

SOUTH AFRICA / JUDGMENT

Bondev Midrand (Pty) Limited v Ramokgopa and Others (72637/2013) [2015] ZAGPPHC 1136 (27 October 2015) [2015] ZAGPPHC 1136

COURT

North Gauteng High Court, Pretoria

BEFORE

M Akhubele

CASE / FILE NUMBER

72637/2013

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IN

THE HIGH COURT OF SOUTH AFRICA

GAUTENG

DMSION, PRETORIA

Case

Number: 72637/ 2013

Date:

27/10/2015

In

the matter between:

BONDEV
MIDRAND (PTY)
LIMITED
Applicant
and
PETRUS
KGOSI
RAMOKGOPA
First Respondent
THE
REGISTRAR OF DEEDS,
PRETORIA
Second Respondent
NEDBANK
LIMITED
Third Respondent

JUDGMENT

M.AKHUBELE AJ INTRODUCTION

- [1] In this application, the applicant, a property developer, seeks amongst others an order to compel the first respondent ("Ramokgopa") to re-transfer to it the property described as Erf [...] M. E. E., Township, Registration Division J.R, Gauteng ("Midstream") ("the property") , held by deed of transfer T1865/ 2007 . The retransfer will be against payment of an amount of R399 000 .00, being the original purchase price paid by the first respondent for the property.
- [2] The application is opposed by Ramokgopa only. He filed an affidavit and raised one defence, a special plea of prescription in terms of the provisions of section 10(1) read with 11(d) of the Prescription Act, 68 of 1969.

BACKGROUND

FACTS

- [3] The facts that gave rise to the current application are largely common cause.
- [4] On 27 January 2007, the applicant and Ramokgopa entered into an agreement for sale of immovable property, being a vacant stand known as Erf [1....] situated at Midstream for a price consideration of R399 000.00.
- [5] The Offer to Purchase Agreement contained amongst others a clause that read as follows:

"

9. BUILDING PERIOD

The PURCHASER undertakes to erect buildings on the PROPERTY to the reasonable satisfaction of the SELLER within (18) months of date of proclamation, failing which the SELLER shall be entitled (but not obliged) to claim that the PROPERTY be retransferred to the SELLER at the cost of the PURCHASER against repayment of the original purchase price to the PURCHASER, interest free. "

[6] Ramokgopa took transfer of the property on 30 May 2007 under Deed of Transfer ("Title Deed") number T07186507. The transfer was subject to several conditions, amongst which is condition B that reads as follows:

"SUBJECT to the following condition imposed and enforceable by BONDEV MIDRAND (PROPRIETARY) LIMITED) (No.2002/ 027600/ 07), namely:

The Transferee or his Successors in Title will be liable to erect a dwelling on the property within 18 (EIGHTEEN) months from 16 November 2006, failing which the Transferor will be entitled, but not obliged to claim that the property is transferred to the Transferor at the cost of the Transferee against payment by the Transferor at the cost of the Transferee against payment by the Transferor OF THE ORIGINAL PURCHASE PRICE, INTEREST FREE. The Transferee shall not within the said period sell or transfer the property without the Transferor's written consent. This period can be extended at the discretion of the Developer. "

[7] Ramokgopa did not erect a dwelling on the property within the 18 months period referred to in the Title Deed. This is still the position.[8]

The building period was not extended.

[9] The applicant sent a letter by ordinary mail to Ramokgopa on 05 November 2010 and advised him, in general terms, amongst other things that it did not waive its rights to re-transfer undeveloped stands and that it was not eager to exercise its right to do so, but would not hesitate to do so as it has done with great success in the past in the Midstream and Midfield estates. The first respondent was referred to the SCA decision of "Lodhi2 Properties v Bondev

[2007] SCA 85 (RSA) in this regard.

[10] The applicant's attorneys sent another letter to him by registered mail on 04 February 2013. Save for the demand that he should sign re-transfer documents, the contents of the letter are basically similar to the first one.

[11] There is no record of any response from the first respondent. This application was issued during January 2014.

DEFENCE TO THE CLAIM

[12] In his answering affidavit, Rarnokgopa raises a point in limine on the basis that the applicant's claim has prescribed in terms of section 10(1) read with section 11(d) of the Prescription Act 68 of

1969. The factual basis of the point in limine is that the applicant's cause of action arose at the expiry of the 18 months period referred to in the title deed, which is 16 November 2006.

The claim, being a debt in terms of the provisions of section 11(d) of the Prescription Act prescribed 3 years thereafter, that is, on 16 May 2011.

[13] The applicant filed a replying affidavit and joined issues with this defence of prescription. It denied that its claim for re-transfer of the property constitutes a debt as defined in the Prescription Act.

[14] A further argument is that Ramokgopa has at all times admitted his obligation to erect a dwelling. Reference was made to recent

communication in which he advised the applicant that he has submitted his building plans to the Home Owners Association. This, so the argument goes, had an effect of pending or interrupting prescription.

