CONSTITUTIONAL COURT OF SOUTH AFRICA

Case CCT 106/16

In the matter between:

OFF-BEAT HOLIDAY CLUB	First Applicant
FLEXI HOLIDAY CLUB	Second Applicant
and	
SANBONANI HOLIDAY SPA SHAREBLOCK LIMITED	First Respondent
SANBONANI DEVELOPMENT LIMITED	Second Respondent
HANS MICHAEL HARRI	Third Respondent
HANS MICHAEL HARRI N.O.	Fourth Respondent
HELLEN DUPORETHA HARRY N.O.	Fifth Respondent
VINCENT CHRISTOPHER CALACA N.O.	Sixth Respondent
SANBONANI HOTEL MANAGEMENT (PTY) LIMITED	Seventh Respondent
REGISTRAR OF COMPANIES	Eighth Respondent

Neutral citation:	*Off-Beat Holiday Club and Another v Sanbonani Holiday Spa Shareblock Limited and Others* [2017] ZACC 15
Coram:	Nkabinde ACJ, Cameron J, Froneman J, Jafta J, Khampepe J, Madlanga J, Mbha AJ, Mhlantla J, Musi AJ and Zondo J

Judgments: Mhlantla J (first judgment/majority): [1] to [56]
Froneman J (second judgment): [57] to [97]
Madlanga J (third judgment): [98] to [108]

Heard on: 29 November 2016

Decided on: 23 May 2017

Summary: Prescription — claims brought under section 252 of the Companies Act 61 of 1973 do not constitute "debts" in terms of the Prescription Act 68 of 1969 — matter remitted to High Court for consideration of section 252 claim

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ORDER

On appeal from the Supreme Court of Appeal (hearing an appeal from the High Court of South Africa, Gauteng Division, Pretoria):

1. The applicants are granted leave to appeal against that part of the judgment and order of the Supreme Court of Appeal that held that their claim located in section 252 of the Companies Act 61 of 1973 had prescribed.
2. The appeal against the order of the Supreme Court of Appeal relating to the dismissal of the section 252 relief is upheld.
3. The order of the Supreme Court of Appeal that relates to a claim brought under section 252 of the Companies Act is set aside and replaced with:

   "(a) The appeal against the order of the High Court relating to the claim brought under section 252 of the Companies Act is upheld.

   (b) The order of the High Court relating to the claim brought under section 252 of the Companies Act is hereby set aside and replaced with the following:

(i) It is declared that a claim brought under section 252 of the Companies Act 61 of 1973 does not constitute a debt in terms of the Prescription Act 68 of 1969.

(ii) The matter is postponed *sine die* to enable the applicants to enrol the matter for the adjudication of the merits of the claims in terms of section 252 of the Companies Act 61 of 1973.

(iii) The issue of costs is reserved."

4. The respondents must pay the applicants' costs in this Court and in the Supreme Court of Appeal, including the costs of two counsel.

JUDGMENT

MHLANTLA J (Nkabinde ACJ, Cameron J, Jafta J, Khampepe J, and Zondo J concurring):

Introduction

[1] This matter comes before us as an application for leave to appeal against a decision of the Supreme Court of Appeal (SCA).[1] The applicants seek to challenge that portion of the SCA's conclusion that their claim located in section 252 of the Companies Act[2] had prescribed. The thrust of their charge is that the reasoning of the SCA is inconsistent with the approach of this Court in *Makate*.[3] This inconsistency, they argue, warrants this Court's intervention.

[1] *Off-Beat Holiday Club v Sanbonani Holiday Spa Shareblock Ltd* [2016] ZASCA 62; 2016 (6) SA 181 (SCA) (SCA judgment). The main judgment, which contains the finding that the applicants take issue with, was prepared by Maya ADP. Cachalia JA and Leach JA each prepared a separate judgment, which do not bear relevance to the appeal at hand.

[2] 61 of 1973. This Act has now largely been repealed and should not be confused with the currently operative Companies Act 71 of 2008.

[3] *Makate v Vodacom (Pty) Ltd* [2016] ZACC 13; 2016 (4) SA 121 (CC); 2016 (6) BCLR 709 (CC).

Factual background

[2] The dispute before this Court is a narrow one and brevity is necessary to capture those facts that are pertinent to its resolution. At the heart of the parties' acrimony is the first respondent, Sanbonani Holiday Spa Shareblock Limited (Shareblock). Shareblock was registered and incorporated as a share block company as defined in the Share Blocks Control Act[4] on 30 September 1987. This company operates a share block scheme in Hazyview (Property) that was developed by the second respondent, Sanbonani Development Limited (Development).

[3] The original investor and controlling mind of both Shareblock and Development is the third respondent, Hans Michael Harri (Mr Harri). Through his personal shares, the Duleda Family Trust (Trust), of which Mr Harri is a trustee, and his daughters, who are beneficiaries of the Trust, Mr Harri owns 80% of Development's shares. [5] Combined with his personal shares in Shareblock, Mr Harri has the largest share in the company and owns 46.7% of Shareblock's shares.

[4] The applicants are two timeshare clubs, Off-Beat Holiday Club and Flexi Holiday Club (the Clubs). They both form part of the Club Leisure Group, which supports this application. In 1991, the Clubs became minority shareholders in Shareblock. Together, and through agreements with the Club Leisure Group, the Clubs effectively control 29.14 % of the shareholding in Shareblock.

[5] In 1988, Shareblock, following a special general meeting, amended its original articles of association. A continuous right was conferred upon Development to use the area on the Property demarcated as 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.

[4] 59 of 1980.

[5] The fourth, fifth and sixth respondents act in their fiduciary capacities as the trustees of the Trust.

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. The seventh respondent, Sanbonani Hotel Management Propriety Limited, conducts a hotel and restaurant business at the hotel under a lease concluded with the Trust.

[6] In 1999, disputes arose about the manner in which Shareblock was run and whether Mr Harri, as the controlling mind of Shareblock and Development, exercised improper influence over Shareblock to its detriment. The Clubs identified two triggering acts. First, they took issue with a VAT refund being paid to Development on Mr Harri's instruction, despite the Receiver of Revenue having indicated that the refund was due to Shareblock. Second, they argued that land earmarked for the common use of all Shareblock members was appropriated by Mr Harri, Development and the Trust.

[7] On 18 May 2000, these disputes were deemed resolved by concluding a settlement agreement. The Clubs were not party to this agreement. The agreement required that Shareblock's share block scheme be converted to a sectional title scheme according to which Shareblock would be the owner by 31 December 2000. This did not occur.

[8] Subsequent disputes again arose in 2004 regarding the composition of the board of directors of Shareblock. Mr Harri gave notice of a shareholders' meeting to remove the Clubs' representative directors 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. The Clubs' application also threatened to seek the expungement of these disputed shares in the amended articles of Shareblock and to appoint a curator under derivative action proceedings instituted in terms of section 266 of the Companies Act. The 2004 application was dismissed. Nothing of significance occurred until October 2008 when the Clubs launched the proceedings that are the

subject of the present application for leave to appeal, in the High Court of South Africa, Gauteng Division, Pretoria (High Court).

Litigation history

High Court

[9] The matter came before Bertelsmann J.[6] The Clubs claimed two broad categories of relief. The first was in terms of section 252[7] in which the Clubs sought a declarator 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[8] of the Companies Act (the derivative action). The respondents submitted that the Clubs' section 252 claim had prescribed as it constituted a "debt" for purposes of sections 11 and 12 of the Prescription Act,[9] and so too the section 266 claim.

[10] The High Court applied *Koster*,[10] a case where liquidators sought to set aside, under section 32 of the Insolvency Act,[11] dispositions made before the liquidation of a close corporation and where it was held that a liquidator's right to institute a claim setting aside an impeachable transaction constitutes a "debt" for purposes of the Act. The High Court thus held that the Clubs' section 252 claim fell into the same category as the liquidator's right to enforce an impeachable transaction under the Insolvency Act. The Court concluded that the claims had prima facie prescribed as the Clubs had had knowledge of the cause of action giving rise to their section 252 claim for many years.

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[6] *Off-Beat Holiday Club v Sanbonani Holiday Spa Share Block Limited* [2014] ZAGPPHC 418 (High Court judgment).

[7] 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 relevant provisions of the section are quoted below at [26].

[8] Section 266 enables a member to bring an action to enforce the company's rights against wrongdoing by directors and officers or past directors and officers. It empowers the court to order that any resolution ratifying or condoning the wrong in question shall be of no force or effect.

[9] 68 of 1969.

[10] *Duet and Magnum Financial Services CC (in liquidation) v Koster* [2010] ZASCA 34; 2010 (4) SA 499 (SCA).

