty to exercise its powers under management rule 70, but that is not something that needs be decided in this case. Such a duty could not conceivably arise in the absence of certainty, or perhaps reasonable certainty, that the repairs in question are necessary. In this case such certainty (which is as I understand it still denied by the appellants) was only achieved in February 2014, after the intervention of this court permitting the respondent access to the site.

10. Management Rule 70 is quite clear. The respondent's right is to "recover the reasonable costs" it has incurred. It is not necessary to express a view on whether that right arises as soon as the work has been done or whether it arises only when the body corporate has paid for the repairs. In either case the right to claim, and the corelative debt owed by the appellants arose less than 3 years before the action was commenced.

11. The respondent's counsel has argued, with reference to *Barnett and Others v Minister of Land Affairs and Others* 2007 (6) SA 313 (SCA) at 321 – 322, that the plea of prescription is also answered by the fact that the appellants' failure

to meet its obligation to repair the patio was a continuing wrong, with the consequence that the claim made by the respondent could not prescribe. I do not think that it is necessary to deal with that. Whilst it is correct that the appellants' failure to repair the patio was a continuing wrong, the continuing injury caused by that wrong was suffered by the Lane family, and not the respondent. The respondent's claim is the product of its decision to intervene, upon which followed what Brand JA in *Barnett* called a "single, completed wrongful act", that is to say the appellants' refusal to reimburse the respondent.

12. The essence of the argument advanced by counsel for the appellants against all of this is that the notice from the respondent to the appellants to effect the repairs could have been sent, on the available information, in July 2012. It is argued that the fact that the respondent did not then "take steps to enforce its rights and claim the alleged debt does not mean that prescription did not start running." In support of this argument reference is made to *Gunase v Aniruth* 2012 (2) SA 398 and *Uitenhage Municipality v Molloy* 1998 (2) SA 735 (SCA). The argument must be premised upon the proposition not only that the respondent had a duty to act, but that prescription started to run on a claim for ultimate reimbursement from the date upon which that duty to act arose. For reasons already given, in my view none of those arguments has any merit. In addition, the respondent did nothing to delay the running of prescription, which is the subject of the cases upon which the appellants rely. The effect of the delay caused by the respondent making sure that this was a case in which its intervention under management rule 70 was allowed, was to delay the creation of the debt. The question as to whether there would ever be a debt was only answered when the appellants refused to comply with the 30 day notice referred to earlier.

13. Furthermore, the argument for the appellants actually supposes that the wrongful conduct of the appellants failing to repair their patio was a wrong in itself committed against the respondent. If there was any merit in that submission, the answer would be that, just as the appellants' failure to repair

the patio was a continuing wrong against the Lane family, so to was it a continuing wrong in relation to the respondent.

14. I conclude that there is no merit in the appeal.

The following order is made.

1. The appeal is dismissed with costs.

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OLSEN J

I agree

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BALTON J

Date of Hearing:	FRIDAY, 04 DECEMBER 2020: By agreement between the parties this appeal was dealt with on the papers.
Date of Judgment:	THURSDAY, 21 JANUARY 2021 This judgment was handed down electronically by circulation to the parties' legal representatives by email and publication on SAFLII. The date and time for hand down is deemed to be on 21st January 2021.
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