[15] The applicant's further argument is that it did not waive its right to enforce the title restrictive condition.

[16] The last issue that was raised in the replying affidavit relates to the inferences that the applicant seeks to draw from an email that was sent to applicant's attorney by Ramokgopa's attorney wherein they sought some settlement of the matter. They made an undertaking that he would complete the building within 8 months as the plans had, by the date of that letter (10 April

2014) been finalized. The applicant contends that this undertaking is proof that Ramokgopa always knew that he had to comply with the condition to erect a dwelling on the property and that he mistakenly thought that submission of building plans would discharge his obligation in this regard. The applicant attached a printout from the companies register to prove that the Home Owners Association, to which plans were allegedly submitted, is a different company. The applicant contends that submission of plans, under the circumstances, is not compliance with the condition to erect a building. Ramokgopa did not raise the defence that the applicant seeks to anticipate in the replying affidavit. I will leave this issue here as I am not required to take it into consideration either as a separate defence or for purposes of deciding the point in limine.

WRITTEN AND ORAL SUBMISSIONS

Applicant

[17] I heard this matter together with a similar application in the matter between Bondev Midrand (Pty) Ltd v Puling Puling and Another, Case Number 58/ 2014. The applicant in both matters is the same entity and was represented by the same counsel, Advocate J.H Horn ("Horn"). Ramokgopa is represented by Advocate M. Manala ("Mr. Manala / Manala "). The respondents in the above matter are represented by Advocate S.D Wagener SC (" Mr. Wagener / Wagener")

The respondents in both matters have raised a plea of prescription on the same basis I have described above. The only distinction in the pleadings between the two matters is that unlike Ramokgopa, the respondents in the other matter have raised further defences on the merits of the application.

[18] As a result, and for the sake of convenience, and on my request, all counsel involved agreed to argue the special plea together. The arguments of the counsel for the applicant are basically similar in both matters.

Save for the manner, extent and style of presentation, the arguments of counsel for the respondents in both matters on the point in limine overlap to a greater extent.

[19] On behalf of the applicant, Mr. Horn filed main as well as supplementary heads of argument that were handed in during the hearing.

[20] In his heads of argument, he described the nature of the right conferred on the applicant by the title deed condition as a personal servitude. He argued that in terms of Section 7(1) of the Prescription Act, it is extinguished by prescription if it has not been exercised for an uninterrupted period of 30 years.

He referred to the Supreme Court of Appeal judgment of Maya JA in the matter of Willow Waters Home Owners Association (Pty) Ltd v Koka (768/ 1 3)(20141 ZASCA 220 (12 December 2014) ("Willow Watters matter") and in particular paragraph 16 thereof with regard to the test to determine whether a right or condition in respect of land is real. The two well-known requirements are (a) the intention of the person who creates the right must be to bind not only the owner of the land, but also the successors in title; and (b) the registration of the condition must subtract something from the dominium of the land against which it is registered. After examining the authorities, Maya JA ruled that a condition in the title deed that prohibited transfer of a property without a clearance certificate or consent of the Home Owners Association was a real or personal right and as such enforceable not only on the insolvent, but the trustees of the insolvent estate.

[21] He also referred me to the matter of Lorenz v Melle and Others 1 978 (3) SA 1044 to support his argument that the condition in the Deed of Transfer created personal servitudes.

He also referred me to the judgment of Du Plessis J in the matter of Bondev Developments (Pty) Ltd v Mosikare and Others (50391/ 2008) [2010] ZAGPPHC 305 (22 April 2010) ("Mosikare matter") where a similar clause in the title deed, was held to constitute a limitation on the respondents' rights of ownership. The claim for retransfer of the property was granted.

He argued that I would have to make a finding that Du Plessis J was clearly wrong if I disagree with his submissions.

[22] He argued further that the fact that the title conditions were registered by the Registrar is an indication that they are real

rights and if I find otherwise I would have to hold that the Registrar was wrong to register them. In this regard he referred me

to paragraph 30 of the judgment of Maya JA .

He also referred to the matter of National Stadium v Firststrand Bank (670/ 10) ZASCA/ 64 (1 December 2010) to support his contention that the title condition matured to real rights upon registration.

[[...]] -In conclusion, Mr Horn argued that the respondents would have to distinguish between conditions B and C in the title deeds. In terms of the Willow Waters matter, Condition C (enforceable by the Home Owners Association) was found to be a real right.

Mr Horn argued that Condition B (enforceable by Bondev, the applicant) is as much a real right as C. Therefore, the applicant's rights will prescribe in 30 years.

He conceded though that prescription was not an issue in the Willow Waters matter.

First respondent

[24] Mr Manala, on behalf of Ramokgopa addressed two main issues in his written heads of argument, namely, the definition or meaning of a debt in the context of the Prescription Act and the correct approach to interpretation of the title condition that forms the subject matter of this application.

