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DISPUTE RESOLUTION ALERT

IN THIS **ISSUE**

CAN MINORITY SHAREHOLDERS' RIGHTS TO PREVENT CORPORATE BULLYING PRESCRIBE? SAY IT ISN'T SO!

The current Companies Act as well as its predecessor provide minority shareholders with specific rights and remedies to ensure that the corporate governance of a company cannot be manipulated or influenced by the majority shareholders to their disadvantage. Unfortunately, as companies grow and become profitable, shareholders often fall prey to disputes regarding, among others, the direction of the company, the allocation of dividends or the sale of company assets. Minority shareholders are often caught in the middle of these skirmishes.

THE POWER OF PRESCRIPTION REINFORCED: THE SCA'S RECENT APPROACH IN RESPECT OF IMMOVABLE PROPERTY

The Supreme Court of Appeal recently delivered two pertinent judgments dealing with the issue of prescription in respect of immovable property claims. Read together, these decisions send a clear message to holders of real rights ostensibly created via registration of a mortgage bond or title deed conditions: Do not assume the luxury of an extended period within which such rights may be enforced.

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Section 252, provides a remedy to minority members of companies in cases where the majority are guilty of oppressive conduct that has unfairly prejudiced them.

The Constitutional Court decision in *Off-Beat Holiday Club and Another v Sanbonani Holiday Spa Shareblock Limited and Others* [2017] ZACC 15 considered whether one of the cornerstone rights available to minority shareholders is vulnerable to prescription.

Sanbonani Holiday Spa Shareblock Limited (Shareblock) operates a share block scheme in Hazyview, the property having been developed by Sanbonani Development Limited (Development). The controlling mind of both companies, through his family trust is Mr Harri who owned 80% of Development and 46.7% of the shares in Shareblock. In 1991, the applicants and minority shareholders of Shareblock, being Off-Beat Holiday Club and Flexi Holiday Club (Clubs) purchased 29.14% of the shareholding.

In 1988, Shareblock, following a special general meeting, amended its original articles of association. In terms of the amendment a continuous right was conferred upon Development to use the area on the property demarcated for common facilities. Further, Development was given an unlimited discretion to develop a resort as a timeshare holiday establishment, including the right to allocate different numbers of shares to different share blocks. Development accordingly commenced building the resort consisting of chalets and a hotel on the property at the cost of R40 million. The hotel was completed in 1990.

In 1999, disputes arose about the manner in which Shareblock was run and whether Mr Harri, as the majority shareholder, exercised improper influence over Shareblock to its detriment. In light of the shareholders' disputes, in 2000 a settlement agreement was entered into to the exclusion of the Clubs which agreement was never complied with and in 2004, the Clubs launched an urgent application, which the court dismissed. Only in 2008, nine years later, were the current proceedings launched.

The Clubs claimed two broad categories of relief:

- In terms of s252 of the old Companies Act, No 61 of 1973 (Old Companies Act), the Clubs wanted a declarator that the creation and allocation of shares were invalid and that the offending articles of association were liable to be cancelled.
- In terms of s266 of the Old Companies Act, namely, a derivative action.

Section 252, where our focus lies, provides a remedy to minority members of companies in cases where the majority are guilty of oppressive conduct that has unfairly prejudiced them.

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The Constitutional Court held that in cases of corporate bullying, equitable intervention is necessary and the courts must be given some latitude to intervene.

Shareblock, Development and others argued that the Clubs' claim in terms of s252 constituted a "debt" for purposes of the Prescription Act, No 68 of 1969 (Prescription Act) and therefore their claim had prescribed.

The Constitutional Court held that in cases of corporate bullying, equitable intervention is necessary and the courts must be given some latitude to intervene and bring to an end the matters complained of. The court held that the following three steps must be followed in order to determine whether the minority shareholders' claim constituted a "debt" and therefore had prescribed:

- the characterisation of the claim;
- whether the s252 claim had prescribed; and
- whether the acts complained of constituted continuing wrongs.

