CONSTITUTIONAL COURT OF SOUTH AFRICA

Off-Beat Holiday Club and Another v Sanbonani Holiday Spa and Others

CCT 106/16

Date of judgment: 23 May 2017

MEDIA SUMMARY

The following explanatory note is provided to assist the media in reporting this case and is not binding on the Constitutional Court or any member of the Court.

On 23 May 2017, at 10h00, the Constitutional Court handed down judgment in an application for leave to appeal against an order of the Supreme Court of Appeal (SCA), which held that the applicants' claim, located in section 252 of the Companies Act 61 of 1973 (Old Companies Act) had prescribed.

The applicants are two timeshare clubs, Off-Beat Holiday Club and Flexi Holiday Club (the Clubs). In 1991, the Clubs became minority shareholders in Sanbonani Holiday Spa Shareblock Limited (Shareblock), the first respondent in the application. The company operates a share block scheme in Hazyview (Property) that was developed by the second respondent, Sanbonani Development Limited (Development). The third respondent is Hans Michael Harri (Mr Harri), who is the original investor and controlling mind of both Shareblock and Development. Mr Harri has the largest share in Shareblock.

In 1999, disputes arose about the manner in which Shareblock was operated and whether Mr Harri, as the controlling mind of Shareblock and Development, exercised improper influence over Shareblock to its detriment.

Disputes again arose in 2004 about the composition of Shareblock's board of directors, the amendment of its articles of association and the allocation of shares. Mr Harri then gave notice of a shareholders' meeting to remove the Clubs' representatives on Shareblock's board of directors. In response, the Clubs launched an application in the High Court of South Africa, KwaZulu-Natal Local Division, Durban, to prevent Shareblock's shareholders, Development and the Trust from voting with certain of their shares at the shareholders' meeting. That application was dismissed.

In October 2008, the Clubs launched an application in the High Court of South Africa, Gauteng Division, Pretoria (High Court). They claimed two broad categories of relief. The first was in terms of section 252 of the Old Companies Act in which the Clubs sought a declarator to the effect that the creation and allocation of the shares were invalid and that the offending articles were liable to be cancelled. The second claim was under section 266 of the Companies Act (the derivative action).

The High Court held that the Clubs' section 252 claim fell in the same category as the liquidator's right to enforce an impeachable transaction under the Insolvency Act. The Court concluded that the claims had prescribed as the Clubs had had knowledge of the cause of action giving rise to their section 252 claim for many years. The High Court also rejected the Clubs' argument that their causes of action amounted to continuing wrongs. It held that the actions complained of were single acts, although with long-term consequences. The Court also dismissed the section 266 claim.

In an appeal to the SCA, that Court held that the section 266 claim had not prescribed as the High Court had just authorised the appointment of the curator.

Regarding the section 252 challenge against Shareblock's articles and allocation of shares, the SCA restated the meaning of the term "debt", that it has a wide and general meaning that includes an obligation to do or refrain from doing something and that it entails a right on one side and a corresponding obligation on the other. The SCA noted that the Clubs by launching the application, in effect sought a new contract by means of a new set of articles. The Court held that it would be impermissible to grant that relief. Furthermore, the Clubs had been aware of the wrongs complained of for many years. The section 252 claim was in fact a debt which was subject to the provisions of the Prescription Act. Accordingly, the SCA dismissed the Clubs' appeal in respect of the section 252 claim on the basis that it had prescribed. It is that part of the order that the Clubs sought to challenge in this Court.

In this Court, the Clubs submitted that Mr Harri's unlawful conduct which included improperly amending Shareblock's articles of association and then implementing decisions taken under the new articles, operated unfairly, prejudicially, unjustly and inequitably. In view of this Court's decision in *Makate v Vodacom (Pty) Ltd* (*Makate*), the Clubs argued that the term "debt" should be given a narrow meaning; that *Makate* must be understood to endorse the proposition that only two things can permissibly qualify as a debt for the narrow purposes of section 10(1) read with section 11(d) of the Prescription Act, namely, a claim for the payment of money or a claim for the delivery of something. Since the Clubs' claims under section 252 of the Companies Act are neither, they contended that the claims could not be regarded as debts and therefore they had not prescribed.