[11] 24 of 1936.

[11] The High Court also rejected the Clubs' argument that their causes of action amounted to continuing wrongs. It relied on *Barnett*[12] to hold that the actions complained of were single acts, albeit with long-term consequences. They had therefore prescribed. The Court also dismissed the section 266 claim (VAT claim) on the basis that it was a debt that had prescribed. The only claim that was upheld related to the arrear rental payments owed to the first respondent for use of land and laundry facilities. A curator *ad litem* was appointed and authorised to institute action against Mr Harri for breach of his fiduciary duties. Accordingly, the High Court dismissed the sections 252 and 266 claims on the basis that they had prescribed. The effect of this conclusion was that the merits of these claims were not considered by the Court.

Supreme Court of Appeal

[12] Aggrieved by this decision, the Clubs approached the SCA for leave to appeal. The SCA (per Maya ADP) considered the Clubs' section 266 claim and held that the debt arises only when the court grants the relief sought by the shareholder under section 266 and appoints a curator *ad litem* to launch the proceedings. The SCA concluded that the section 266 claim had not prescribed as the appointment of the curator had just been made by the High Court. The SCA extended the ambit of the authorisation of the curator *ad litem* and authorised him to also recover damage or loss incurred as a result of the fact that Mr Harri had wrongfully allowed or caused Shareblock to unjustifiably pay VAT refunds in the sums of R2 169 897.04 and R120 309.13 to Development.

[13] Regarding the section 252 challenge against Shareblock's articles and allocation of shares, the SCA adopted the meaning of the term "debt" based on the reasoning in *Desai*[13] to have a wide and general meaning.[14] That includes an

[12] *Barnett v Minister of Land Affairs* [2007] ZASCA 95; 2007 (6) SA 313 (SCA).

[13] *Desai NO v Desai* [1995] ZASCA 113; 1996 (1) SA 141 (SCA).

[14] See SCA judgment above n 1 at para 32.

obligation to do or refrain from doing something that entails a right on one side and a corresponding obligation on the other.

[14] The SCA rejected the Clubs' attempt to amend their claims to include the rectification of a contract. It concluded that those claims were not susceptible to prescription as they do not alter rights and obligations but merely concern erroneous reflections of these rights and obligations. The SCA held that the Clubs' case was distinguishable from these instances. That the Clubs founded their case on section 252 rather than section 115, which provides for rectification of the register of members, reflected this.

[15] The allocation of Shareblock's shares was done pursuant to the articles that the Clubs now sought to amend. The SCA noted that what the Clubs effectively sought was a new contract by means of a new set of articles and that it would be impermissible to grant that relief. 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 seek to challenge.

In this Court

Applicants' submissions

[16] The Clubs submit 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. The Clubs contend that the section 252 remedy is incapable of prescription.

[17] The Clubs argue that the SCA erred in affording the term "debt" a wide and general meaning. In view of this Court's decision in *Makate*, the Clubs argue that "debt" should be given a narrow meaning rather than a wide one. *Makate* pointed out that the meaning of "debt", as articulated in *Desai*, was too wide to be constitutionally compliant. The Clubs submit 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)[15] read with section 11(d)[16] 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 cannot be regarded as debts. If they are not debts, in terms of the Prescription Act, then they have not prescribed.

[18] In the alternative, the Clubs submit that their claim constitutes a continuing wrong that is also incapable of prescription. It is not the act of unlawfully amending the articles of association, or manipulating the share blocks, or building a hotel on common property that triggers the running of prescription. Rather, the Clubs submit, it is the continuing effect of these acts that prevents prescription from running. If the appeal is successful, the Clubs seek a remittal of the application to the High Court for the adjudication of the merits of the claim.

Respondents' submissions

[19] The respondents rejected the Clubs' contention that *Makate* radically recalibrated our law of extinctive prescription so that only claims for the payment of money or the rendering of goods or services amount to a "debt" capable of prescription under the Prescription Act. Instead, they maintain that the Clubs' section 252 action falls squarely within the meaning of "debt" following *Makate*. To this end they rely on Wallis AJ's concurring judgment, arguing that the Clubs' claims do not fall into a "small category of rights that do not constitute a debt for the purposes of prescription".[17]

[15] Section 10(1) of the Prescription Act reads:

> "Subject to the provisions of this Chapter and of Chapter IV, a debt shall be extinguished by prescription after the lapse of the period which in terms of the relevant law applies in respect of the prescription of such debt."

[16] Section 11 in turn reads:

> "The periods of prescription of debts shall be the following:
>
> (d) save where an Act of Parliament provides otherwise, three years in respect of any other debt."

[17] *Makate* above n 3 at para 199.

[20] According to the respondents, the relief sought by the Clubs under the aegis of section 252 is a series of orders affecting the shares in a manner that, in substance, they constitute no less a "debt" than a claim for performance of an obligation to do something as ordinarily understood. Focus should be placed on the ultimate ends of the Clubs' claims, which fall into even a narrow construction of "debt"—so the respondents submit.

[21] As to the "continuing wrong" argument, the respondents point out that the Clubs were active participants in this wrong, having participated in the contested share allocations. Furthermore, the Clubs had full sight of Shareblock's constitutional regime when they freely bought into it. That the articles of Shareblock existed in their current form in a continuous manner since 1988 is obvious. It does not follow that the continuous existence of the articles has given rise to a continuous claim of oppression.

Jurisdiction and leave to appeal

[22] This Court is empowered to decide matters of a constitutional nature and any other matter that raises an arguable point of law of general public importance that ought to be considered by it.[18] In addition, it must be in the interests of justice to grant leave.

[23] This matter involves the interpretation of this Court's judgment in *Makate*, which altered the law of prescription relied on by the SCA. It also implicates the right of access to courts and the proper application of the principles in *Makate* and prescription law generally. It is trite that the interpretation of the Prescription Act

[18] Section 167(3)(b) of the Constitution.

implicates the right of access to courts in terms of section 34 of the Constitution.[19] In this regard, this Court has previously found jurisdiction.[20]

[24] The crux of this case is the proper interpretation of the term "debt" as it appears in section 10(1) read with section 11(d) of the Prescription Act, and having regard to section 39(2) of the Constitution. The SCA judgment was handed down before *Makate* was delivered. In making its section 252 finding, the SCA relied on the test enunciated in *Desai*. This Court in *Makate* concluded that the test in *Desai* was inappropriate to the extent that it went beyond *Escom*.[21] The interpretation of prescription legislation has widespread implications. Therefore, it is in the interests of justice that leave to appeal be granted.

Issues

[25] There are three issues to be determined. The first is the nature of a section 252 claim. The second issue is the proper interpretation of the term "debt" as it appears in section 10(1) read with section 11(d) of the Prescription Act, having regard to section 39(2) of the Constitution, and, whether, in the light of *Makate*, a claim brought under section 252 of the Act constitutes a "debt" that falls to be prescribed by way of extinctive prescription. The last issue is, if a section 252 claim is a debt, whether the acts complained of by the applicants as being oppressive constitute continuing wrongs and are therefore not subject to the running of prescription.

The nature of a section 252 claim

[26] The provisions that are relevant for the determination of this matter are contained in sections 252(1), 252(2) and 252(3). They provide the following:

[19] Section 34 provides that: "Everyone has the right to have any dispute that can be resolved by the application of law decided in a fair public hearing before a court or, where appropriate, another independent and impartial tribunal or forum."

[20] *Makate* above n 3 at para 90. See also *Road Accident Fund v Mdeyide* [2010] ZACC 18; 2011 (2) SA 26 (CC); 2011 (1) BCLR 1 (CC).

[21] *Makate* above n 3 at para 93. See also *Electricity Supply Commission v Stewarts and Lloyds of SA* 1981 (3) SA 340 (A) (*Escom*).

"**Member's remedy in case of oppressive or unfairly prejudicial conduct:**

(1) Any member of a company who complains that any particular act or omission of a company is unfairly prejudicial, unjust or inequitable, or that the affairs of the company are being conducted in a manner unfairly prejudicial, unjust or inequitable to him or to some part of the members of the company, may subject to the provisions of subsection (2), make an application to the Court for an order under this section.

(2) Where the act complained of relates to—

(a) any alteration of the memorandum of the company under section 55 or 56;

(b) any reduction of the capital of the company under section 83;

(c) any variation of rights in respect of shares of a company under section 102; or

(d) a conversion of a private company into a public company or of a public company into a private company under section 22,

an application to the Court under subsection (1) shall be made within six weeks after the date of the passing of the relevant special resolution required in connection with the particular act concerned.