The court confirmed that the correct characterisation of a claim for purposes of the Prescription Act is the characterisation arising from the relevant legal provision on which the claim is based. Thus, according to s252 of the Old Companies Act, the Clubs' claim is for declaratory relief, not an alteration of the terms of a contract or a monetary award. Interestingly, the court held further that when considering the merits of the case, and granting just and equitable relief, the courts must, even if claims have prescribed, consider the tardiness of the applicant in bringing its claim and remember that this section provides a crucial mechanism to keep corporate bullying at bay.

When determining whether the Clubs' claim had prescribed, the Constitutional Court found that the interpretation of the term "debt" which is the least intrusive of the right of access to the courts must be preferred. In this regard, the Constitutional Court adopted a narrow interpretation, holding that the claim in terms of s252 is a far cry from the definition of a "debt" which is something owed or due, or an obligation to pay money, goods or services to another. It is rather a right to seek a

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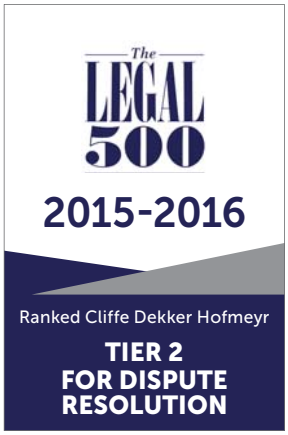
Claims in terms of s252 currently may not prescribe, however, the relief sought may be altered significantly if the courts believe that the shareholders were tardy in seeking help from the courts.

judicial determination as to whether the Clubs are entitled to a statutory remedy. In light of the above, the court did not consider the third step of the enquiry. The High Court is now tasked with reviewing the merits of the Clubs' claims, and to see whether a fair and just remedy may be found.

The minority judgment, however, provided that the relief set out in the Clubs' application did not ask the court to determine whether their claims in terms of s252 had prescribed. The Clubs had pleaded specific relief regarding the allocation of shares and amending of the articles, which relief the High Court and the Supreme Court of Appeal correctly confirmed had prescribed. The Constitutional Court, according to the minority, had therefore erred in looking at whether claims in terms of s252 had prescribed and not at what the Clubs were specifically seeking in terms of their papers. The minority accordingly held that to provide a blanket decision that confirmed that any claims in terms of this section could not prescribe was taking it a step too far.

Therefore, in the event that minority shareholders see a dispute brewing, action should be taken immediately. Claims in terms of s252 currently may not prescribe, however, the relief sought may be altered significantly if the courts believe that the shareholders were tardy in seeking help from the courts.

Nicole Meyer



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THE POWER OF PRESCRIPTION REINFORCED: THE SCA'S RECENT APPROACH IN RESPECT OF IMMOVABLE PROPERTY

The crisp issue for decision by the SCA was whether "the prescription period of the debt in issue was 30 years or 3 years as provided in s11(a)(i) or 11(d) of the Prescription Act respectively".

The Supreme Court of Appeal recently delivered two pertinent judgments dealing with the issue of prescription in respect of immovable property claims. Read together, these decisions send a clear message to holders of real rights ostensibly created via registration of a mortgage bond or title deed conditions: Do not assume the luxury of an extended period within which such rights may be enforced.

***Investec Bank Ltd v Erf 436 Elandspoort (Pty) Ltd* (1029/2016) [2017] ZASCA 128 (29 September 2017)**

The Appellant (Investec) instituted action against the Respondent (Erf 436) for the recovery of money owing on a loan. As security for the loan, Erf 436 registered a mortgage bond, in favour of Investec, over a notarial lease that it had earlier concluded with South African Railway Commuter Corporation Limited (SARCC). This lease comprised Investec's real right under the mortgage bond. During January 2002, SARCC cancelled the lease.

Investec construed this cancellation as a breach of the loan agreement and demanded payment of the outstanding balance, which became due and payable on 18 September 2002. Having failed to make payment, on 21 January 2011 – some eight years later – Investec instituted formal action. Erf 436 raised various defences to the action - in particular that the claim had prescribed. Investec contended the claim was secured by a mortgage bond as contemplated in s11(a) of the Prescription Act, No 68 of 1969 (Prescription Act) and was therefore subject to a 30 year prescription period.

