

## ISSUE 10 – 2023

### UNINCORPORATED HOA: PRESCRIPTION ALERT

#### Long Beach Owners Association v Miles N.O - Trial (624/2020) [2023] ZAECMKHC 71 (30 May 2023)

*When does a debt prescribe that an owner owes to its unincorporated homeowners' association? Section 13(1)(e) of the Prescription Act provides that the usual term for the running of prescription is interrupted if the debtor is a member of the governing body of a juristic person creditor. The association in this matter argued that it was a juristic person for purposes of this section and that its claim against an owner in the estate did not prescribe after three years. The argument failed and the judgment sounds a warning note to such unincorporated associations to address outstanding debts timeously.*

*The Judgment can be viewed [here](#).*

#### FACTS

On 5 March 2020, the Long Beach Owners Association ('the LBOA') brought an action against the Haven Trust (the Trust) claiming payment of some R600,000. The LBOA alleged that as a homeowners' association and having regard to its resolutions and constitution, it legitimately incurred legal expenses in pursuing two matters in court. (The first litigation related to an appeal against a finding of the MEC: Economic Development Environmental Affairs and Tourism relating to an environmental approval relevant to the LBOA and the land within the development. The second decision related to the refusal to grant two forestry licences.) Judgment was handed down on 25 April 2016.

The legal costs incurred amounted to some R4,2 million. The amount claimed from the Trust was its share, as owner of a home in the development and as a member of the LBOA, of the legal costs. (Its constitution provided, amongst other things, that: (i) all owners of properties within the development shall be members of the LBOA; and (ii), that the association may require members to pay an additional levy to cover "extraordinary expenses" necessarily incurred, such as the legal expenses claimed.)

The Trust defended the matter on various grounds and later also raised a special plea of prescription. It alleged that the debt (in respect of the legal costs) arose after 25 April 2016, the day on which judgment was handed down. The Trust became aware thereof only much later, sometime after 2 July 2021; but the court action was in any event only launched in March 2020.

This judgment relates only to the question whether the LBOA's claim had become prescribed. In this regard, the LBOA argued that **section 13(1)(e)** of the Prescription Act 68 of 1969 applied. This section provides that if a "creditor is a juristic person and the debtor is a member of the governing body of such juristic person ..." then the "period of prescription shall not be completed before a year has elapsed after the day referred to in paragraph (i)." Paragraph (i) states that "... the relevant period of prescription would, but for the provisions of this subsection, be completed before or on, or within one year after, the day on which the relevant impediment referred to in paragraph ... (e) ... has ceased to exist". In other words, section 13(1)(e) provides that the period of prescription would be delayed until a year after the debtor (the owner)

who is a member of the governing body of a creditor (that is a juristic person), ceases to be a member of the juristic person.

The LBOA argued that it was such a juristic person because:

- Its constitution records that it is “its own legal persona, quite separate and distinct from its members” and that it is entitled to institute action for all and any of the obligations and duties imposed on the members in terms of the constitution.
- It was constituted in terms of section 29(2)(b) of the Land Use Planning Ordinance 15 of 1985 (“LUPO”), in terms of which the local authority imposed, as a condition of for approval of the development, that an owners’ association had to be established and that a constitution had to be prepared for it. In terms of LUPO, such an association was a “body corporate.”

The Trust, in turn, relied on section 10, as read with 11 and 12 of the Prescription Act. These sections, in summary, provide that debts are extinguished by prescription after the lapse of the prescribed periods that apply in respect of the particular debt. In the present case, the period was 3 years. The debt became due, in terms of the Prescription Act, at the latest on 25 April 2016 and the claim of the LBOA had become prescribed on 26 April 2019. The action was only launched in March 2020.

## HELD

- The effect of prescription is to extinguish the debt after the lapse of the prescriptive period applied to that debt by the Act. The question in this matter was whether there was room for the LBOA to rely on section 13, in other words, that the claim had not yet prescribed.
- For purposes of section 13(1)(e), the LBOA therefore had to show that it was a juristic person and that that the completion of the prescription period is delayed until a year after the debtor (the owner) who is a member of the governing body of a creditor (that is a juristic person), ceases to be a member of the juristic person.
- In considering section 13(1)(e), it is relevant to note that at the time that the Prescription Act was promulgated during 1969, the 1926 Companies Act was in operation and subsequently the 1973 Companies Act was promulgated. Neither provided a definition of a “juristic person”.
- The new Companies Act of 2008 does have a definition of a “juristic person” albeit concise, and states that the term “includes a foreign company and a trust, irrespective of whether or not it was established within or outside the Republic.” The Close Corporations Act 69 of 1984 simply defines a close corporation as a juristic person on its registration.
- There was no statutory provision in effect when the Prescription Act was promulgated which recognised or provided that a homeowners’ association or any association of its nature, was a juristic person.

- The LBOA was established in terms of section 29 of LUPO, which provides at 29(2) that a homeowners' association coming into being by virtue of the LUPO provisions "shall be a body corporate". LUPO does not define the term "body corporate".
- On the facts in this matter, the LBOA is not an incorporated association, but rather one arising from an agreement between its members and having a separate legal personality with perpetual succession. It is a "*universitas*" (a voluntary association with legal personality but distinct from an incorporated entity) with the ability to sue and be sued in its own name with the purpose of furthering the common interest of its members.
- The statement in the constitution that it has its own legal *persona*, does not change this. ("It is recorded that this Association constitutes its own legal *persona*, quite separate and distinct from the members who constitute the Association....") On a plain reading of this in the context, it does not convert the association to a juristic person.

## CONCLUSION

The special plea was upheld; the claim had prescribed.