[25] On the definition of "debt", he referred to the matter of Duet and Mamum Financial Services CC (in Liquidation) v Koster; 2010 (41 SA 499 (SCA) para 24 where Nugent JA described a debt for purposes of the Prescription Act as follows :

"[24] A 'debt' for purposes of the Act is sometimes described as entailing a right on one side and a corresponding 'obligation' on the other.²¹ But if 'obligation' is taken to mean that a 'debt' exists only when the 'debtor' is required to do something then I think the word is too limiting. At times the exercise of a right calls for no action on the part of the 'debtor' but only for the 'debtor' to submit himself or herself to the exercise of the right. And if a 'debt' is merely the complement of a 'right', and if all 'rights' are susceptible to prescription, then it seems to me that the converse of a 'right' is better described as a 'liability, which admits of both an active and a passive meaning."

[26] On the correct approach to interpretation of the words in Condition B of the Title Deed, Manala referred to amongst others the judgment in the matter of Natal Joint Municipal Pension Fund v Endumeni Municipality 2012 141 SA 593 (SCA) para 18 where Wallis JA stated the following;

"

[18] ... Interpretation is the process of attributing meaning to the words used in a document, be it legislation, some other statutory instrument, or contract, having regard to the context provided by reading the particular provision or provisions in the light of the document as a whole and the circumstances attendant upon its coming into existence. Whatever the nature of the document, consideration must be given to the language used in the light of the ordinary rules of grammar and syntax; the context in which the provision appears; the apparent purpose to which it is directed and the material known to those responsible for its production. Where more than one meaning is possible each possibility must be weighed in the light of all these factors. 15 The process is objective not subjective. A sensible meaning is to be preferred to one that leads to insensible or unbusinesslike results or undermines the apparent purpose of the document. Judges must be alert to, and guard against, the temptation to substitute what they regard as reasonable, sensible or businesslike for the words actually used. To do so in regard to a statute or statutory instrument is to cross the divide between interpretation and legislation. In a contractual context it is to make a contract for the parties other than the one they in fact made. The inevitable point of departure is the language of the provision itself, 16 read in context and having regard to the purpose of the provision and the

background

to the preparation and production of the document." [1]

[27] Mr. Manala disagreed with the submissions made by Mr. Horn that registration of the right to seek re-transfers of the property in the title deed elevated it to a real right. He submitted that in fact, in terms of Section 63(1) of the Deeds Registries Act 47 of 1937 the Registrar may register personal rights if they are supplementary to other registrable rights. In this matter, the argument went further, we do not know how the title condition in question was registered. If indeed the Registrar has exercised a discretion, then it is subject to review.

[28] He argued further that the first condition in the title deed marked B is capable of being divided into several parts, such as (a) binding on successors in title, (b) restriction to sell within the said period without the consent of the applicant.

[29] The condition itself must be capable of binding successors not simply because it is so stated.

[30] The submission of Mr Horn that there is no difference between Conditions B and C of the title deed is, according to Mr. Manala, not correct.

[31] Condition C, in favour of the Home Owners Association is performance in perpetuity in that, with ownership of the erf or stand, comes compulsory membership of the Home Owners Association. Condition B, that is enforceable by the applicant applies only to the purchaser and hence there is a requirement that the purchaser may not sell to a third party without the consent of the applicant. The inclusion of this condition is descriptive of the right. The property can still be validly transferred from one owner to another.

[32] He argued further that failure to erect a dwelling within the prescribed time frame is a trigger event that entitles the applicant

to claim re-transfer of the property. This right is not a servitude. A servitude is a right to use. Furthermore, not all rights of benefits are a right of servitude.

[33] The applicant's cause of action arose on 16 May 2008. It could only be exercised by the applicant, not its successors.

[34] On whether registration by the Registrar elevates personal to real rights, he reiterated his submission that it does not. He referred to the matter of *Van Deventer v Ivory Sun Trading 77 !Ptyl Ltd* (20151 1 ALLSA 55 (SCA) where it was held that registration of a right of pre-emption does not convert it into a real right, it only has practical consequences.

[35] In reply, Mr Hom submitted that the onus was on the first respondent to prove that the condition was probably registered in the discretion of the Registrar

[36] With reference to the judgment of Du Plessis J in the *Bondev v Mosikare* matter, Mr Hom argued that indeed applicant did not waive its right to claim retransfer of the property. The onus is on the party who alleges waiver to prove it. He also relied on the Du Plessis judgment to support the argument that the condition binds the successors in title.

Other than the Willow Waters and Mosikare matters that I have discussed above, Mr Hom referred to at least three other judgments from this division that deal with claims for re-transfer of properties back to the sellers on the basis of similar provisions in Deeds of Transfer.

Incidentally, the applicant in these matters is the same juristic entity as the applicant in the two matters before me.