(3) If on any such application it appears to the Court that the particular act or omission is unfairly prejudicial, unjust or inequitable, or that the company's affairs are being conducted as aforesaid and if the Court considers it just and equitable, the Court may, with a view to bringing to an end the matters complained of, make such order as it thinks fit, whether for regulating the future conduct of the company's affairs or for the purchase of the shares of any members of the company by other members thereof or by the company and, in the case of a purchase by the company, for the reduction accordingly of the company's capital, or otherwise."

[27] Section 252 provides a court with an important tool to facilitate and provide equitable relief to minority shareholders. The section provides a member with a means of obtaining relief from unfairly prejudicial, unjust or inequitable acts or omissions of the company or conduct of its affairs. This section has to be given a construction that will advance the remedy rather than limit it.[22] The wording of the provision indicates that section 252(1) and (3) is directed at the rectification of an unfairly prejudicial, unjust or inequitable conduct in the operations of a company. Section 252(1) allows any member of a company to complain if any particular act or

[22] *Donaldson Investments v Anglo-Transvaal Colliers* 1979 (3) SA 713 (W) at 719; 1980 (4) SA 204 (T) at 209.

omission of a company is unfairly prejudicial, unjust or inequitable or if the affairs of the company are being conducted in a manner unfairly prejudicial, unjust or inequitable to the member.

[28] Section 252(3) permits a court, if it appears to it that the particular act or omission is unfairly prejudicial, unjust or inequitable or that the company's affairs are being conducted in such a manner, to make a just and equitable order. This section confers a wide and unfettered discretion on the court to do what it considers fair and equitable in order to provide appropriate relief to cure any unfair prejudice that the applicant has suffered at the hands of the company. The just and equitable relief is about institutional governance. 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 section encompasses the concept of fairness. Fairness is the criterion by which a court must decide whether it has jurisdiction to grant relief.[23] The test of fairness is an objective one. The court will have to balance the interests of both parties in order to make an order that is just and equitable. In doing so, the court has an equitable jurisdiction in the exercise of which the lateness of complaints, including the fact that any sources of complaints may be debts that have prescribed, will be considered.[24] The court has to consider an order that will be appropriate at the time of the hearing.

[29] The issue before this Court is not about the merits of the applicants' section 252 claim, but whether that claim is a debt for the purposes of the Prescription Act or not. The SCA in its analysis of the issues focused on the question whether the claims were debts susceptible to extinctive prescription and did not consider the role that could be played by the High Court when adjudicating the merits of the section 252 claim. It concluded that these claims were founded on personal rights and were debts that had prescribed.

[23] See *Louw v Nel* [2010] ZASCA 161; 2011 (2) SA 172 (SCA); 2011 (2) BCLR 295 (CC) at paras 21-3.

[24] See [36]-[42] below.

[30] In my view, the SCA adopted an incorrect approach. It seems to me that until a determination on the validity of the parties' positions against each other is made under section 252, neither party can discharge its respective obligations as neither is aware of the existence or extent of these obligations. I am satisfied that the applicants' oppressive conduct claim is founded on section 252(1) read with 252(3), as opposed to section 252(2). The matter was pleaded on the basis of sections 252(1) and 252(3) and the specified instances in section 252(2) are not relevant to the facts of this matter. The internal limiter of six weeks in section 252(2) therefore does not apply.

[31] The manner in which section 252 is drafted makes it possible that a particular claim brought under this section is not a "debt" as defined in *Makate*. The Clubs seek a declaratory order that certain provisions of Sanbonani's articles of association are invalid and that certain shares were improperly issued and that the holders of those shares are barred from voting on them. The relief sought has a direct effect on the future conduct and running of the company. The mere fact that the claim is for a declarator does not mean that the Clubs are attempting to avoid the construction of "debt" per *Escom* and therefore the application of the Prescription Act. In *Escom*, the term "debt" was defined as "that which is owed or due; anything (as money, goods or services) which one person is under obligation to pay or render to another".[25]

[32] In this case, we are not dealing with relief of the nature discussed in *Koster* where declaratory relief immediately precedes a claim that practically is a "debt" under the narrow construction of the term in *Escom*. In this sense, the declarator would be a mere litigatory framing technique that fetters even the narrow application of the Act. Instead, this case concerns an entitlement to the making of an equitable judicial determination, which in any event considers the delay. The outcome of an equitable determination is not certain in advance. A court has to decide what is just and equitable based on the unique facts of the case. The declaratory order would clearly spell out the rights and duties of a party going forward and whether the applicants' claim should be absolutely barred or not. Therefore, the fact that the

[25] *Escom* above n 21 at 344F.

Clubs' claim is for a declarator does not affect the applicants' entitlement to the relief sought.

[33] However, before an analysis can be undertaken as to whether the applicant's claim constitutes a debt for purposes of the Prescription Act, it must be established first what the correct characterisation of the claim is. Because a given claim can be characterised in different ways, it can constitute a debt on one characterisation but not another. The applicants argue that their claim is in no way a debt because it is a claim for declaratory relief, which is not a debt in the ordinary sense of the term according to *Escom*. However, the respondents argue that the claim is a debt, because an alteration of the articles would lead in effect to a new contract. Thus, there is a need for there to be an objective characterisation of the claim independent of the averments of the parties that can be easily identified by a court and that advances rather than diminishes the purposes of the Prescription Act.

[34] In my view, the correct characterisation of a claim for purposes of the Prescription Act is the characterisation arising from the relevant legal provisions on which the claim is based. Here, the claim is based on section 252 of the Companies Act, the plain text of which discusses an entitlement to an equitable judicial determination. Thus, according to section 252, the applicants' claim is for declaratory relief, not an alteration of the terms of a contract or a money award. The respondents' alternate proposal that attention should be given instead to the ultimate effects or aims of the relief sought is less desirable because it requires that a court perform a complicated causal or psychological inquiry that is certain to yield disparate results for what is essentially the same type of claim across cases. This would undermine the purposes of the Prescription Act which assumes that claims can be readily classified as one kind or another. My solution is that courts restrict themselves to the text of the legal provision on which the claim is based. In order to identify what the relevant claim is, the court should use the applicants' cause of action as guidance. However, the court is not beholden to the applicants' characterisation of the claim, which might be at variance with the relevant legal provision. The latter governs.

[35] There is also no internal time bar in the Companies Act to the applicants' section 252 claim. However, section 252(3) does make provision for a court to grant relief where it "considers it just and equitable". Therefore, the Court can take into account the length of the period that has elapsed between the date of commission of the conduct complained of and the date court proceedings are instituted when a section 252 claim is adjudicated. In this sense, the applicants only take issue with their claim falling within the ambit of the Prescription Act, procedurally precluding an equitable merits determination under section 252(3) altogether. Therefore, the decision to narrow the applicants' relief in this Court to a declaration that their section 252(3) claim falls outside of the Prescription Act is appropriate.

[36] In my view, the trial court is better suited to consider and adjudicate the question relating to the validity of the claim under section 252(3). When doing so, it can also consider the applicants' tardiness as a factor in granting relief thereto and also determine what may or may not have prescribed and whether just and equitable relief in relation to the running of the company may be justified, even if certain debts have prescribed.

[37] Is there a contradiction in saying that a section 252(2) claim is not a "debt" but that a court exercising its equitable jurisdiction under the provision can take into account the fact that the sources impelling the complaint led to claims that, themselves, have in fact prescribed? In my view there is no contradiction.

[38] A section 252(2) claim affords a claimant the right to seek an equitable, judicial determination of the merits of a complaint about the governance of a company. It is open to a court, in determining a just and equitable remedy, to take into account the history of the company's management and governance. This may include the fact that certain issues that underlie the complaint may have prescribed. This fits with the wide discretion the provision confers on a court. And it is not incongruous with the finding that a section 252(2) claim is not invariably a "debt".

[39] The facts here offer a vivid instance. Part of the Clubs' claims against Mr Harri may have prescribed. Yet those prescribed debts themselves form part of the history of the conduct of the company that may make it just and equitable for a court to grant equitable relief now. More precisely, even past action in respect of which a debt may have prescribed guide a court into granting a contemporaneous just and equitable order.

[40] The present tense focus of sections 252(1) and (3) is key to this. That oppressive conduct created debts, historically, that were capable of prescribing does not disable or impede the court's remedial powers, now, under section 252(3). Differently put, it is not, in my view, the case that the court's just and equitable discretion under section 252(3) arises only where the complaint is sourced in a non-prescribed debt.

[41] The court in granting just and equitable relief cannot of course revive prescribed debts. But it can take them into account in assessing whether governance calls for a just and equitable remedy now. It may be that, in practice, it will be difficult to fashion a remedy that takes these considerations into account. But that is not a reason for barring the court's power, *a priori*, on the ground that the debts have prescribed.