In the alternative, the Clubs submitted that their claims constituted continuing wrongs, incapable of prescription. Therefore, the section 252 remedy was incapable of prescription because the acts complained of had ongoing effects.

On the other hand, the respondents submitted that Clubs' section 252 claims had in fact prescribed. They contended that the Clubs' section 252 action fell squarely within the meaning of "debt" following *Makate* and that what the Clubs sought was a claim for performance of an obligation to do something as ordinarily understood.

As to the "continuing wrong" argument, the respondents argued that the Clubs were active participants as they had participated in the contested share allocations. Furthermore, the Clubs had full knowledge of Shareblock's constitutional regime when they freely bought into it.

The majority judgment, written by Mhlantla J (Nkabinde ACJ, Cameron J, Jafta J, Khampepe J, Madlanga J concurring), held that until a determination on the validity of the parties' positions against each other was made under section 252, neither party could discharge its respective obligations as neither was aware of the existence or extent of those obligations.

The majority held that the Clubs sought a declaratory order that certain provisions of Shareblock's articles of association were invalid, that certain shares were improperly issued and that the holders of those shares were barred from voting on them. Their claim was for a declaratory relief and not an alteration of the terms of a contract or a monetary award. The majority held the mere fact that the claim was for a declarator did not mean that the Clubs were attempting to avoid the construction of the term "debt" as defined in *Electricity Supply Commission v Stewarts and Lloyds of SA* (*Escom*) and also avoid the application of the Prescription Act.

As to the nature of a section 252 claim, the majority held that section 252 gives courts the ability to protect minority shareholders from the oppressive conduct on the company. In particular, if a court finds that a particular act or omission on the part of the company is unfarily prejudicial, unjust or inequitable to minority shareholders, or that the company's affairs have been conducted in such a manner, then the court is empowered to make a just and equitable remedial order. The fact that the court has such broad discretion to grant just and equitable relief suggests that a section 252 claim does not constitute a "debt" for purposes of the Prescription Act.

In so far as the question whether the claims had prescribed is concerned, the majority stated that *Makate* overturned the definition of the term "debt" enunciated in *Desai* and endorsed the definition in *Escom*. The majority held that an application of the narrow test as enunciated in *Escom* would bring the applicants' section 252 claim outside of the purview of the term "debt" incapable of prescribing under the Prescription Act. As a result, leave to appeal was granted and the appeal was upheld.

In a separate judgment (second judgment), Froneman J (Mbha AJ and Musi AJ concurring) agrees that leave to appeal must be granted and that the appeal should succeed, but to a more limited extent than ordered in the majority judgment. Froneman J disagrees with the declatory order that the claim brought under section 252 of the Companies Act 61 of 1973 does not constitute a debt. Hee holds that the High Court had

to determine whether each of the claims set out in the notice of motion had prescribed or not. All were 'debts' under the Prescription Act, but not all of them had necessarily prescribed. The matter should be remitted to the High Court to determine those that might not have prescribed.

In a third judgment (third judgment), Madlanga J opined that the majority judgment focused on the nature of the relief sought in determining whether a claim is a "debt" under the Prescription Act. In his view, the correct approach would be to examine the conduct complained of and the resultant claim. If the conduct gave rise to a claim that qualified as a debt within the meaning of the Constitutional Court's judgment in *Makate*, then prescription under the Prescription Act will apply. Whether the conduct gives rise to a claim that qualifies as a debt is something capable of identification independently of any relief that may subsequently be claimed. The third judgment concludes that, based on this approach, it would have made a slight change to the declarator.