



Do levy debts prescribe for Bodies Corporate?

In the case of *Body Corporate of Santa Fe v Bassonia Four Zero Seven CC*¹ (*Santa Fé*) 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 unit owner”). The unit owner 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 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, but most notably for purposes of this article:

- 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 because 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.

It is important to note that the High Court application for leave to appeal was also dismissed, and the body corporate thereafter petitioned the Supreme Court of Appeal (“the SCA”) to hear the appeal under a special application for leave

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 *Santa Fé* para 17.



to appeal. Unfortunately, this appeal lapsed, or was never prosecuted, for reasons unknown.

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 argued 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 had been given the opportunity to hear an appeal on this matter, would have been required to adjudicate on the above, and it does appear that the body corporate would have had good prospects of success on these grounds.

In an earlier version of this article, it was predicted that this issue would come up again in court and parties should be ready for the potential arguments. That happened earlier in 2024 when the judgment in the case of *L.A and Another v Body Corporate of London Place and Others*⁴ ("*London Place*") was handed down by the Cape Town High Court.

Let's explore one of the initial grounds of appeal relating to prescription in *Sante Fé*, 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 Cape Town High Court also faced this question in *London Place*.⁵

The question arises as to who is "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. The Court in *London Place* had to deal with this question.⁶ 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 wields the power to manage and administer this unique legal entity known as the body corporate. *London Place* dealt with the functions and duties of the body corporate and the trustee's fiduciary duties.⁷ The Cape Town High Court ultimately concluded that the unit owners are not members of the governing body in this context, but the trustees are.⁸

If one considers 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? The Cape Town High Court in *London Place* held that section 13(1)(e) of the Prescription Act aims to delay prescription where a debtor can influence a juristic entity's decision to sue.⁹ The Court seems to accept that trustees in sectional title schemes, often residents, could be intimidated to avoid legal actions.¹⁰

⁴ (11463/2023) [2024] ZAWCHC 92 (27 March 2024). Accessible at <https://www.saflii.org/za/cases/ZAWCHC/2024/92.html>.

⁵ *London Place* para 1.

⁶ *London Place* para 8.

⁷ *London Place* paras 12 to 14.

⁸ *London Place* para 16.

⁹ *London Place* para 17.

¹⁰ *London Place* para 17.



That said, the Court also stated that while possible in smaller schemes, multiple trustees typically mitigate such influence unless a trustee is also the defaulter.¹¹ Critically, however, it appears that the possible influence that the body of owners can wield on the whole board of trustees, was not dealt with in the *London Place* judgment.

The Court in *London Place* referred to the unreported judgment of *Body Corporate of 22 West Road South v Ergold Property Number 8 CC*¹² (“*West Road South*”) wherein it was held that section 13(1)(e) of the Prescription Act addresses conflicts of interest where a debtor influences a juristic entity’s governance to delay debt recovery.¹³ The Court in *West Road South* was of the view that only trustees, not unit owners, constitute the governing body of a body corporate.¹⁴ As a result, the Court in *London Place* ruled that the levy debts owing by the unit owners to the body corporate had already prescribed as the unit owners were not trustees.¹⁵

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 Act¹⁶ (“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 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.¹⁷ 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.¹⁸ In substantiation of the above, a member of the body corporate may nominate any person for the office of trustee,¹⁹ and at the annual general meeting the trustees are elected by the unit owners.²⁰ 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.²¹ It is therefore submitted that the true and ultimate power of the body corporate lies with the unit owners.

¹¹ *London Place* para 17.

¹² 2014 JDR 2258 (GJ).

¹³ *West Road* pages 14 to 16.

¹⁴ *West Road* pages 14 to 16. See the quote at para 18 of *London Place*.

¹⁵ *London Place* paras 8, 15 and 20.

¹⁶ Act 8 of 2011.

¹⁷ 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.

¹⁸ Prescribed Management Rule (“PMR”) 9(b) of the STSMA Regulations.

¹⁹ PMR 7(1) of the STSMA Regulations.

²⁰ 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.

²¹ PMR 6(4)(g) of the STSMA Regulations.



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.²² 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' debts owed to it, as the first Sectional Titles Act²³ 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.²⁴

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 and does not consider the text, context and purpose of the provisions relating to the interruption of prescription.

²² 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.

²³ Act 66 of 1971.

²⁴ PMR 17(4)(a) and(b) of the STSMA Regulations.



Look back at the proposed mischief which section 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 section 15B(3)(a)(i)(aa) of the Sectional Titles Act²⁵ 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.

Whatever the outcome of this argument is in potential future cases, 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.

While the arguments in *Santa Fé* were not ultimately ventilated at the SCA, and we may have missed an opportunity to finally argue and carefully pronounce on the prescription of levies owed to sectional title bodies corporate by its members, and while the more recent case of *London Place* seems to have addressed and pronounced on similar arguments on this issue, it is submitted that the SCA, and possibly even the Constitutional Court should be approached, at the appropriate time, for final clarity on the issue.

In the recent Constitutional Court ("the CC") case of *Rademeyer v Ferreira*²⁶, the apex court addressed the issue of prescription in what initially appeared to be a straightforward matter (but was not). The fact that the prescription issue required resolution by the CC underscores its significance for this discussion. The case centered on balancing extinctive prescription laws with the constitutional right of access to courts under section 34 of the Constitution.²⁷ Strict application of prescription laws must avoid disproportionately disadvantaging vulnerable groups, as such cases engage broader constitutional rights and the CC's jurisdiction, particularly when prescription limits legal recourse.²⁸ The minority judgment stated: "Consequently, circumstances in which individuals are deprived of access to courts should be interpreted in a restrictive manner."²⁹

A noteworthy aspect for this article is also the minority judgment in *Rademeyer v Ferreira*. While the majority ruled one way, it remains plausible that, if confronted with the issue at hand – whether levy debts owed to a sectional title body corporate prescribe after three years or whether prescription is delayed – the outcome might still hold surprising developments.

²⁵ Act 95 of 1986.

²⁶ (CCT 184/2022) [2024] ZACC 24 (25 October 2024). Accessible at <https://www.saflii.org/za/cases/ZACC/2024/24.html>.

²⁷ *Rademeyer v Ferreira* paras 33, 34, 36, 39 and 57.

²⁸ *Rademeyer v Ferreira* para 33.

²⁹ *Rademeyer v Ferreira* para 39.



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It is inadvisable for any creditor, especially a body corporate, to delay initiating legal action for the recovery of unpaid levy contributions beyond three years. Recovery efforts should be swift and efficiently concluded. However, unavoidable delays do occur, and in such instances, levy debts should not be subject to the standard three-year prescription rule, given the unique characteristics of bodies corporate and the complexities of community living. Whether this issue will ever be definitively resolved remains uncertain, leaving us to wait patiently for finality.

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