[42] The practical value of understanding the provision in this way is that it enables a court to determine the complaint without an applicant being barred at the outset on the basis that the source of the claim is a debt that has long prescribed. The provision is about institutional governance. It provides a crucial mechanism to keep corporate bullying at bay. An understanding of the provision that furthers this aim is one that should be adopted.

Whether the applicants' section 252 claim has prescribed

[43] Section 10(1) of the Prescription Act reads:

> "Subject to the provision of this Chapter and of Chapter IV, a debt shall be extinguished by prescription after the lapse of the period which in terms of the relevant law applies in respect of the prescription of such debt."

Section 11(d) in turn reads:

> "The periods of prescription of debts shall be the following:
>
> (d) save where an Act of Parliament provides otherwise, three years in respect of any other debt."

[44] The Prescription Act does not define the term "debt". This term has been given different interpretations by the courts. In *Escom*, a narrow meaning was ascribed to the term as being—

> "that which is owed or due; anything (as money, goods or services) which one person is under obligation to pay or render to another."[26]

However, in *Desai*, it was held that the term "has a wide and general meaning, and includes an obligation to do something or refrain from doing something". This Court in *Makate* finally clarified this issue and provided a proper meaning of "debt" and held that the term "debt" does not warrant a wide and general meaning. This Court, per Jafta J, held that the proper meaning of debt as it appears in section 10(1) read with 11(d) of the Prescription Act was given an impermissibly wide meaning in *Desai*. It went on to conclude that the interpretation of debt must be construed in accordance with section 39(2) of the Constitution. On that interpretation, an interpretation of "debt" which must be preferred is the one that is least intrusive of the right of access to courts. Furthermore, the Court said—

> "To the extent that *Desai* went beyond what was said in *Escom*, it was decided in error. There is nothing in *Escom* that remotely suggests that "debt" includes every obligation to do something or refrain from doing something apart from payment or delivery."[27]

[26] *Escom* above n 21 at 344F.

[27] *Makate* above n 3 at para 93.

[45] The applicants aver that their claim has not prescribed on two bases. First, the claim is for relief that the articles of association be compliant with the law. Therefore, that relief cannot be construed as a "debt" for purposes of the Prescription Act and is therefore incapable of prescribing under the Act. Second, it constitutes a "continuing wrong" and is therefore incapable of prescribing.

[46] A finding for the applicants on either ground qualifies them for the relief they seek. Having said that, the basis that formed the bulk of the argument was whether the applicants' claim under section 252 constitutes a "debt" under the Prescription Act. The SCA applied the broad definition of "debt" enunciated in *Desai* and then went further to hold that "in principle all rights are susceptible to prescription except for rectification claims".[28] In conclusion, it found the applicants' claim amounted to a "debt" and therefore had prescribed under the Prescription Act.

[47] After the SCA's judgment, this Court handed down its decision in *Makate*. In sum, *Makate* held that the broad interpretation of "debt" in *Desai* was inconsistent with earlier decisions that gave the term a narrow definition.[29]

[48] I am satisfied that in interpreting the meaning of "debt", *Makate* functionally overturned the broad test adopted in *Desai* to the extent that it went beyond the narrow test in *Escom*. The SCA's reliance on the broader test in *Desai* in finding that the applicants' section 252 claim is capable of prescribing is therefore misplaced. In my view, an application of the narrow test as enunciated in *Escom* would bring the applicants' section 252 claim outside of the purview of "debt", and therefore would be incapable of prescribing under the Prescription Act.

[49] On the application of this narrow test, I am satisfied that the applicants' claim under section 252 cannot constitute a "debt". The claim is a far cry from something owed or due, or an obligation to pay money, goods or services to another. If anything,

[28] See SCA judgment above n 1 at paras 32-3.

[29] See *Makate* above n 3 at 20.

it is the right to seek a judicial determination as to whether the applicants are entitled to a statutory remedy, the entitlement to which is determined on equitable grounds, and thus allows the court to consider the applicants' tardiness, what may or may not have prescribed and whether a just and equitable relief in relation to the operation of the company may be justified.

[50] The finding that a section 252 claim does not in and of itself constitute a "debt" is buttressed by this discussion of the nature of the power section 252 conferred on a court.[30] The broad, equitable discretion to grant just and equitable relief points away from a section 252 claim constituting a "debt" for the purposes of the Prescription Act. In *Gaffoor*,[31] in discussing the nature of section 115 of the Companies Act (which dealt with rectification of a company's register of members), the SCA stated that—

> "section 115 creates a statutory right to apply to the court for the exercise by it of a statutory power; such right is not a 'debt' within the meaning of that expression in Chapter III of the Prescription Act and there can be no extinction of such right by prescription."[32]

[51] The SCA endorsed the High Court's characterisation of section 115 as vesting "in the court a wide discretion which is to be exercised according to the circumstances of each case".[33] Similarly, the statutory entitlement to a judicial determination in terms of section 252, and the court's wide discretion in granting just and equitable relief, supports the finding that a section 252 claim is not invariably a "debt".[34]

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[30] See [26]-[42].

[31] *Gaffoor NNO v Vangates Investments (Pty) Ltd* [2012] ZASCA 52; 2012 (4) SA 281 (SCA) (*Gaffoor*).

[32] Id at para 36.

[33] Id at para 28.

[34] See also *Verrin Trust & Finance Corporation (Pty) Ltd v Zeeland House (Pty) Ltd* 1973 (4) SA 1 (C) (*Verrin Trust*) at 10C-H, where Corbett J said the following in relation to section 32 of the Companies Act 46 of 1926 (the equivalent of section 115):

> "The jurisdiction which the court exercises under section 32 is a discretionary one and an applicant under the section is not entitled to an order *ex debito justitiae* [as of right]".

[52] In discussing *Gaffoor*, the SCA in the present case held that this was of no assistance to the Clubs as it dealt with a claim for rectification, which was distinguishable from the Clubs' claim.[35] While section 115 does deal with rectification of a company's register of members, it by no means follows that *Gaffoor* has no bearing on the present matter. The fact that section 115 relates to rectification does not detract from its most vivid features—that of affording a statutory right to request a court to exercise a discretionary power. These aspects of the provision are akin to those in section 252, and the approach in *Gaffoor* is usefully illuminating.

[53] The Prescription Act is therefore not the proper mechanism to bar the applicants from exercising their section 252 right. Not only does their claim fall outside of the scope of "debt" under *Makate* and *Escom*, but section 252(3) already contains an equitable mechanism that assuages the respondents' practical objections to the applicants' tardiness. The narrowness of the applicants' relief before this Court makes it unnecessary for this Court to venture into making a section 252(3) merits

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In relation to the effect of the delay in instituting an application for rectification, the learned judge further held (at 14C) that:

> "I regard the lapse of time, therefore, as having a bearing upon the equities involved in what might be a temporary disturbance of the status quo rather than as constituting any sort of legal bar".

See also *Bayly v Knowles* [2010] ZASCA 18; 2010 (4) SA 548 (SCA) at para 25, where the Court said the following in relation to section 252:

> "In any exercise of a discretion under section 252(3) the court is bound to consider not only the interests of the warring shareholders but also those of shareholders who have stood apart and the best interests of the company itself."

[35] See SCA above n 1 at paras 35-7. The SCA, at paras 36 and 37, held that—

> "Indeed, in principle all rights are susceptible to prescription except for rectification claims (and other claims rooted in real rights) in the case of extinctive prescription. The basis for this exclusion is that this type of common law claim has no correlative debt within the meaning of the word. Thus, it does not alter the rights and obligations of the parties and create a new contract for the parties – it merely corrects the erroneous reflection of those rights or obligations in the written memorial to accord with the true facts and give effect to what has always been the actual intention of the parties.
>
> But the clubs' case is entirely different from the rectification cases discussed above. The golden thread running through them is that the rectification would neither constitute any delivery of property nor alter the rights and obligations of the parties – it would simply correct the erroneous recordal of those rights."

The explication of this central theme is questionable in the context of section 115 of the Companies Act. A court called upon to rectify a company's register of members may, in appropriate circumstances, determine the ownership or entitlement to the shares in dispute. This determination extends beyond "simply correct[ing] the erroneous recordal of those rights". See *Verrin Trust* above n 34 at 9G.

determination. It follows that the wording of section 252 indicates that a claim under this section is not a debt that can prescribe.

Whether the acts complained of constitute continuing wrongs

[54] In light of my conclusion, it is unnecessary for me to consider the applicants' alternative argument on the basis of a "continuing wrong". A determination on either ground alone qualifies them for the relief they seek. It follows that the appeal must be upheld and the declarator sought granted.