[37] I proceed to summarize the facts as well as the principles in the judgments I have been referred to.

Lodhi 2 Properties Investments CC and Another v Bondev Developments (Pty) Ltd, case number 05/ 8878 (Witwatersrand Local Division) The respondent (Bondev) obtained default judgment against the applicants to retransfer the property on the basis that the building period had expired . The applicants applied for rescission of the default judgment and the matter came before Gildenhuys J. He dismissed the application for rescission and refused leave to appeal.

As I understand the judgment, the issues that arose in that matter are different from the ones raised in this matter. Gildenhuys J was asked to rescind the default judgment on the basis of a defence that was subsequently disclosed, not in the affidavits, but during argument, namely; that the buy back clauses include forfeitures to which the provisions of the Conventional Penalties Act would apply and that had the judge that granted default judgment known about this fact, he would not have granted the order for retransfer of the properties. Secondly, the applicants' application for rescission was in terms of Rule 42(1)(a). It was submitted that the ground of rescission on the basis of possible application of the Conventional Penalties Act was a good defence in the main application. Since the rescission application was in terms of Rule 42(1)(a), the court held that there was no room for good defence as a basis for rescission. Good defence is only relevant to applications for rescission in terms of common law.

[38] I do not understand how this judgment assists the applicant. On appeal, *Lodhi 2 Properties Investments CC v Bondev Developments (Pty) Ltd* (128/ 061 [2007] ZASCA 85; [2007] SCA 85 (RSA) ; 2007 (61 SA 87 (SCA) (1 June 2007), para 27 Streicher JA concluded the following:

[27] Similarly, in a case where a plaintiff is procedurally entitled to judgment in the absence of the defence and the judgment if granted cannot be said to have been granted erroneously in the light of a subsequently disclosed defence. A court which grants a judgment by default like the judgments we are presently concerned with, does not grant the judgment on the basis that the defendant does not have a defence: it grants the judgment on the basis that the defendant has been notified of the plaintiff's claim as required by the rules, that the defendant, not having given notice of an intention to defend, is not defending the matter and that the plaintiff is in terms of the rules entitled to the order sought. The existence or non-existence of a defence on the merits is an irrelevant consideration and, if subsequently disclosed, cannot transform a validly obtained judgment into an erroneous judgment.

This case clearly does not support the contention of the applicant be it with regard to the submissions made before me or in the letters of demand that are seemingly sent to defaulting purchasers.

[39] I was also referred to the judgment of Fabricius J in the matter of *Bondev Developments (pty) Ltd v Plenty Properties 60 (pty) Ltd and Others* (43602/08) [2009] ZAGPPHC 346 (2 December 2009). In this matter the respondent was not the original purchaser. The building period had already expired when the respondent took transfer of the property. The issue here was whether the condition was capable of being complied with or enforceable. Fabricius J held that it was impossible to comply, and therefore unenforceable. The parties had purportedly entered into an agreement to extend the building period but no time for performance had been indicated.

[40] In the matter of *Mosikare* [2], Du Plessis J criticized the reasoning of Fabricius J and stated the following

"With due respect to the learned judge in the Plenty Properties case, it was unnecessary for the applicant to have stipulated a new time for performance after Sunset and thereafter the respondents fell in mora. A time for performance had been Stipulated in the condition. On expiry of the stipulated time, the obligation had to be fulfilled immediately and had to be completed within a reasonable time. I have come to the conclusion that the Plenty Properties case was wrongly decided and I decline to follow it."

[41] Dodson AJ delivered his judgment in the matter between Bondev Midrand I Ptyl Limited v Rasalanavho and Others 147616/ 2014)

[2015] ZAGPPH C 538 110 June 2015¹ about two weeks before I heard the applications before me.

In this matter, the parties had agreed to extend the building period by 12 months. Under the circumstances, Dodson AJ ruled that it was not necessary to decide the special plea of prescription of the claim because on the facts the applicant was still within its rights to institute the claim, assuming, as he did, in favour of the respondents that the prescription period was three years.

[42] I am of the view that none of these judgments are of assistance with regard to the issues before me. Furthermore, there appears to be a contradiction amongst these judgments on the issue of whether the restrictive clause is enforceable against subsequent purchasers after the 18 months period has elapsed.

ISSUES

FOR DECISION

[43] According to the respondent, the issues that I am required to determine are whether, the applicant's claim for retransfer of

the property to itself constitute a debt as contemplated in the Prescription Act 68 of 1969 ("the Prescription Act" and if so, whether the debt has prescribed in terms of section 11(d) thereof.

The applicant denies that the right is a debt and contends that the question of prescription should be determined by first examining the nature of the right that is conferred by the title condition. The issue here is whether its registration in the Deed of Transfer means that it is a real right, and is incapable of prescription. An additional or alternative argument is whether the right the right is a personal servitude that expires after 30 years in terms of section 7(1) of the Prescription Act.