The crisp issue for decision by the SCA was whether "the prescription period of the debt in issue was 30 years or 3 years as provided in s11(a)(i) or 11(d) of the Prescription Act respectively". The SCA rejected Investec's assertion that "the phrase 'any debt secured by mortgage bond' in section 11(a)(i) [could] be interpreted to mean 'any debt that was at any time' secured by mortgage bond".

The SCA contented that "the language of section 11(a)(i) was clear" and affirmed that upon a purposive and contextualised interpretation thereof, the cancellation of a mortgage bond or the loss of security would have an effect on the prescription period. More specifically, once security ceases to exist, the relevant debt is no longer secured and the prescription period subsequently becomes three years as it is with 'any other debt' in terms of s11(d) of the Prescription Act.

It was common cause that the running of prescription commenced on 18 September 2002. SARCC's cancellation of the lease agreement extinguished Investec's real right in terms of the mortgage bond. The fact that the debt was no longer secured by mortgage bond rendered it subject to the three year prescription period in terms of s11(d) of the Prescription Act as opposed to the 30 year prescription period provided for in s11(a)(i) thereof. As such Investec's claim had prescribed.

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The SCA then had to determine whether such personal right constituted a 'debt' in terms of the Prescription Act.

***Bondev Midrand (Pty) Ltd v Puling (802/2016); Bondev Midrand (Pty) Ltd v Ramokgopa (803/2016)* [2017] ZASCA 141 (2 October 2017)**

Similarly, this case centred on the issue of prescription. Herein the Appellant (Bondev), a property developer, sought an order obliging the Respondents (Puling & Ramokgopa) to re-transfer to it certain immovable property in consequence of Puling & Ramokgopa's breach of a condition registered against their respective title deeds. The condition comprised two clauses:

- The first "obliged the transferee or its successors in title to erect a dwelling on the property within a period of 18 months".
- The second entitled Bondev "to have the property re-transferred to it against return of the purchase price in the event of a dwelling not being erected within that period".

Neither Puling nor Ramokgopa had erected a dwelling and as such Bondev sought re-transfer. The issue at hand was whether Bondev's claim for re-transfer prescribed three years after Puling & Ramokgopa failed to erect a dwelling, being the date on which its claim became due. In deciding this, the SCA had to determine whether Bondev's claim constituted a 'debt' in terms of s11(d) of the Prescription Act, and as such was capable of prescribing, or whether it was a real right not subject to the three year prescriptive period.

The SCA held that the first clause conferred a real right as it intended to bind both the transferee and its successors in title, and constituted an encumbrance upon the exercise of an owner's ownership rights in respect of its land. Conversely, the second clause did not amount to such an encumbrance – it was a personal right that could not bind third parties. It offered an entitlement rather than an obligation. Comparatively, the restriction upon ownership imposed by the first clause remained binding whether or not Bondev elected to seek re-transfer per clause two. Therefore, the clauses were stand-alone and did not constitute 'a composite whole' that restricted Puling & Ramokgopa's use of property.

The SCA then had to determine whether such personal right constituted a 'debt' in terms of the Prescription Act. It found that "it appeared to be settled [in law] that even on a narrow meaning a 'debt' includes the right to claim the return of property". As such, Bondev's claim to re-transfer was a debt, envisaged by s11(d) of the Prescription Act, the prescription period of which was three years.

Comment

To reiterate, these decisions demonstrate how prudent it is for holders of real rights, secured by mortgage bonds, title deed conditions and other instruments, to fully assess and understand the true nature of their interests.

Preanka Gounden and Nick Muller

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Cliffe Dekker Hofmeyr is very pleased to have achieved a Level 3 BBBEE verification under the new BBBEE Codes of Good Practice. Our BBBEE verification is one of several components of our transformation strategy and we continue to seek ways of improving it in a meaningful manner.

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