[55] Therefore, the High Court will have to adjudicate the merits of the section 252 claim and also consider the issue relating to the costs of that application.

Order

[56] In the result, the following order is made:

1. The applicants are granted leave to appeal against that part of the judgment and order of the Supreme Court of Appeal that held that their claim located in section 252 of the Companies Act 61 of 1973 had prescribed.
2. The appeal against the order of the Supreme Court of Appeal relating to the dismissal of the section 252 relief is upheld.
3. The order of the Supreme Court of Appeal that relates to a claim brought under section 252 of the Companies Act is set aside and replaced with:

"(a) The appeal against the order of the High Court relating to the claim brought under section 252 of the Companies Act is upheld.

(b) The order of the High Court relating to the claim brought under section 252 of the Companies Act is hereby set aside and replaced with the following:

(i) It is declared that a claim brought under section 252 of the Companies Act 61 of 1973 does not constitute a debt in terms of the Prescription Act 68 of 1969.

(ii) The matter is postponed *sine die* to enable the applicants to enrol the matter for the adjudication of the merits of the claims in terms of section 252 of the Companies Act 61 of 1973.

(iii) The issue of costs is reserved."

4. The respondents must pay the applicants' costs in this Court and in the Supreme Court of Appeal, including the costs of two counsel.

FRONEMAN J (Mbha AJ and Musi AJ concurring):

[57] I have had the privilege of reading the judgments of Mhlantla J (first judgment/majority judgment) and Madlanga J (third judgment) and agree that leave to appeal must be granted. I also agree that the appeal should succeed, but to a more limited extent than Mhlantla J proposes. In particular, unfortunately, I cannot agree with the declaratory order that—

> "the claim brought under section 252 of the Companies Act 61 of 1973 does not constitute a debt."

My disagreement arises from two aspects: the first procedural; the second more substantive in nature.

Relief sought in the High Court

[58] The procedural aspect relates to the finding in the first judgment that—

> "we are not dealing with relief of the nature discussed in *Koster* where declaratory relief immediately precedes a claim that practically is a 'debt' under the narrow

construction of the term in *Escom*. In this sense, the declarator would be a mere litigatory framing technique that fetters even the narrow application of the Act".

I am afraid that the relief sought in the notice of motion was exactly that: it framed the substantive relief sought by the applicant.[36]

[59] The part of the order sought in the notice of motion under section 252 of the Companies Act[37] reads:

"(a) An Order declaring the following to be invalid:

(i) article 3.5 of the First Respondent's articles;

(ii) the allocation of more than 1040 shares to share block 65SBPC relating to site 56 of the First Respondent;

(iii) the creation of share blocks 57 to 60 SBCF and 61 to 63SBCP in the Articles of Association of the First Respondent;

(iv) the creation of share blocks relating to 'Maintenance weeks' and the allocation of shares pursuant thereto;

(b) An Order that the articles of the First Respondent are amended in the following respects:—

(i) deleting the word 'issued' and substituting therefor the word 'allocated' in article 3.1 so that it will read as follows:

'The authorised share capital of the company is divided into: 168 528 (one hundred and sixty eight thousand five hundred and twenty eight) ordinary shares of Rl,00 each of which 168 528 (one hundred and sixty eight thousand five hundred and twenty eight) ordinary shares of Rl,00 each have been allocated as set out in Annexure "A" conferring rights of use as set out in articles 3.2 and 3.3, 3.4 and 3.5, appointed between 63 Share Blocks, numbered 1 – 63';

(ii) Substituting article 3.5 with the following:

'The shares comprising the share blocks 09 (naught nine) SBSP to 41 (forty one) SBSP inclusive and 43 (forty three)

[36] In SCA judgment above n 1 at para 31 Maya ADP states:

"And the description of the relief sought by the clubs as a mere request for a declarator does not tally with what is set out in their notice of motion and is patently wrong."

[37] 61 of 1973.

SBSP to 55 (fifty five) SBSP, inclusive and 61 (sixty one) SBSP, confer on the holder right of use for residential purposes of such portion of the land upon which the sites are situated and marked S9 (S nine) to S41 (S forty one), S42 (S forty two), S43 (S forty three) to S55 (S fifty five) and S61 (S sixty one) on Annexure "B".

Until an improvement, if any, in respect of such sites is completed, the said share blocks shall not be allocated but the Share Block Developer shall have the right to the use of such portion of the land being the sites S9 (S nine) to S41 (S forty one), S43 (S forty three) to S55 (S fifty five) and S61 (S sixty one) as marked on Annexure "B" to complete development.'

(iii) by amending Annexure "A" to the Articles to read as set forth in Annexure "'EE" to this Notice of Motion.

(c) An Order directing the Seventh Respondent to note and register the articles of the First Respondent in their amended form.

(d) An Order directing:—

(i) that the following shares are to be cancelled by the First Respondent forthwith:—

(aa) the shares allocated to share block 56SBPC other than 1 040 shares; and

(bb) the shares allocated to share blocks 57SBCF to 60SBCF as well as 61SBSP to 63SBCP; and

(cc) the shares relating to "Maintenance weeks";

(ii) that pending such cancellation the holders of such shares for the time being are not entitled to vote on them."

[60] The applicants never sought an order in the High Court or the SCA declaring that their claim under section 252 of the Companies Act is not a debt under the Prescription Act. What needed to be determined in the High Court was thence whether each of the claims set out in the notice of motion had prescribed or not. That is what it did, as did the SCA. And that is what this Court should do, too. I consider

each of the claims to fall comfortably within the meaning of "debt" under the Prescription Act.

Access to courts to enforce debts

[61] There has been much ado about prescription by this Court recently.[38] Now we are at it again. I indicated previously that I agree that a fresh look at the Prescription Act is necessary in light of the right of access to justice guaranteed in terms of section 34 of the Constitution.[39] But there is a danger that in that process we lose direction, rather than gaining clarity. So there is a need to analyse, first, the ambit of the section 34 access to justice guarantee before we venture into changing our existing law in its light.

[62] In terms of section 34 "[e]veryone has the right to have any dispute that can be resolved by the application of law decided in a fair public hearing before a court or, where appropriate, another independent and impartial tribunal or forum". What kind of dispute can be resolved by "the application of law"?

[63] To answer that we need not attempt to reinvent the wheel. A dispute that can be resolved by the application of law is usually one that can be decided by a determination of the legal obligations that parties owe to one another. A legal obligation is—

> "a legal tie which binds a debtor to the necessity of making some performance. If such a performance is not forthcoming, the creditor may bring an action".[40]

[64] In *Introduction to South African Law and Legal Theory* the authors explain that a legal obligation is—

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[38] See, for example, *Myathaza v Johannesburg Metropolitan Bus Services (SOC) Limited t/a Metrobus* [2016] ZACC 49; (2017) 38 *ILJ* 527 (CC); [2017] 3 BLLR 213 (CC); *Makate* above n 3; and *Mdeyide* above n 20.

[39] *Myathaza* above n 38 at paras 66-8.

[40] Zimmerman *Comparative Foundations of a European Law of Set-Off and Prescription* (Cambridge University Press, Cambridge 2002) at 62, citing the "famous definition contained in in Inst. See III, 13 pr., as translated by Peter Birks and Grant McLeod, Justinian's Institutes (1987)" in fn 1.

> "a juristic bond between two persons in terms of which the one is legally bound as against the other to perform something. It is therefore a relationship which entails on the one hand a person's right to performance by someone else . . . and on the other hand another party's duty to perform. The performance which forms the object of the right and the corresponding duty may consist in giving something, in doing something or in not doing something. The holder of the right is called a creditor and the other the debtor".[41]

[65] Our existing law reflects this understanding of legal obligations. The pertinent example lies in the enforcement of judgments. A judgment obliging a debtor to do something that sounds in money can be enforced by execution against the assets of the debtor.[42] A judgment obliging a debtor to do or refrain from doing something, which does not translate into the payment of money, is enforced through contempt of court orders against the debtor.[43] All this is trite law.

[66] So, in order to determine whether section 34's right of access to justice has an interpretive or other role to play when prescription comes into play, one first has to determine whether the dispute at hand is covered by its injunction that it must be a dispute that "can be resolved by the application of law".

[67] Sections 252(1), 252(2) and 252(3) of the Companies Act provide:

> **"**(1) Any member of a company who complains that any particular act or omission of a company is unfairly prejudicial, unjust or inequitable, or that the affairs of the company are being conducted in a manner unfairly prejudicial, unjust or inequitable to him or to some part of the members of the company, may subject to the provisions of subsection (2), make an application to the Court for an order under this section.