Deeds Registries Act

The Registrar is also required to " register any real right, not specifically referred to in this subsection, and any cession, modification or extinction of any such registered right" [5]

[45] Section 63 entitled "Restriction on registration of rights in immovable property" reads as follows:

- (1) No deed, or condition in a deed, purporting to create or embodying any personal right, and no condition which does not restrict the exercise of any right of ownership in respect of immovable property, shall be capable of registration: Provided that a deed containing such a condition as aforesaid may be registered if, in the opinion of the registrar, such condition is complementary or otherwise ancillary to a registrable condition or right contained or conferred in such deed.{highlighted for emphasis}
- (2) The provisions of subsection (1) shall not apply with reference to any condition in a mortgage bond or lease or in a deed referred to in section 3(1)(c) or (p).

[46] Creation and registration of personal servitudes is provided for in sections 65 and 66.

Section 65 reads as follows: Registration of notarial deed creating personal servitude

- (1) Save as provided in any other law, a personal servitude may be created by means of a deed executed by the owner of the land

encumbered thereby and the person in whose favour it is created, and attested by a notary public: Provided that in the case of a servitude in favour of the public or

of all or some of the owners or occupiers of erven or lots in a township or settlement, the registrar may, if in his opinion it is impracticable to require such deed to be executed by the persons in whose favour the servitude is created, register such deed notwithstanding the fact that it has not been executed by such persons: Provided further that where it is desired to register a road or thoroughfare in favour of the public at the same time as the registration of a subdivision which it serves, it shall in like manner and without the registration of a notarial deed be permissible to register it in the deed relating to the subdivision and also to endorse the deed of the remainder accordingly: Provided further that conditions which restrict the exercise of any right of ownership in immovable property may be included in any deed of transfer of such immovable property tendered for registration if such conditions are capable of being enforced by some person who is mentioned in. or, if not mentioned therein, is ascertainable from the said deed of transfer or from other evidence and such person, if determinable, has signified acceptance of such right. (my own underlying for emphasis)

- 2) Such deed shall contain a sufficient description of the land encumbered by the servitude and shall mention the title deed of such land .
- (3) If the land to be encumbered by a personal servitude is mortgaged or subject to any other real right with which the said personal servitude may conflict, the bond or other registered deed by which such right is held shall be produced to the registrar together with a consent in writing of the legal holder of such bond or other right to the registration of the said personal servitude and, in the case of a bond, free from the bond .

[47] Section 66 provides for restriction on registration of personal servitudes and reads as follows:

'No personal servitude of usufruct, usus or habitatio purporting to extend beyond the lifetime of the person in whose favour it is created shall be registered , nor may a transfer or cession of such personal servitude to any person other than the owner of the land encumbered thereby, be registered ."

Prescription Act 68 of 1969

[48] Section 7 "Extinction of servitudes by prescription" reads as follows:

- (1)) A servitude shall be extinguished by prescription if it has not been exercised for an uninterrupted period of thirty years.
- (2) For the purposes of subsection (1) a negative servitude shall be deemed to be exercised as long as nothing which impairs the enjoyment of the servitude, has been done on the servient tenement.

[48.1] Section 11, entitled "Periods of prescription of debts" reads as follows:

The periods of prescription of debts shall be the following:

- (a) thirty years in respect of -
 - (i) any debt secured by mortgage bond;
 - (ii) any judgment debt;
 - (iii) any debt in respect of any taxation imposed or levied by or under any law;
 - (iv) any debt owed to the State in respect of any share of the profits, royalties or any similar consideration payable in respect of the right to mine minerals or other substances;
- (b) fifteen years in respect of any debt owed to the State and arising out of an advance or loan of money or a sale or lease of land by the State to the debtor, unless a longer period applies in respect of the debt in question in terms of paragraph (a);
- (c) six years in respect of a debt arising from a bill of exchange or other negotiable instrument or from a notarial contract, unless a longer period applies in respect of the debt in question in terms of paragraph (a) or {b);
- (d) save where an Act of Parliament provides otherwise, three years in respect of any other debt.

[49] I deem it necessary to discuss, briefly, earlier authorities on the origins of what has become known as the subtraction from the dominium test.

This foundation is important for a proper understanding of the purpose or effect of registration of conditions in a Deed of Transfer.

In paragraph 20 of his heads of argument, counsel for the applicant, Mr Hom, quoted section 63(1) of the Deeds Act without its important proviso. This prompted counsel for the respondent, Mr Manala, to (correctly) point out and argue that registration of a title condition that imposes personal obligations does not elevate it to a real right.

[50] The proviso to section 63(1) is a subsequent amendment to the Deeds Act after cases such as *Ex Parte Geldenhuys* 1926 OPD 155 that pioneered the principle of "subtraction from the dominium test."

