Courier Issue No 30
May 2008
MCS Publications

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COURIER

Do levy claims prescribe?

Tertius Maree

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Alastair Lomas Walker, a Durban attorney who was profiled in MCS Courier no. 21, raised a very important question, namely whether a body corporate's levy claims become prescribed after expiry of 3 years.

We know that civil claims for payment of monies become prescribed after 3 years in terms of the provisions of the Prescription Act unless the debtor has admitted liability or summons has been served during the intervening period. Up to the present it has been generally accepted that this is also the case in respect of levy claims due to a Body Corporate. This notion was also accepted by the Cape High Court in the Fish Eagle decision, which was discussed in MCS Courier no 12.

The question has recently been highlighted due to views expressed in some quarters that levy claims are not affected by the provisions of the Prescription Act. This argument is founded upon the terminology of section 13(1) of the Prescription Act which determines that if the creditor is a body corporate of which the debtor is a member of the governing body, prescription only takes place after expiry of one year after removal of such impediment.

Alastair considered the impact of section 13(1), which could have a substantial influence upon the ability of bodies corporate to recover arrear levies where trustees are slow to issue summonses.

The sectional title body corporate is a body corporate in terms of section 36 of the Sectional Titles Act and is undoubtedly also a body corporate for the purposes of section 13(1) of the Prescription Act.

The question which arises is whether an ordinary member (not being a trustee) is to be regarded as a member of the '*governing body*' of the body corporate. Put differently: Is it sufficient for the purposes of section 13 (1) that the debtor is a member of the body corporate, or must he be a trustee in order to invoke extension of prescription?

The matter is further obfuscated by the continued usage, especially amongst Afrikaans speakers, of the term '*beheerliggaam*' or '*controlling body*' when referring to the body corporate, (which is an association of owners). The

present Sectional Titles Act refers to '*regspersoon'* and '*body corporate'*. Usage of the old terminology serves to confuse the terms '*Body Corporate*' and '*trustees*.' This confusion makes it more difficult to interpret section 13(1) correctly.

When interpreting a statutory provision, the actual intention of the legislature must be sought. One method would be to determine what the mischief is which the legislature intends to address. For this purpose the legislation must be considered in its entirety and the surrounding circumstances must be taken into account.

Section 13(1) mentions a number of impediments which would suspend the running of prescription, for example where the creditor is a minor. Provision is then made for such impediment by extending the prescription period.

This could be explained with reference to a company. A company has shareholders as well as directors. However it is the board of directors which make the day to day decisions affecting the company, including a decision to sue a debtor. Directors, similar to trustees in sectional title scheme, stand in a fiduciary relationship to the company and should recuse themselves where their personal interests are in conflict with the interest of the company. This is not always done correctly and even where a director has recused himself, his presence may still influence a decision involving claims against him by the company.

A person's directorship is therefore an impediment to an unbiased, rational decision whether or not to sue such person. It seems that this is the type of impediment which the legislature wishes to combat in section 13(1). In the matter of Symington and others v Pretoria-Oos Privaat Hospital Bedryfs (Pty) Ltd SCA 77/2004 it was accordingly decided that section 13(1) does not apply in respect of claims against shareholders, but only in respect of claims against directors, because shareholders will not normally affect a decision to sue. Accordingly the term '*governing body'* of a company was determined to be the board of directors and not the shareholders.

The position in sectional title law is similar, with a board of trustees which is comparable to a board of directors. A trustee may, by his mere presence, impose an impediment to a decision to institute action against him for arrear levies. Accordingly the legislature intended to combat this mischief by determining that, in respect of arrear levies owed by a trustee, prescription should only take place after expiry of one year from removal of the relevant impediment, namely his trusteeship.

In summary it can therefore be said that claims for levies owed by ordinary members prescribe after a period of 3 years from the date upon which the debt arose. If the arrears are due by a trustee, prescription also takes place after 3 years, but not before expiry of at least one year after termination of his trusteeship.

Trustees should take note of the potential effects of prescription on levy recoveries and should take timeous action to safeguard the body corporate against unnecessary losses.

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Maintenance of Pipes and Access to Sections

Ilse Kotze

Whereas the body corporate is responsible to maintain the common property and each owner is responsible to maintain his or her section, one would assume that each owner should also be responsible to maintain all the pipes situate in his or her section. This is not necessarily the case.

Pipes situate inside sections would usually be the responsibility of the owner of the section to maintain and repair, unless the pipes are '*capable of being used in connection with the enjoyment of more than one section or of the common property*', when it will be the responsibility of the body corporate to maintain and repair.

This follows from section 37(1)(p) of the Act which stipulates that it is the function of the body corporate '*to maintain and repair (including renewal where reasonably necessary) pipes existing on the land and capable of being used in connection with the enjoyment of more than one section or of the common property or in favour of one section over the common property*'.

In summary, the body corporate is responsible for the maintenance of all pipes wherever it may exist within the boundaries of the scheme, except if situated within a section and only benefiting that section.