[41] Hosten et al (eds) *Introduction to South African Law and Legal Theory* (Butterworths, Durban-Pretoria 1983) at 385. See also De Wet & Van Wyk *Die Suid-Afrikaanse Kontraktereg & Handelsreg* 5 ed (Butterworths, Durban 1995) vol 1 at 1.

[42] Ellis "Civil Procedure" in Joubert & Faris (eds) *Law of South Africa* 2 ed (Lexis Nexis Butterworths, Durban 2006) vol 3 at para 242.

[43] Id.

> (2) Where the act complained of relates to—
>
> (a) any alteration of the memorandum of the company under section 55 or 56;
>
> (b) any reduction of the capital of the company under section 83;
>
> (c) any variation of rights in respect of shares of a company under section 102; and
>
> (d) a conversion of a private company into a public company or of a public company into a private company under section 22,
>
> an application to the Court under subsection (1) shall be made within six weeks after the date of the passing of the relevant special resolution required in connection with the particular act concerned.
>
> (3) If on any such application it appears to the Court that the particular act or omission is unfairly prejudicial, unjust or inequitable, or that the company's affairs are being conducted as aforesaid and if the Court considers it just and equitable, the Court may, with a view to bringing to an end the matters complained of, make such order as it thinks fit, whether for regulating the future conduct of the company's affairs or for the purchase of the shares of any members of the company by other members thereof or by the company and, in the case of a purchase by the company, for the reduction accordingly of the company's capital, or otherwise."

[68] Legal obligations were traditionally characterised as arising from contract, delict, unjustified enrichment and by operation of law (*ex lege*).[44] Analytical categorisation cannot bind us, only help us find our way, but legal obligations created by statute comfortably fall within the last category.[45]

[69] It seems to me that a claim based on alleged "unfairly prejudicial, unjust or inequitable" conduct under the provisions of section 252 *must*, not only *can*, be resolved by a court "by the application of law". The legal application consists in

[44] Hosten et al above n 41 at 386.

[45] In *Oertel v Direkteur van Plaaslike Bestuur* 1983 (1) SA 354 (A) at 370B-375A, it was held that a statutory legal obligation may constitute a "debt" under the Prescription Act.

determining whether the conduct is unfairly prejudicial, unjust or inequitable and whether it is just and equitable to make an order once that has been determined. The relief that may be ordered is to—

> "make such order as it thinks fit, whether for regulating the future conduct of the company's affairs or for the purchase of the shares of any members of the company by other members thereof or by the company and, in the case of a purchase by the company, for the reduction accordingly of the company's capital, or otherwise".

In a nutshell: unfairly prejudicial, unjust or inequitable conduct against a company member may give rise to a legal obligation on the part of the company to do something to remedy that conduct. It falls squarely within a dispute to be resolved by a court by the application of law, in the sense of determining the correlative legal rights and obligations of the opposing parties in the litigation initiated under section 252.

[70] In *Makate* the majority judgment, by which I am willingly bound, found that the dictionary definition of a "debt" as adopted in *Escom* is the one that we must apply in interpreting the Prescription Act, namely:

> "1. Something owed or due: something (as money, goods or services) which one person is under an obligation to pay or render to another.
>
> 2. A liability or obligation to pay or render something; the condition of being so obligated." [46]

[71] This dictionary definition of a "debt" is as near as damn it to what our law accepts as constituting a legal obligation.[47] So, at first glance, it appears as if the "application of law" to determine the legal obligations that one litigating party may owe another, which triggers the application of section 34 of the Constitution, must also at the same time involve determining the "debt" that is owed by one litigating

[46] *Makate* above n 3 at para 85.

[47] And also virtually all legal systems, see Zimmerman above n 40 at 62.

party to another. Generally, determining a dispute by the application of law amounts to determining the legal obligation one party owes to another, which, in turn, falls within the definition of a "debt" accepted in *Makate*.

[72] There are, however, disputes that can be resolved by the application of law that do not depend on correlative right/duty legal obligations. The American jurist, WH Hohfeld, exposed the limitations of the traditional "right/duty" pattern and refined it into four distinct pairs of correlatives: right/duty; privilege/no-right; power/liability; immunity/disability.[48] The right to make a will, or the right to free speech, does not immediately present a correlative duty on another to do or not do something in relation thereto.[49] So there may be cases where a dispute may come before court and be resolved by the application of law without it being determined on the basis of legal obligations owing by one party to another.

[73] Eschewing reliance on jurisprudence and philosophy of law, the SCA has recently reminded us that where rights have as their object a thing, and not performance by another, then the rights in relation to the thing give rise to competencies, not necessarily correlative duties.[50] Ownership, for example, may give an owner the right to the use of land, or to give others the right to use it, but does not necessarily give rise to any concomitant duties over the land.[51] In *ABSA Bank Ltd*[52] this distinction was relied on in holding that a vindicatory action was not a "debt" under the Prescription Act. The absence of a correlative duty or obligation also accounts for holding that rectification claims for contract,[53] deeds of transfer,[54] and a

[48] Campbell and Thomas (eds) *Fundamental Legal Conceptions as Applied in Judicial Reasoning by Wesley Newcomb Hohfeld* (Ashgate, Aldershot 2001). See also the discussion in Loubser *Extinctive Prescription* (Juta & Co Ltd, Kenwyn 1996) at 26-7.

[49] Compare *Estate Orpen v Estate Atkinson* 1966 (2) SA 639 (C) at 641C-E.

[50] *National Stadium South Africa (Pty) Ltd v Firstrand Bank Ltd* [2010] ZASCA 164; 2011 (2) SA 157 (SCA) at paras 30-1.

[51] Id at para 31.

[52] *ABSA Bank Ltd v Keet* [2015] ZASCA 81; 2015 (4) SA 474 (SCA) at paras 20-26

[53] *Boundary Financing Ltd v Protea Property Holdings (Pty) Ltd* [2008] ZASCA 139; 2009 (3) SA 447 (SCA) (*Boundary Financing*).

[54] *Bester NO v Schmidt Bou Ontwikkelings CC* [2012] ZASCA 125; 2013 (1) SA 125 (SCA).

company's register of members in terms of the Companies Act where the ownership of the shares always remained in the entity that sought its ownership reflected in the register,[55] do not constitute a "debt" in terms of the Prescription Act.

[74] Even if one accepts that there may be cases under section 252 where the resolution of the dispute can be resolved by the application of law in a manner that does not depend on a determination of the legal obligations owing to one of the parties by another, that will be the exception, not the rule. The normal claim under section 252 does not fit this exceptional bill. It will usually be a claim by one party (a member of a company), against another party (the company), that it has conducted itself in an unfairly prejudicial, unjust and inequitable manner towards a member or members of the company, and that it is under a legal obligation to make good the obligation in a manner that the court thinks fit. That kind of case (the normal or usual one) will, for the reasons already given, also fall within the dictionary definition of a "debt" that *Makate* imposes on us when we interpret and apply the Prescription Act.

[75] The first judgment is grounded on different and disparate reasons for holding that the claim brought under section 252 of the Companies Act does not constitute a debt:

(a) The first is based on an acceptance of the correlative right/duty requirement, namely that because fairness is inherent in the determination of a section 252 claim, the respective obligations that the parties owe each other is only known when the determination is made.[56] The "debt" thus only comes into existence when the determination is made and prescription cannot run before then.[57]

(b) The second is that the remedy afforded is a discretionary one that in itself allows a consideration of the time that had elapsed as one of the

[55] *Gaffoor* above n 31.

[56] Majority judgment at [28].

[57] Id at para.33.

> factors to be taken into account in determining a just and equitable remedy. Aligned to this is the consideration that section 252 grants courts a form of institutional governance to remedy corporate bullying.[58]

[76] My difficulty with this approach is that it turns an ordinary function of courts—to determine the validity of legal claims and grant appropriate relief—into an exceptional one justifying the exclusion of the Prescription Act altogether and thus in effect, proclaims that no claim under section 252 can ever prescribe. I think that takes things too far.

[77] That fairness is the judicial criterion for determining claims brought under section 252 is correct, but that feature does not make it any different from the determination of claims that depend on any other legal requirement for its legal validity. In a delictual claim the various elements of a delict must be established before judgment is finally given, but that does not mean that before judgment the claim was not a "debt" under the Prescription Act. It simply means that the original debt now becomes a judgment debt. Fairness as the relevant legal requirement is no different in nature or principle. The idea that fairness is not a legal requirement and that there is a rigid conceptual distinction between fairness and law is one that is increasingly recognised as being discordant with our constitutional values.[59] Does it mean that all claims that have fairness as one of its underlying requirements are not "debts" under the Prescription Act? I think not.