This matter concerned the joint will, in which the testators left their undivided property to their children and imposed two conditions,

namely that the last surviving spouse would, when the eldest child attain the age of majority, together with that child, divide the property into lots for the benefit of all children and secondly, that the child who received a lot in which the family house was situated would pay the others a certain amount of money.

The Registrar objected to the proposal to embody the conditions in the deed of transfer on the basis that they created personal rights and would only be binding on the legatees and not on subsequent persons they might transfer their portions to.

After examining earlier authorities[6] De Villiers JP authorised registration of the conditions on the basis that the first one (time and manner of partitions) was a real burden on the land and not just an obligation on each child. The second condition (payment of money) was defined as a *jus in personam* and not, as a rule registrable. It became registrable because it was so intimately connected to the first condition, the entire clause of the will.

DISCUSSION

Is registration of title conditions in Deed of Transfer the answer to the question of prescription?

[51] It is clear from a proper reading of the provisions of the Deeds Act that I have quoted above that registration of conditions that create personal obligations in a title deed does not elevate them to real rights.

A personal right does not limit the right of ownership in the property. The holder thereof has a right to claim specific performance from another person.

The right, as in this instance may be created by agreement.

[52] Consequently, the fact that a personal right has been registered in the Deed of Transfer does not elevate it into a real right. The effect thereof is a matter of interpretation, taking into account the wording of the relevant clause.

The condition in the Deed of Transfer in the matters before me , in terms of which the contracting parties inserted a clause to claim transfer of property upon happening of a specific condition are known as reversionary clauses and whether or not they are a burden on the land or a specific person depends on how they have been constructed.

[53] Counsel for the applicant conceded in his heads of argument (paragraph 26.4) that the fact that the condition is contained in the deed of transfer is not decisive.

He nevertheless devoted much of his submissions on trying to convince me that it was important. Reliance was also placed on the fact that the cases he relied on appear to emphasize the fact that the relevant conditions (similar to the one in question) were embodied in the Deed of Transfer.

[54] I agree with counsel for the respondent that there is a difference between title condition B and C in the Deed of Transfer. Condition C reads as follows"

" C SUBJECT to the following conditions in favour of MIDLANDS HOME OWNER'S ASSOCIATION (an Association incorporated under section 21) (No. 2005/ 0[....] 343/ 0B)(hereinafter referred to as the Association)

- (a) Every owner of the erf or any subdivision thereof shall upon registration of transfer automatically become a member of the Association and shall be bound by the provisions of the Articles of Association and the Home Owners Association Rules until he ceases to be owner. Neither the erf nor any subdivision thereof shall be transferred to any person who has not bound himself to the satisfaction of the said Association to become a member thereof
 - (b) The owner shall not be entitled to transfer the erf or any subdivision thereof without a Clearance Certificate from the Association that all monies owing to the Association have been paid and that the provisions of the articles of Association have been complied with.
- [55] Title condition C links ownerships of the erf with perpetual membership of the Home Owners Association. This has no end. As Mr. Manala has put it, it is performance in perpetuity.

In coming to the

conclusion

that a similar condition constitutes a real right, Maya JA in the Willow Waters matter pointed out the requirements that must be met (subtraction from the dominium test) and went further to state that "... Whether the title condition embodies a personal or real right which restricts the exercise of ownership is a matter of interpretation "[7] [56] I do not agree with the submission that registration of personal obligations in the Deed of Transfer determines whether a right is real or personal. As I have indicated above, a title condition that imposes mere obligations are registrable in terms of the proviso to section 63(1).

As I have already observed above, counsel for the applicant and the Learned JA have omitted to quote the provisos[8].

Interpretation of title condition B

[57] In my view the answer lies the interpretation of the title condition with a view to determining whether it subtracts the rights that the owner has on the property. The characteristics of title condition B are the following:

[57.1] It can only be enforced by Bondev Midrand (Pty) Ltd (applicant) against the transferee and successors in title.

[57.2] The applicant is entitled, but not obliged, to claim retransfer if no dwelling is erected on the property within 18 months from 16 November 2006.

[57.3] Within the said 18 months, the transferee may not sell or transfer the property without the consent of the applicant.

[57.4] The period can be extended at the discretion of the applicant.

[58] My understanding of this title condition is that if for any reason the applicant ceases to exist, its successor(s) in title will not have legal standing to enforce it against the transferees and their successors in title. Furthermore, the restriction with regard to selling and transfer of the property is only applicable within the 18 months period.

[59] One of the rights of enjoyment of an owner of the property is to pass unrestricted ownership of the property.

I have already made an observation above that the transferee (respondent) is restricted from selling and transferring the property

without the transferor's consent within the stipulated period, namely, 18 months from 16 November 2006.

[60] Nothing would have prevented the respondent from validly selling and transferring the property without the consent of the applicant after the expiry of the 18 months period.