The trustees can access sections to maintain pipes in accordance with the following provisions:

Practice note:

An owner who wishes to consolidate two or more of his sections has to obtain the consent of the trustees. Thereafter the owner must instruct a land surveyor or architect to prepare a sectional plan of consolidation and to submit it to the surveyor-general for approval.

Registration must then be effected in the deeds registry by the conveyancer appointed by the owner. Upon registration the owner will have one title deed in respect of his sections so consolidated.

Ilse Kotze

Section 44(1)(a) of the Act obligates owners to permit any person (authorized in writing by the trustees), at all reasonable hours on notice, to have access to their sections for the purpose of maintaining, repairing or renewing pipes existing in a section for which the body corporate is responsible. In case of an emergency, no notice is required.

The Act also affords owners protection whereas in terms of section 28(1) of the Act an implied servitude exists in favour of and against each section for the passage or provision of water, sewerage and drainage through or by means of pipes. Section 28(2) of the Act confers the right on owners of sections (exercisable by the body corporate) to have access to sections from time to time during reasonable hours to the extent necessary to maintain, repair or renew any pipes therein, or for making emergency repairs therein necessary to prevent damage to the common property or any other sections.

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ENERGY: HOW CAN WE DO OUR BIT?

Jacques Maree

We are all very much aware of the energy crisis in South Africa which has affected us all personally. As winter fast approaches, many of us are waiting nervously, expecting more load-shedding as our energy demands increase. We have heard of such targets as reducing our energy usage by 10%. How can sectional title bodies corporate do their bit?

To start off, I think what is required is a change of attitude. We have to actively pursue this matter, maybe change our perceptions and interpretation of the rules governing a scheme, especially rules regarding the aesthetic appearance. In many instances we have to look at amending our rules.

Almost every body corporate has a common electricity account which usually includes energy consumed by common property lights. Many of these lights can be replaced by energy saver lights. This is purely a maintenance item and only requires a trustees resolution. If the trustees are not using energy saver lights, why not raise the issue at your next annual general meeting and possibly instruct the trustees to use such lights in future as a matter of policy.

An alternative to electricity is gas. Even though the installation of gas cooking equipment in most sectional title complexes may not be practical, there are complexes where this may be considered. I have seen trustees fight tooth and nail to prevent owners from placing gas cylinders on common property claiming it to be a danger and aesthetically displeasing. Some want to let the area to the owner or create an exclusive use area. Even though the standard conduct rules do not provide for the placement of gas cylinders on common property by owners, these rules can always be adapted to provide for such placement with trustees consent and subject to reasonable conditions.

When it comes to generators we have to distinguish between two scenarios. The one is where an owner wants to install or place a generator that serves his section only, the other where the trustees want to install a generator for use by the body corporate on common property.

If an owner wants to install a generator on his exclusive use area he must apply to the trustees for permission. Many small generators however, do

not require installation. They are merely objects that can be moved around and may be placed on exclusive use areas by owners in the same manner as, for example a sun umbrella. No trustees' consent is required.
Where the intention is to place or install a generator on common property the conduct rules will have to be amended to provide therefor.

A generator installed by the trustees on the common property for use and enjoyment of the common property, is an improvement to the common property and the provisions of management rule 33 will apply. Taking our current energy crisis into consideration this improvement can be considered a non-luxurious improvement for which less stringent provisions apply as opposed to a luxurious improvement.

Another alternative to consider in the quest of saving energy is the use of solar energy. In other countries this has been utilised to a much greater degree than in South Africa. I have seen skyscrapers designed with solar energy panels running the entire height of the building.

Solar energy is energy from the sun which can be used for purposes of heating, lighting, cooking, electricity, etc. For bodies corporate the provision of lighting and especially hot water appear to be attractive alternatives and is something that may be considered, by individual owners and trustees.

The requirements for the installation of solar energy equipment is much the same as in the case of generators where we firstly have to distinguish between installation for own use or for common use.

All the above involve objects or structures to be placed on the outside of buildings. In the past the aesthetic appearance rule was used as a trump card to prevent owners or the trustees from placing such objects or installing such structures. It is perhaps time that we should change out attitudes in this regard. Our energy crisis is not a short term problem and it is becoming necessary to accept that such installations will necessarily become more prevalent and that we should devise methods to incorporate these into sectional title living, at the same time preserving safety and, as far as practically possible, aesthetics.

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Vrae oor versekering

Ook instandhouding van dele word bepreek

Tertius Maree

Extract from the series DeeltitelForum, published weekly in Die Burger.

Die versekering en instandhouding van deeltitel-eiendom is belangrike kwessies wat spesiale aandag verg.