[78] The existence of a just and equitable remedy cannot do the trick either. The remedy follows upon the determination of the claim in terms of the legal requirements for the validity of the claim: it does not itself form part of those requirements. And there is not a word in the remedial part of the statute – section 252(3) – that expressly or impliedly excludes the operation of the Prescription Act. If the existence of a wide

[58] Id at para 28.

[59] See *Botha v Rich N.O.* [2014] ZACC 11; 2014 (4) SA 124 (CC); 2014 (7) BCLR 741 (CC); and *Business Zone 1010 CC t/a Emmarentia Convenience Centre v Engen Petroleum Limited* [2017] ZACC 2.

and equitable remedy was decisive, then our wide just and equitable remedial powers under section 172(1) would preclude us from recognising the constitutional validity of statutory prescription provisions. That has not been the case.[60] The common law also recognises that discretionary remedies like specific performance may be subject to prescription.[61] A legal obligation arising from legislation may constitute a "debt" under the Prescription Act.[62] Neither the existence of a discretionary just and equitable remedy nor the fact that it derives from statute present, in themselves, sufficient ground for holding that a claim under section 252 does not constitute a "debt" under the Prescription Act.

[79] There is, however, SCA authority that these two features justify the conclusion that the Prescription Act is not applicable to the old section 115 of the Companies Act. In *Gaffoor*[63] Van Heerden JA stated:

> "I agree . . . that s[ection] 115 creates a statutory right to apply to the court for the exercise by it of a statutory power; such right is not a 'debt' within the meaning of that expression in ch 3 of the Prescription Act and there can be no extinction of such right by prescription."

[80] It is not entirely clear whether this conclusion is based on the fact that what is granted to an applicant is a "right" without a correlative "duty" (a "power" as it described in the passage) or whether it flows from the assumption that a discretionary jurisdiction is not one that entitles an applicant to an order flowing from a judicial debt (*ex debito justitiae*).[64] Whatever the case may be, these are not the features of the claims brought by the applicants under section 252, nor did they seek relief under section 115.

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[60] *Mdeyide* above n 20; *Brümmer v Minister for Social Development* [2009] ZACC 21; 2009 (6) SA 323 (CC); 2009 (11) BCLR 1075 (CC); and *Mohlomi v Minister of Defence* [1996] ZACC 20; 1997 (1) SA 124 (CC); 1996 (12) BCLR 1559 (CC).

[61] *Kilroe-Daley v Barclays National Bank Ltd* [1984] ZASCA 90; 1984 (4) SA 609 (A) at 624C-E.

[62] *Oertel* above n 45 at 370B-375A.

[63] *Gaffoor* above n 31 at para 36.

[64] Compare *Verrin* above n 34 at 10C-H.

[81] Determination of a legal obligation that already considers delay would make the application of the Prescription Act superfluous, not because the legal obligation does not fall within the dictionary definition of a "debt" as articulated in *Escom* and endorsed in *Makate*, but because the temporal limitation that is the premise upon which the Prescription Act is based, is already adequately covered in particular legislation, here section 252 of the Companies Act. That was the basis for this Court's decision in *Mdeyide*[65] and the portion of Jafta J's judgment in *Myathaza* that dealt with the disjunct between the provisions of the Labour Relations Act and the Prescription Act.[66]

[82] I do not agree that consideration of "prescription", in the wider sense of dealing with the temporal limitation of a claim under section 252, is inherent in a determination of a section 252 claim, but that approach at least opens up the substantive justification for the exclusion of the Prescription Act to debate in a way that a mere exclusionary definition of a "debt" does not allow. The latter method seeks to hide the substantive reasons for the definitional exclusion. There is room for a constructive debate if the substantive reasons for not wanting to recognise a particular claim as falling within the legal, not merely dictionary, meaning of a "debt" under the Prescription Act, is openly acknowledged and advanced. That would force us to justify, in more substantive terms than has been the case thus far, why claims for rectification[67] and obligations to negotiate in good faith[68] are not recognised as "debts" for the purposes of the Prescription Act. And it would open a legitimate debate why certain fundamental rights and claims based on historical injustice may not be subject to the strictures of the Prescription Act.

[65] *Mdeyide* above n 20 at paras 11-20, 42-52.

[66] *Myathaza* above n 38 at paras 43-56.

[67] See *Boundary Financing* above n 53 at para 13.

[68] See *Makate* above n 3 at paras 98-100.

[83] But that, again, is an argument in favour of fact-contextual and piecemeal adjudication of claims under section 252. It is not a justification for an all-or-nothing approach based on the assertion in the majority judgment (with which I do not agree) that the just and equitable enquiry under the section necessarily includes consideration of temporal limits to the exclusion of the specific provisions of the Prescription Act.

[84] So, to say that "the claim brought under section 252 of the Companies Act 61 of 1973 does not constitute a debt", is in my respectful view too wide and cannot be supported. There may be exceptional cases where a claim brought under section 252 of the Companies Act may not constitute a "debt" in accordance with the definition of debt favoured in *Makate*, but there are many more cases where the claim under section 252 will constitute a "debt" as defined for the purposes of application of the Prescription Act. The various claims in the notice of motion provide an apt illustration.

[85] Prayer 2(a)(i) of the notice of motion at the High Court seeks to declare article 3.5 of Shareblock's articles to be invalid. It is based on the assertion that—

(a) it does not set out the rights of shareholders in the articles of association as was required by section 65(2) of the Companies Act, but instead leaves it to the discretion of a developer; and

(b) it does not define the number of shares in each block as is required in terms of the Share Block Control Act, but also leaves it in the hands of the developer; and

(c) it is void for vagueness because Shareblock cannot compel Development to define the shares which will form part of share blocks and what rights will accrue thereto.

[86] In prayer 2(b)(i)-(iii) the applicants seek an order regarding how certain clauses should be amended and in prayer 2(c) they seek an order directing the Registrar of Companies to note and register the articles of Shareblock in their amended form.

[87] What does this amount to other than a claim that Shareblock unlawfully registered the articles and that it owes a legal obligation to the wronged shareholders to correct the defect? It is a claim for:

> "1. Something owed or due: something (as money, goods or service) which one person is under an obligation to pay or render to another.
> 2. A liability or obligation to pay or render something; the condition of being so obligated",

in terms of the dictionary definition of "debt" approved and adopted in *Makate*.[69]

[88] The applicants also asserted that Shareblock's legal obligation to them extended further, and they requested in prayer 2(d)(i) for an immediate cancellation of certain shares as well as an order in prayer 2(d)(ii) to prohibit voting under these shares before their cancellation. That is also clearly part of the alleged "debt" owed to them.

[89] The High Court held that the claims arising from the wording of the articles and the allocation of the shares were "single acts, albeit with long-term consequences" and that they had "therefore prescribed".[70] The single act in relation to the amendment and registration occurred in 1988 and it was done with the consent of the members. But does this mean that the illegality of the "statutory contract"[71] endures forever? The SCA held that the applicants could not—

> "effectively seek . . . a new set of articles and, therefore, a new contract which the parties should perhaps have concluded but patently did not. That is impermissible".[72]

[69] *Makate* above n 3 at para 85.

[70] High Court judgment above n 6 at para 42.

[71] In terms of section 65 of the Companies Act.

[72] SCA judgment above n 1 at para 38.

[90] That appears to foreclose any amendment of the articles on the basis of their alleged illegality by anyone, even members who now wish to acquire shares in Shareblock. This is an issue that was not considered in either the High Court or the SCA, because for the purposes of determining the claim of prescription "the postulation is, of course, that the allegations underpinning the [prescription] claim had in fact been established."[73]

[91] Postulating that the articles may still be declared invalid and amended for illegality at the time the application was brought in the High Court, I agree that, to the extent that the applicants sought to use the invalidity to remedy past wrongs, those claims had prescribed. But, on the same postulate, the remedying of present and future wrongs may not have prescribed.

[92] This is because it is not only the invalid act that may constitute the wrong, but that act causally related to resultant harm.[74] The question is thus whether the alleged invalid registration and allocation is—

> "a single, completed wrongful act − with or without continuing injurious effects, such as a blow against the head − on the one hand, and a continuous wrong in the course of being committed, on the other. While the former gives rise to a single debt, the approach with regard to a continuous wrong is essentially that it results in a series of debts arising from moment to moment, as long as the wrongful conduct endures".[75]

[93] In *Barnett* Brand JA distinguished that case from *Radebe*:[76]

> "Where the present case differs from *Radebe*, as I see it, is that the government's claim is not for the setting aside of a single act of deprivation of possession which

[73] *Barnett* above n 12 at para 20.