[61] Whether or not the Registrar would have agreed to remove this condition is a different matter and that is not the case that was argued before me. It also depends on the reasons (the opinion of the Registrar in terms of Section 63(1) of the Deeds Act) why the condition was registered in the first place. This too is not the case before me. I may mention, for the sake of completeness that Section 68 of the Deeds Act deals with "Registration of lapse of personal servitude".

[62] It is also clear from a reading of title condition B that the applicant is required to exercise its discretion with regard to certain matters that could see this condition existing beyond the 18 months period, such as:

[62.1]deciding whether or not to claim retransfer of the property if no building is erected within 18 months from 16 November 2006.

[62.2] deciding whether or not to extend the 18 months period.

[63] With regard to the decisions that the applicant is required to make, I am of the view that on a reading of the title condition, they must be made before the expiry of the 18 months period.

[64] I reject the contention by the applicant that it can wait 30 years before making any decision with regard to any of these issues.

I am fortified in my view by the remarks made by the Constitutional Court in the matter of Road Accident Fund and Another v Mdeyide (CCT 10/ 101

[2010] ZACC 18; 2011

(1) BCLR 1 ICC) ; 2011 121 SA 26

(CCT (30 September 2010 para 8 where Van Der Westhuizen J stated the following:

"This Court has repeatedly emphasized the vital role time limits play in bringing certainty and stability to social and legal affairs and maintaining the quality of adjudication. Without prescription period s, legal disputes would have the potential to be drawn out for indefinite period s of time bringing about prolonged uncertainty to the parties to the dispute. The quality of adjudication by courts is likely to suffer as time passes, because evidence may have become lost, witnesses may no longer be available to testify, or their recollection of events may have faded .10 The quality of adjudication is central to the rule of law. For the law to be respected, decisions of courts must be given as soon as possible after the events giving rise to disputes and must follow from sound reasoning, based on the best available evidence"

[64.1] These remarks are particularly relevant with regard to the (subtle) disputes of facts that may arise over a long period of time. For example, a transferee may raise a defence of extension (by conduct) of the building period or waiver of right to enforce the condition.

IS THE APPLICANT'S CLAIM A DEBT AS CONTEMPLATED IN THE PRESCRIPTION ACT?

"Generally under the Prescription Act, prescription applies to a debt. For the purposes of this Act, the term debt has been given a broad meaning to refer to an obligation to do something, be it payment or delivery of good s or to abstain from doing something. Although it may on occasion be doubtful whether an obligation is indeed a debt in terms of the Act, there is no doubt that a claim under the RAF Act constitutes a debt. However, the RAF Act regulates the prescription of claims under it and some of the differences between the two statutes have been placed at the core of this matter.

[66] In the matter of Barnett and Others v Minister of Land Affairs and Others (304/ 061 (2007] ZASCA 95; (2007) SCA 95 (RSA!; 2007 (6) SA 313 (SCA) 16 September 20071 Para 19 Brand JA stated the following:

[19] In my view it is fair to say that the Government was aware of the identities of the defendants and of the facts upon which its claims against them rely, more than three years before the present action was instituted. I am also prepared to accept that the vindictory relief which the Government seeks to enforce constitutes a 'debt' as contemplated by the Prescription Act. Though the Act does not define the term 'debt', it has been held that, for purposes of the Act, the term has a wide and general meaning and that it includes an obligation to do something or refrain from doing something (see eg *Electricity*

Supply Commission v Stewarts & Lloyds of SA (Pty) Ltd 1981 (3) SA 340 (A) at 344F-G and *Desai NO v Desai* [1995] ZASCA 113 [1995] ZASCA 113; ; 1996

(1) SA 141 (A) at 146H-J). Thus understood, I can see no reason why it would not include a claim for the enforcement of an owner's rights to property (see also eg *Evins v Shield Insurance Co Ltd* 1979 (3) SA 1136 (W) 1141F-G).

[67] The issues in the *Desai* [10] matter that is referred to above related to an obligation on a party to take certain steps to procure registration of transfer of interests in immovable properties. Grosskopf JA said the following at Para 8-9 For the

reasons

which follow I am of the opinion that the appellant's "debt", i.e. the obligation to procure registration of transfer in terms of clause 13(d), was indeed extinguished by prescription. Seeing that this finding is decisive of the case, it is unnecessary to consider the other aspects raised in argument, including the

submissions

relating to the true nature of the agreement and the applicability of s 1(1) of Act 71 of 1969.

[68] The principles in the cases I have referred to above were followed in subsequent cases such as *Leketi v Tladi NO and Others* 1117/ 20091 [2010] ZASCA 38; [2010] 3 All SA 519 (SCA) 130 March

2010) where an obligation to restore property that has been fraudulently transferred to its rightful owner was held to be a debt as described in the Prescription Act.>

[69] The conclusion, from the foregoing is that yes, indeed, the obligation in the title condition B to claim retransfer of property

is a debt as contemplated in the Prescription Act.