'n Leser van DeeltitelForum skryf: 'Ons woon in 'n deeltitel-dorpshuiskompleks met ses losstaande huise, elk met sy eie tuin. Daar is 'n gemeenskaplike ringmuur met 'n toeganshek. Aangesien u ons al voorheen van goeie raad bedien het, sal ek dit waardeer as u lig kan werp op die volgende vrae:

- Versekering: Bestaan daar enigsins 'n moontlikheid dat die eienaar sy eie versekering vir sy spesifieke eiendom kan uitneem? Sou almal nie saamstem met die idee nie, is dit dan moontlik dat een eienaar dan sy eie sy huis kan verseker? Wat is die prosedure wat gevolg moet word? Die doel met die vrae is dat die polis wat reeds vir die skema beding is, nie regtig baie voordele vir die versekerdes inhou nie. Ons het dit onlangs weer ondervind toe een van die eenhede se warmwatertoestel onklaar geraak het.
- Instandhouding van dele: U het by 'n vorige geleentheid hieroor geskryf dat dit wel moontlik is om reëls te skep ingevolge waarvan elke eienaar self verantwoordelikheid dra vir die instandhouding van sy eie woning of dele daarvan. Ook dat u inderdaad al meermale reëls van die aard vir regspersone opgestel het wat dit tans doeltreffend gebruik. Wat is die moontlikheid dat u hierdie reëls aan ons beskikbaar stel?
- Het die Deeltitel-regulasieraad al die wet gewysig sodat 'n bestuursreël by wyse van 'n eenparige besluit geskep kan word wat elke eienaar vir die instandhouding van sy eie woning verantwoordelik maak?'

Besonderhede van versekering en wat trustees se pligte is, word vervat in bestuursreël 29. Bestuursreëls kan by wyse van eenparige besluit gewysig word. Dit sou dus moontlik wees om 'n heel ander bedeling vir versekering te skep by wyse van aanvaarding van 'n goedopgestelde bestuursreël ter vervanging van bestuursreël 29. So kan byvoorbeeld voorsiening gemaak word vir aparte versekeringspolisse deur individuele eienaars.

Onder normale omstandighede, waar komplekse uit 20 of meer eenhede bestaan, is eenparigheid vir praktiese redes dikwels nie haalbaar nie. Indien eenparigheid in 'n kompleks bestaande uit slegs ses eenhede nie verkry kan word nie, is daar miskien goeie redes daarvoor.

Die gedagte van aparte versekering laat onmiddellik waarskuwingsligte flikker. Hou in gedagte dat elke losstaande huis elemente van gemeenskaplike eiendom bevat, waarin elke eienaar ‘n belang het. Ander gemeenskaplike eiendom, soos hekke en toegangspaaie, is ook teenwoordig. Dit sal dan afsonderlik verseker moet word.

Hou verder in gedagte dat waar elkeen onafhanklik mag verseker, dit kan gebeur dat sommige dele onderverseker mag word, of selfs glad nie verseker word nie. In sodanige gevalle mag dit byvoorbeeld die regspersoon se verantwoordelikheid word om ‘n huis te herstel of te herbou.

Ek dink dit is ‘n beter idee om bestuursreël 29 te behou, alle eenhede daarvolgens te verseker, en elke eienaar toe te laat om sodanige addisionele versekering uit te neem as wat hy nodig ag. Hiervoor maak bestuursreël 29 reeds voorsiening.

Ten opsigte van die leser se aanmerking dat hul huidige polis nie voordelig is nie, moet ek byvoeg dat dit nodig is om navorsing te doen voordat op ‘n geskikte polis besluit word. Dit is onwaarskynlik dat ‘n enkel-eienaar ten opsigte van sy deel ‘n voordeliger polis sal kan beding as die regspersoon ten opsigte van een polis vir al die geboue.

Wat betref die gedagte dat elke eienaar verantwoordelik gemaak word vir instandhouding van sy eie huis, moet ek ook waarskuwings rig.

Dit is wel goed moontlik om ingevolge artikel 32 (4) ‘n heffingsbedeling te skep deur middel van gewysigde bestuursreëls, waarvolgens die koste van instandhouding deur die regspersoon vanaf individuele eienaars verhaalbaar is. Die regspersoon sal dan steeds vir die daadwerklike instandhouding verantwoordelik bly.

Die wet is egter nog nie aangepas om positief aan te dui dat die regspersoon se instandhouding op individuele eienaars afgewentel mag word nie. Dit is ook nie wenslik dat geheel en al van dié funksie afstand gedoen word nie, aangesien dit nodig is dat sekere standaarde gehandhaaf word.

Indien die regspersoon die instandhoudingsplig op individuele eienaars sou afwentel by wyse van ad hoc ooreenkomste met eienaars, sou dit belangrik wees dat die trustees die reg voorbehou om in te gryp wanneer dinge skeef loop, of indien niks gebeur nie.

Die bestuur van kleiner komplekse met losstaande wonings bly problematies aangesien die standaardreëls gerig is op woonstelblokke. Dit is wel moontlik, en ook wenslik, om reëls in plek te stel wat gerig is op kleiner komplekse. Die aanpassings moet egter met omsigtigheid gedoen word.

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