[74] Loubser above n 48 at 94. Compare *Masstores (Pty) Limited v Pick n Pay Retailers (Pty) Limited* [2016] ZACC 42; 2017 (1) SA 613 (CC); 2017 (2) BCLR 152 (CC).

[75] *Barnett* above n 12 at para 20.

[76] *Radebe v Government of the Republic of South Africa* 1995 (3) SA 787 (N) at 803D-804G.

> happened wholly in the past, but effectively for an order terminating wrongful conduct which is still in the course of depriving it of the possession of its property."[77]

[94] Was the applicant's case based on oppressive harm of the past, or present and future harm? The answer is: both. This is how the founding affidavit describes it:

> "The effective usurpation of common property and common facilities without any form of compensation, the ongoing abuse of these facilities subsidised by minority members and the arbitrary allocation of shareholding in such a manner as to afford a position of strength to DEVELOPMENT are matters which, I submit, would entitle the Applicants to an order for the winding-up of SHAREBLOCK on the basis that it is just and equitable to do so. *Were SHAREBLOCK to be wound-up however, this would not have any effect upon the shareholding which has been done in a disparate and arbitrary manner to the Applicant's prejudice and the prejudice of the other minority shareholders. HARRI, DEVELOPMENT and the Trust would consequently merely continue to enjoy an unfair advantage on liquidation over and above the Applicants.*
>
> *It is submitted that the only manner in which this Honourable Court is able to bring the suppressive conduct to an end is to direct the amendment of SHAREBLOCK's articles in certain respects.*"

[95] The oppressive current and future harm that the applicants relied on is thus the alleged unfair advantage that would continue to exist on liquidation. On my approach that claim may not have prescribed if two prerequisites are found to exist:

(a) That the registration of clause 3.5 and resultant allocation of shares is indeed illegal and liable to be declared invalid; and

(b) That the alleged unfair advantage on liquidation is indeed "unfairly prejudicial, unjust or inequitable" to the applicants under section 252.

[77] *Barnett* above n 12 at para 21.

[96] The High Court and SCA failed to consider the possibility that the applicants' claim related to present and future harm, not only past harm. To that extent the appeal must succeed and the High Court must be given an opportunity to determine those issues.

[97] I would make the following order:

1. The applicants are granted leave to appeal against that part of the judgment and order of the Supreme Court of Appeal that held that their claim located in section 252 of the Companies Act 61 of 1973 had prescribed.

2. The order of the Supreme Court of Appeal relating to the section 252 claims is set aside.

3. The matter is remitted to the High Court, Gauteng Division, Pretoria to determine the following issues:
   3.1 Whether the registration of clause 3.5 of the first respondent's articles of association and resultant allocation of shares is illegal and liable to be declared invalid;

   3.2 Whether the alleged unfair advantage on liquidation flowing from a finding under 3.1 is "unfairly prejudicial, unjust or inequitable" to the applicants under section 252; and

   3.3 The appropriate remedy if the issues in 3.1 and 3.2 are resolved in favour of the first and second applicants.

4. The first to seventh respondents are ordered to pay costs, including those consequent upon the employment of two counsel.

MADLANGA J:

[98] I have read the judgment of my colleague Mhlantla J (majority judgment). Save for a slight change to the order, I agree with the outcome. I write separately because I take a different approach to the analysis of "debt".[78]

[99] In its analysis of "debt", I read the majority judgment to place particular focus on the nature of the relief sought by the applicants. I disagree with this approach. On this approach, there is the risk that the primary objectives of prescription may be defeated. In *Mdeyide* Van Der Westhuizen J captured these objectives thus:

> "This court has repeatedly emphasised the vital role time limits play in bringing certainty and stability to social and legal affairs, and maintaining the quality of adjudication."[79]

[100] Not all claims prescribe under the Prescription Act; only claims that are "debts" within the meaning of that Act do. If we were to look to the remedy sought to establish whether a claim at issue is a "debt", an ingenious applicant or plaintiff could use the simple stratagem of concealing the true nature of the underlying claim. For example, the litigant could do this by seeking relief that is not specific beyond a generalised prayer for whatever a court might find to be just and equitable relief. An example is the section 252(3) relief. An unsuspecting respondent or defendant would easily find her- or himself defending the merits of the claim and not raising an otherwise available defence of prescription. Because in our law the defence of prescription may not be raised by a court of its own accord,[80] the respondent or defendant may end up being prejudiced. Surely, the shield of prescription cannot be pierced so easily.

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[78] Much of the difficulty I have with the majority judgment is in paragraphs 25, 28, 30-32, 34-42, 49-53 and 55.

[79] *Mdeyide* above n 20 at para 8; see also South African Law Commission "Prescription Periods" *Discussion Paper* 126, July 2011 at para 3.8 ("The main practical purpose of extinctive prescription is the promotion of certainty in the affairs of individuals, and particularly in the relationship between the debtor and creditor.")

[80] Section 17(1) of the Prescription Act provides that a court shall not, of its own motion, take notice of prescription. On this section, see *Sarrahwitz v Maritz N.O.* [2015] ZACC 14; 2015 (4) SA 491 (CC); 2015 (8) BCLR 925 (CC) at paras 12-4.

[101] As I read the majority judgment, this is the exact situation to which it exposes respondents and defendants. It examines the remedy provided by the statute under which an applicant brings her or his claim. In this case, this is the remedy provided by section 252(3) for applicants who have a cause of action under section 252(1) of the Companies Act. This remedy is "an order as [a court] thinks fit" if a court deems such an order to be "just and equitable".[81]

[102] In *Makate*, we held that "debt" in the Prescription Act means "an obligation to pay money, deliver goods or render services".[82] It may very well be that, right from the onset, an applicant or plaintiff was aware that the conduct later complained of under section 252(1) of the Companies Act gave rise to an obligation to pay money, deliver goods or render services. On the *Makate* definition that must be a debt. And courts should not allow the concealment of its true nature by the simple device of not claiming the debt owing, but rather resorting to the language of section 252(3). Axiomatically, claims founded on this type of debt are capable of prescription under the Prescription Act.

[103] The very essence of prescription is that ordinarily the merits of debts that have prescribed should not be adjudicated. That much is plain from the words of this Court in *Mdeyide*. If, because of how the relief has been couched, a claim that is, in fact, founded on a debt would end up being adjudicated even if it would otherwise have prescribed, that would defeat the objectives of the Prescription Act. Focusing, for a moment, on one of these objectives, "the quality of adjudication"[83] might well be compromised. Therein lies my difficulty with the approach in the majority judgment. It is susceptible to letting off the net, and having courts adjudicate the merits of, claims that have prescribed to the prejudice of respondents or defendants.

[81] Section 252(3).

[82] *Makate* above n 3 at para 92.

[83] *Mdeyide* above n 20 at para 8.

[104] An additional difficulty with this approach is that it seems to admit of the possibility that claims arising from *the very same conduct* may be held to have prescribed or not to have prescribed, depending on (a) the bases on which the claims were prosecuted and (b) the relief each basis affords in law. That does not sound right.

[105] In my view, the correct approach is to examine the *conduct* complained of and the *resultant claim*. If the conduct gives rise to a claim that qualifies as a debt within the meaning of *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. If, on the other hand, the claim arising from the conduct does not fit the *Makate* definition of "debt", there can be no prescription under the Prescription Act.

[106] This approach provides an objective basis for determining which claims are capable of prescription. It does not depend on the remedy sought or the particular legal basis under which that remedy is sought. And it is consistent with section 252(2) of the Companies Act which provides an internal prescription period.[84] The focus of this section is the type of conduct, not the available relief.

[107] Applying this approach to the instant matter, I would ask whether the conduct complained of—that is, the amendment of Shareblock's articles of association and allocation of shares—did, in fact, give rise to a debt within the meaning of *Makate*. When I look at that conduct, I do not see that an obligation to pay money, deliver goods or render services did come into being. Thus we are here not concerned with a debt capable of prescription under the Prescription Act.

[108] In conclusion, I would have phrased (b)(i) of the substituted order under paragraph 3 of the order in the majority judgment differently. But for that, I agree with the outcome. Here is how I would have couched (b)(i) of the substituted order:

[84] See [26].

> "(i) It is declared that the applicants' claim brought under section 252 of the Companies Act 61 of 1973 does not constitute a debt in terms of the Prescription Act 68 of 1969."

I would do this to make plain that some claims brought under section 252 of the Companies Act may prescribe.

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For the Respondent:	G I Hoffman SC, G B Rome SC, JA Raizon and G Singh instructed by David Oshry and Associates