In the matter of *Municipality of Mossel Bay v The Evangelical Lutheran Church* (443/ 12) [2013] ZASCA 64 (24 May 2013), the church was the registered owner of two stands that contained restrictive conditions in favour of the Municipality. In terms of these conditions, the properties were to be used, at all times for church or educational purposes. Building of a pastoral house was also allowed.

A further condition was that if at any time the properties were to cease to be used for this purpose, the stands would revert to the municipality. The Appeal Court interpreted the restrictive conditions [11] and held that the court a quo had excised a portion of the condition and interpreted the remaining one in a vacuum. Madjiet JA stated the following (Para [13])

"When the restrictive conditions are holistically interpreted by giving the words therein their ordinary grammatical meaning, in their contextual setting, the church is plainly in contravention of the restrictions, it being common cause (for the reasons expounded above) that the properties are no longer

used for educational or church purposes. Whatever the stated intent of the church as to its future usage may be, this cannot and does not salvage its breach. The court below erred in finding to the contrary and the appeal ought therefore to succeed".

[71] Furthermore, in my view, the clauses such as the one under consideration must be distinguished from clauses in credits agreements in terms of which the credit grantor reserves its rights to claim return of the object on breach of the contract.

Applications to claim return of property (such as motor vehicles on breach of a credit agreement) are claims based on ownership of the property (*rei vindicatio*) and the courts have correctly held that the prescription Act is not applicable.

(See in this regard; Absa Bank Ltd v Keet 2015 (4) SA 474 (SCA), Staegemann v Langenhoven and Others 2011 (5) SA 648 (WCC))

[72] Consequently, I am of the view that the applicant's claim for re- transfer of the property to itself constitute a debt as contemplated in the Prescription Act 68 of 1969.

[73] The last issue that I need to consider is whether, on the facts, the debt has prescribed.

The allegations that were made by the applicant in its replying affidavit with regard to possible interruption of prescription were not pursued in argument.

[74] Under the circumstances, I am of the view that the applicant's claim has indeed prescribed in terms of section 11(d) of the Prescription Act. I therefore make the following order;

1. The respondent's plea of prescription is upheld with costs.

TAN MAKHUMBULE AJ

Acting Judge of the High Court

27/10/2015

APPEARANCES

APPLICANT:

Advocate NJ Horn

Instructed by:

Tim Du Toit & CO. Inc

Lynnwood, PRETORIA

RESPONDENT: Advocate Matlhaba Manala

Instructed by: Mothle Jooma Sabdia Inc

Brooklyn, PRETORIA

[1] Wallis JA (Farlam, Van Heerden, Cachalia and Leach JJA concurring)

[2] *supra*

[3] take note of use of the word "shall".

[4] section 3(1)(o)

[5] Section 3(1)(r)

[6] The learned JP referred to the matter of *Hollins v Registrar of Deeds* (1904, T.S. 603), and confirmed the principle laid down by Innes CJ that only real rights can be registered against title deeds because they are burdens on a land and as such are a deduction from the dominium.

[7] Last sentence of paragraph [16] and with reference to the matter of *First National Stadium South Africa (Pty) Ltd & Others v Firststrand Bank Ltd* 2011 (2) SA 157 (SCA) para 33

[8] See paragraph 21 of the

judgment.

In paragraph 31 the Learned JA indicated that registration is however not decisive.

[9] With reference to the following authorities: *Barnett and Others v Minister of Land Affairs and Others* 2007 161 SA 313 (SCA); 2007

(11) BCLR 1214 (SCA) at para 19 and *Desai NO v Desai and Others* [1995] ZASCA 113; 1996 (11 SA 141 (SCA) at 146H. Further see section 1 of the *Institution of Legal Proceedings Against Certain Organs of State Act* 40 of 2002

[10] *Desai NO v Desai NNO and Others* (718 /

93) \ 1995] ZASCA 1 13; 1996

(1) SA 141 (SCA); (22 September 1995)

[11] Para 2-3 "The salient restrictive conditions in respect of Erf 2002 read as follows: '(B)

(1) The property in question shall be used solely for church or educational purposes, provided that in addition to any church or school buildings erected on the land, a parsonage or a caretaker's house may be erected; (2) The land shall be used solely for the purposes set out in (1) above. If at any time it ceases to be used for such purpose, or is no longer required for such purpose, it shall revert to the Council without payment of compensation of any improvement effected on or to the land.' [3] '(a) [I]n the event of the property not being used for Church purposes it shall revert to the Council, save and except that in addition to the Church one dwelling as a parsonage or a caretaker's house may be erected in respect of the property.'

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[3] '(a) [I]n the event of the property not being used for Church purposes it shall revert to the Council, save and except that in addition to the Church one dwelling as a parsonage or a caretaker's house may be erected in respect of the property.'

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